PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS THIS LITIGATION AS MOOT, OR IN THE ALTERNATIVE, TO STAY THE LITIGATION, AND RESPONSE TO RESPONDENTS' MOTION TO TAKE OFFICIAL NOTICE

Respondents Altria Group, Inc. ("Altria") and Juul Labs, Inc. ("JLI") ask the Commission to absolve them of antitrust liability for entering an unlawful transaction and illegal agreements because Altria purportedly "exited" its investment in JLI and related agreements. Respondents' private arrangements fail to remedy the harm to competition that arose when, as part of Altria's $12.8 billion investment in JLI (the "Transaction"), competitors Altria and JLI illegally agreed that Altria would exit e-cigarettes and not compete against JLI in the future. Respondents now want the Commission to ignore that harm and dismiss the case. The anticompetitive effects of the Transaction are not undone simply because Respondents have now walked away from their illegal activities. The lost competition between JLI and Altria has not suddenly been restored. And, crucially, nothing prevents Altria and JLI from re-entering their illegal agreements or entering a similar illegal transaction or agreement in the closed-system e-cigarette market.

Contrary to Respondents' claims, this case is not moot. It is a well-settled principle of law that voluntary cessation of illegal conduct does not moot an action. In fact, a case is only moot if it is impossible for a court to grant effectual relief. Here, the Commission can and should grant the relief requested in the Notice of Contemplated Relief and Proposed Order, including any measures necessary to prevent the illegal conduct from recurring in the future.

Complaint Counsel thus respectfully requests that the Commission deny Respondents' Motion to Dismiss This Litigation As Moot, or in The Alternative, to Stay The Litigation.[1] Complaint Counsel further respectfully requests that the Commission reverse the Initial Decision and find that Respondents violated Section 1 of the Sherman Act (15 U.S.C § 1) under the rule of reason, and that the Transaction violated Section 7 of the Clayton Act (15 U.S.C. § 18), both of which constitute unfair methods of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and grant the relief requested in the Notice of Contemplated Relief and Proposed Order.[2]

ARGUMENT

I. Respondents' voluntary cessation of their illegal conduct does not moot this proceeding

Respondents and Complaint Counsel agree on one thing: that the law says an action "might become moot if subsequent events made it **absolutely clear** that the allegedly wrongful behavior **could not reasonably be expected to recur."** Motion at 2 (emphasis added) (quoting CC's Oct. 24, 2022 Resp. to Mot. for Official Notice of Non-Compete Termination at 4 (citing *Friends of*

[1] Contrary to Respondents' assertion, there is no "good cause to stay this action to permit the parties to respond to any Complaint Counsel inquiries" regarding the "changed circumstances" (Motion at 3), as there are no inquiries that would justify staying the action and delaying the relief sought in the Complaint.
[2] Complaint Counsel takes no position with respect to Respondents' Motion to Take Official Notice.

the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000))).[3] Recurrence is the exact issue that gives Complaint Counsel concern. Respondents' voluntary exit from the Transaction, fewer than thirty days from the anticipated decision of the Commission, does not prevent the potential for recurrence and does not moot this case. *See R.C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 106-07 (2d Cir. 1989) (abandonment of transaction was "timed to head off an adverse determination on the merits"); *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.") (citations omitted); *United States v. W. T. Grant Co*., 345 U.S. 629, 632 (1953) ("The courts have rightly refused to grant defendants such a powerful weapon [as mootness] against public law enforcement" in similar circumstances.).[4]

Respondents have failed to carry their "heavy burden" to establish mootness. *Friends of the Earth,* 528 U.S. at 189 (citing *United States v. Concentrated Phosphate Exp. Ass'n, Inc.*, 393 U.S. 199, 203 (1968)); *In the Matter of the Coca-Cola Co.*, 117 F.T.C. 795, 917-919, 1994 WL 16011006 (F.T.C. 1994) (rejecting argument that abandoning a merger was grounds to moot and dismiss an on-going merger challenge); *R.C. Bigelow, Inc.*, 867 F.2d at 106-07 (same). Nothing in Respondents' Motion explains how the voluntary cessation of their illegal conduct makes it "absolutely clear" that the conduct "could not be reasonably expected to recur." Respondents baldly claim—without any elaboration—that "[t]here is no possibility" that the harm will recur.

