

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Lina M. Kahn, Chair**
 Noah Joshua Phillips
 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 RESPONDENTS’ MOTION FOR
OFFICIAL NOTICE OF MYBLU MARKETING DENIAL LETTER**

On June 7, 2022, Respondents filed a motion requesting that the Commission take official notice of information Respondent JLI obtained from the FDA in response to a Freedom of Information Act (“FOIA”) request pertaining to the denial of certain *myblu* e-cigarette products.¹ Complaint Counsel does not oppose the Commission taking notice of any decision by the FDA to grant or deny Premarket Tobacco Application (“PMTA”) authorization to any e-cigarette product.² Complaint Counsel files this response, however, to rebut certain flawed and misleading assertions contained in Respondents’ motion and to make clear that Complaint

¹ ITG’s *myblu* products are pod-based. CCF ¶¶ 178-79. ITG has also submitted PMTAs for its *blu PLUS* cigalike products. CCF ¶ 1176. The FDA has not yet issued decisions on those PMTAs.

² To avoid burdening the Commission with numerous additional motions over the next several months, Complaint Counsel would be willing to stipulate that all official PMTA decisions posted to the FDA’s public website are appropriate for official notice.

Counsel has serious concerns about granting official notice to cherry-picked documents obtained through one-sided FOIA requests.

Respondents' motion suggests that the FDA's letter denying the authorization of certain *myblu* products somehow indicates that Altria's products were incapable of receiving PMTA authorization. This is both unsupported by the record, and ultimately not dispositive of whether Altria's exit substantially lessened competition in the closed-system e-cigarette market. Respondents assert that Altria's e-cigarettes were unlikely to obtain PMTA approval because of elevated formaldehyde generation, but again fail to mention that Altria had developed a replacement battery to address that issue in its MarkTen cigalikes, and that Altria planned to use data-bridging to include the new battery in its initial MarkTen PMTA. CCFF ¶¶ 1275-80, 1295-96. Altria likewise planned to incorporate a new battery in Elite 2.0 to address formaldehyde generation. CCFF ¶ 1293. Moreover, the evidence shows that the new gasket Altria implemented in Elite shortly before its discontinuation significantly reduced formaldehyde production. CCFF ¶¶ 987, 1216-18, 1228-31.

Respondents' motion focuses solely on the FDA's *myblu* denials while ignoring that the FDA's *authorization* of other e-cigarettes (Logic's Pro and Power, and Reynolds' Vuse Solo, Vibe, and Ciro) directly undermines their assertion that e-cigarettes must (1) have nicotine salts and (2) be pod-based to secure FDA approval. *See* Complaint Counsel's Mot. Official Notice (Mar. 31, 2022); Complaint Counsel's Second Mot. Official Notice (May 24, 2022). The FDA's authorizations show this simply is not true.

Importantly, Complaint Counsel does *not* need to demonstrate that Altria's e-cigarette products would have obtained PMTA approval to demonstrate that Altria's exit substantially lessened competition. *See* Reply Br. to Resps.' Answering Br. ("Reply") at 7-8, 15. Even if

Altria believed its existing e-cigarettes might not be approved, it made no sense to remove those products *four years* before the then-August 2022 PMTA deadline. *Id.* at 7-8. Even with the PMTA deadline ultimately changing to September 2020, Altria could have kept its existing e-cigarettes on the market for several more years while awaiting the FDA’s determination, and the record shows that Altria was planning to do so in the absence of the JLI deal. *E.g.*, Reply at 7-8, 15; CCFF ¶¶ 1265, 1299-300, 1364-66, 1378. Furthermore, a myopic focus on Altria’s existing products ignores Altria’s future competitive significance through its innovation efforts. CCFF ¶¶ 1538-730.

CONCLUSION

For the foregoing reasons, Complaint Counsel files this response to Respondents’ motion.

Dated: June 13, 2022

Respectfully submitted,

s/ James Abell

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 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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