[3] *See United States v. Concentrated Phosphate Exp. Ass'n, Inc.*, 393 U.S. 199, 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).

[4] Altria has acknowledged that the Commission's impending decision in this case contributed to its abandonment of its relationship with JLI. *See* Exhibit A, Ben Remaly, *Altria abandons Juul for another e-vape company,* GCR (Mar. 7, 2023), *available at* https://globalcompetitionreview.com/gcr-usa/article/altria-abandons-juul-another-e-vape-company-0, at 2 ("We were also mindful of the expected timing related to the FTC's appeal of the ALJ decision").

Motion at 2. Respondents simply assert that Altria lacking a current "ownership interest in JLI" gives it "every incentive to compete against JLI." Motion at 2. But lacking a current ownership interest is no safeguard against anticompetitive conduct. Further, Respondents do not even attempt to argue they will not repeat their anticompetitive conduct through agreements with other parties. In essence, Respondents are asking the Commission to dismiss this action based on little more than their unsupported and limited assurances that they will not engage in this type of anticompetitive conduct again with JLI. *See R.C. Bigelow, Inc.*, 867 F.2d at 106 (citing *W.T. Grant Co.*, 345 U.S. at 633) (noting that even a "disclaimer of intention to revive allegedly unlawful conduct does not suffice by itself to meet defendants' heavy burden in order to render the case moot"). Absent a Commission order, JLI or Altria could re-enter an illegal agreement at any time, be it to revive their written non-compete or renew Altria's stake in JLI or enter some other similar unlawful transaction between themselves or with another party in the closed-system e-cigarette market.

II. This proceeding is not moot because the Commission can and should grant effective relief

"A case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever' to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (cleaned up). As "long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). When a court has the ability to fashion "some form of meaningful relief," even if not "fully satisfactory," the "availability of this possible remedy" is sufficient to overcome a claim of mootness. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12-13 (1992). Here, it is hardly "impossible" for the Commission to grant effectual relief. The Notice of Contemplated Relief requests, in part:

> b. The voiding of all agreements related to the Transaction, including the Non-Compete agreement and the Services Agreement between Altria and JLI, as well as a prohibition against any future non-compete agreements between Respondents, except with prior approval by the Commission.

c. A prohibition against any transaction between Altria and JLI that combines their businesses in the relevant market, except with prior approval by the Commission.

e. A requirement that, for a period of time, Altria and JLI provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating therein.

Complaint at 16; *see also* Proposed Order §§ II, IX, CC Post-Trial Brief at Attachment A. These remedies would permit the Commission to address potentially anticompetitive agreements proactively rather than retroactively. *See In re Androgel Antitrust Litig. (No. II)*, No. 1:09-cv-00955-TWT, 2017 WL 2404941, at *3 (N.D. Ga. Jun. 2, 2017) ("By requiring [defendant] to seek prior approval [from the Commission] for all [future relevant agreements], the potential anti-competitive consequences of such agreements could be addressed proactively rather than reactively."); *see also FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) ("[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow land the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.").

Without an order mandating prior approval and prior notice, the Commission may never find out about Respondents' subsequent activities. Respondents could, for example, enter a future agreement that does not require an HSR filing. Indeed, the importance of the prior notice and prior approval remedies sought by Complaint Counsel is readily apparent given the history of this case. Altria did not need to file an HSR notification when it acquired the 35 percent non-voting equity interest in JLI in 2018 (CCFF ¶ 35), shut down its own electronic cigarette business, and entered a six-year non-compete with JLI. CC Appeal Brief 9-10. Taken together, these actions caused a significant portion of the overall competitive harm arising from the Transaction. Moreover, Altria and JLI's latest transaction related to Altria's exit of its investment in JLI in exchange for a non-exclusive global IP license {[redacted]}.

The Commission has previously ordered relief preventing companies from re-engaging in illegal conduct. *See, e.g.*, Exhibit B, *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* ("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 C, *In re Coca Cola Company,* F.T.C. Dkt. 9207 (May 18, 1995), Press Release (Coca-Cola "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 [certain entities]. 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 . . . ."), *available at* https://www.ftc.gov/news-events/news/press-releases/1995/05/coca-cola-company; Exhibit D, Federal Trade Commission, *Statement on the Commission of the Use of Prior Approval Provisions in Merger Orders* (Oct. 25, 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

The remedies requested in the Notice of Contemplated Relief and Proposed Order are essential safeguards that the Commission can and should grant now to prevent Altria and JLI from voluntarily re-entering their illegal agreements and/or entering similar illegal transactions in the closed-system e-cigarette market.[5]

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Commission deny Respondents' Motion to Dismiss This Litigation As Moot, or in The Alternative, to Stay The Litigation. Complaint Counsel respectfully requests that the Commission reverse the Initial Decision; find that Respondents violated Section 1 of the Sherman Act under the rule of reason and that the transaction violated Section 7 of the Clayton Act; and grant the relief requested in the Notice of Contemplated Relief and Proposed Order.

[5] Not only is this case not moot, but the Commission has a strong public interest in granting the relief sought in the Notice of Contemplated Relief and Proposed Order. *FTC v. Swedish Match N. Am., Inc.*, 131 F. Supp. 2d 151, 172 (D.D.C. 2000) ("There is a strong public interest in effective enforcement of the antitrust laws[.]"); *U.S. v. Ivaco, Inc.*, 704 F. Supp. 1409, 1430 (W.D. Mich. 1989) ("By enacting Section 7, Congress declared that the preservation of competition is always in the public interest.").

Dated: March 16, 2023

Respectfully submitted,

s/ Nicole Lindquist
Nicole Lindquist
Laura Antonini
Peggy Bayer Femenella
James Abell
Stephen W. Rodger
Eric Sprague
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-3672
Email: NLindquist@ftc.gov

Counsel Supporting the Complaint

EXHIBIT A

GCR

A unique view of the American litigation landscape

Altria abandons Juul for another e-vape company

Ben Remaly
07 March 2023

Shutterstock/GrungeElfz

The Federal Trade Commission's challenge to Altria's purchase of a 35% stake in Juul appears to have concluded after the Marlboro manufacturer ditched its investment to acquire the e-vapour startup NJOY.

Altria revealed after the markets closed on Friday that it had swapped its minority stake in Juul for licensing rights to some of the vape company's products. On Monday, it said it would be moving forward with a $2.75 billion purchase of NJOY.

In February 2022, the FTC's internal tribunal **rejected** staff's allegations that Altria had illegally agreed to forgo competing with Juul for vape products for six years in exchange for its $12.8 billion investment in the company.

Administrative law judge D Michael Chappell ruled that commission staff had failed to show "clear proof" that Altria would have otherwise entered the e-cigarette market but for its investment in Juul.

Staff appealed against their loss to the agency's commissioners, who unanimously authorised the complaint in 2020. Both Democrats added that they would have also challenged the merger as attempted monopolisation and an unfair method of competition because the deal granted Altria an observer on Juul's board of directors.

The commissioners heard oral arguments on staff's appeal in September, then **extended** the challenge by asking the parties whether they could interpret the alleged non-compete agreement between Altria and Juul as a *per se* violation of Section 1 of the Sherman Act because the arrangement may have been "inherently suspect". Staff claimed the deal violated Section 1 under both the *per se* standard and the rule of reason.

While the commissioners were due to issue a decision later this month, it is no longer clear if they will after Altria dropped its investment – although agency leadership has **signalled** a far more aggressive stance in seeking prior approval from companies contemplating similar mergers.

The Biden Administration has yet to attempt to litigate a requirement for prior approval of similar acquisitions following an abandoned merger, as the FTC did in 1986 when suing to block Coca-Cola from trying again to acquire any part of Dr Pepper.

The FTC declined to comment on Altria's abandonment of Juul.

Altria said it was abandoning the transaction because of "significant regulatory and legal challenges and uncertainties".

The bigger regulatory risk related to Juul may have been with the US Food and Drug Administration. The regulator **ordered** Juul to stop selling its vaping products in June over concerns its vaping products may have been leaking harmful chemicals.

Altria terminated its non-compete provisions with Juul in September, signalling it intended to enter the market through other means – though it noted the FTC's commissioners were also slated to issue their opinion later this month.

"We were also mindful of the expected timing related to the FTC's appeal of the ALJ decision," Altria said. "We continue to believe that the investment was lawful and this view is supported by the ALJ decision last year."

Now, Altria is looking to purchase the e-cigarette company NJOY for at least $2.75 billion – a figure that could rise by an additional $500 million if NJOY receives FDA approval for additional products.

The Wall Street Journal described that price as unusually high for the tobacco market. Not counting any additional bonuses, the asking price is 18 times higher than NJOY's sales totals from 2022.

For comparison, Altria paid about 13 times the amount of Juul sales when making its investment in 2018.

NJOY is one of just a handful of e-vape companies with FDA approval to sell its products. Nielsen estimates that NJOY has only about 3% of the US market for e-cigarettes, but the merging parties said they expect sales of NJOY's Ace products to grow post-consummation.

"Due to NJOY's small sales force and the limited distribution and visibility of ACE, ATC [adult tobacco consumer] awareness of the brand is low," Altria said.

Counsel to Altria on NJOY merger

Arnold & Porter

Debbie Feinstein in Washington, DC

Counsel to NJOY

Weil Gotshal & Manges

John Scribner in Washington, DC

Counsel to the Federal Trade Commission

Holly Vedova, Peggy Bayer Femenella, Stephen Rodger, James Abell, Jeanine Balbach, Michael Blevins, Erik Herron, Frances Anne Johnson, Joonsuk Lee, Meredith Levert, Nicole Lindquist, Michael Lovinger, David Morris, Kristian Rogers and Steven Wilensky in Washington, DC

Counsel to Altria Group for FTC challenge

Wilkinson Stekloff

Partners Beth Wilkinson and James Rosenthal in Washington, DC, and Moira Penza and Ralia Polechronis in New York, assisted by Hayter Whitman

Wachtell Lipton Rosen & Katz

Partners Jonathan Moses and Kevin Schwartz in New York, assisted by Adam Goodman

Counsel to Juul Labs

Cleary Gottlieb Steen & Hamilton

Partner Jeremy Calsyn, senior counsel David Gelfand and counsel Matthew Bachrack in Washington, DC, assisted by Linden Bernhardt and Jessica Hollis

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Ben Remaly

Author | Editor, GCR USA

ben.remaly@lbresearch.com

EXHIBIT B

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

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

Contact Information

Media Contact

Betsy Lordan
Office of Public Affairs
202-326-2180

Staff Contact

Lincoln Mayer
Bureau of Competition
202-326-3324

EXHIBIT C

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.

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

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.))

EXHIBIT D

STATEMENT OF THE COMMISSION ON USE OF PRIOR APPROVAL PROVISIONS IN MERGER ORDERS

On July 21, 2021, the Commission voted to rescind the 1995 Policy Statement on Prior Approval and Prior Notice Provisions ("1995 Statement").[1] The 1995 Statement ended the Commission's then-longstanding practice of incorporating prior approval and prior notice provisions in Commission orders addressing mergers. With the rescission of the 1995 statement, the Commission returns now to its prior practice of routinely requiring merging parties subject to a Commission order to obtain prior approval from the FTC before closing *any* future transaction affecting each relevant market for which a violation was alleged. This is a critical tool that serves several Commission interests:

- *Preventing facially anticompetitive deals.* Too many deals that should have died in the boardroom get proposed because merging parties are willing to take the risk that they can 'get their deal done' with minimal divestitures. Acquisitive firms in particular are too willing to roll the dice on an anticompetitive deal because there are few downsides (from their perspective) to their long-term strategy that contemplates other acquisitions down the road. Parties pursuing facially anticompetitive deals should now know that they are at risk of being subject to a prior approval provision.

- *Preserving Commission resources.* Challenging anticompetitive mergers—through litigation or settlement—is a resource intensive enterprise that puts pressure on the Commission's limited staff and budget. Where the Commission has expended those resources to understand the competitive dynamics and market structure of a particular market, the Commission should not have to incur additional costs by either (1) re-reviewing the same transaction on numerous occasions or (2) reviewing a similar transaction by one of the merging parties in the same market. Investigating the likely effects of a proposed merger under a prior approval provision is much different than a similar investigation under the strictures of the Hart-Scott-Rodino Act ("HSR"), where the merging parties can force a Commission decision to sue. Conducting merger review after a petition for prior approval would allow the Commission to husband its scarce resources without the brinksmanship we encounter during HSR reviews.

- *Detecting anticompetitive deals below the HSR reporting thresholds.* Incorporating prior approval provisions in Commission orders reduces the risk that the Commission will not

[1] Press Release, Fed Trade Comm'n, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter.

learn of harmful mergers that do not trigger federal antitrust reporting requirements. That risk is especially acute for merging parties with a history of attempting anticompetitive transactions. Absent these provisions, the Commission often learns about these deals without sufficient time to investigate and, if necessary, block the transaction.

Going forward, the Commission returns to its prior practice of including prior approval provisions in all merger divestiture orders for every relevant market where harm is alleged to occur, for a minimum of ten years. The Commission is less likely to pursue a prior approval provision against merging parties that abandon their transaction prior to certifying substantial compliance with the Second Request (or in the case of a non-HSR reportable deal, with any applicable Civil Investigative Demand or Subpoena *Duces Tecum*). This should signal to parties that it is more beneficial to them to abandon an anticompetitive transaction before the Commission staff has to expend significant resources investigating the matter.

In addition, from now on, in matters where the Commission issues a complaint to block a merger and the parties subsequently abandon the transaction, the agency will engage in a case-specific determination as to whether to pursue a prior approval order, focusing on the factors identified below with respect to use of broader prior approval provisions. The fact that parties may abandon a merger after litigation commences does not guarantee that the Commission will not subsequently pursue an order incorporating a prior approval provision.

Use of Broader Prior Approvals Where Additional Relief Needed. In some situations where stronger relief is needed, the Commission may decide to seek a prior approval provision that covers product and geographic markets beyond just the relevant product and geographic markets affected by the merger. The following non-exhaustive list of factors will be relevant to this determination. No single factor is dispositive; rather, the Commission will take a holistic view of the circumstances when determining the length and breadth of prior approval provisions.

1. *Nature of the transaction.* Whether the merging parties are attempting a transaction that is substantially similar to a transaction that was previously challenged by the Commission—even if the prior matter was not litigated (i.e., even if the parties previously abandoned the transaction). A subsequent transaction is "substantially similar" to a prior transaction if it includes some or all of the assets implicated in a prior transaction challenged by the Commission. Similarly relevant is whether either party had been subject to a merger enforcement action in the same relevant market.

2. *Level of market concentration.* Whether the relevant market alleged is already concentrated or has seen significant consolidation in the previous ten years.

3. *The degree to which the transaction increases concentration.* Whether the transaction significantly increases concentration.

4. *The degree to which one of the parties pre-merger likely had market power.* Whether, pre-merger, one of the parties likely had market power. There may be instances where the combination of a nascent or fringe competitor with a company with a high market share does not increase concentration much but raises significant competitive concerns.

5. *Parties' history of acquisitiveness.* Whether either party to the transaction has a history of, or has indicated a desire to enter into, acquisitions in the same relevant market, in related markets (i.e., upstream or downstream firms), or in adjacent or complementary products or geographic areas.

6. *Evidence of anticompetitive market dynamics.* Whether the market characteristics create an ability or incentive for anticompetitive market dynamics post-transaction.

Divestiture Buyers. The Commission will also require buyers of divested assets in Commission merger consent orders to agree to a prior approval for any future sale of the assets they acquire in divestiture orders, for a minimum of ten years. This will ensure that the divested assets are not later sold to an unsuitable firm that would contravene the purpose of the Commission's order. The Commission has on occasion in the past required divestiture buyers to agree to such prior approval terms; going forward the Commission intends to require all buyers to do so.

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2023, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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

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

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

Beth A. Wilkinson
James M. Rosenthal
Hayter Whitman
Alysha Bohanon
Wilkinson Stekloff LLP
2001 M Street NW, 10th Floor
Washington, DC 20036
Tel: 202-847-4000
bwilkinson@wilkinsonstekloff.com
jrosenthal@wilkinsonstekloff.com
hwhitman@wilkinsonstekloff.com

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

Counsel for Respondent JUUL Labs, Inc.

abonhanon@wilkinsonstekloff.com

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

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

Counsel for Respondent Altria Group, Inc.

By: *s/ Nicole Lindquist*
Nicole Lindquist, Attorney

Counsel Supporting the Complaint