INTRODUCTION

The meteoric rise of Respondent JUUL Labs, Inc. ("JLI") in the closed-system e-cigarette market posed an existential threat to Respondent Altria Group, Inc. ("Altria"), the largest tobacco company in the United States. But rather than compete on the merits, Altria agreed with JLI that it would exit the market in exchange for a 35 percent stake in JLI. At trial, Complaint Counsel proved that this agreement violated Section 1 of the Sherman Act (15 U.S.C. § 1) under the full rule of reason and that the transaction itself violated Section 7 of the Clayton Act (15 U.S.C. § 18). On appeal, the Commission can restore competition in the closed-system e-cigarette market by reversing the Initial Decision, which erred in finding that Altria's sudden exit was unrelated to an agreement with JLI, and that the transaction did not substantially lessen competition.[1]

The Commission has asked for additional briefing on the potential applicability of the *per se* rule and inherently suspect standard on the "unwritten agreement" between Respondents that Altria exit e-cigarettes. Although agreements of this kind could merit application of the *per se* rule or inherently suspect standard, the Commission need not address these questions in *this* appeal. Complaint Counsel has proven that the agreement between Respondents violated Section 1 under the full rule of reason, which involves a more detailed inquiry than either *per se* or inherently suspect. It is therefore unnecessary in *this* case for the Commission to adopt either of these analytical frameworks in evaluating the illegality of Respondents' agreement.

More importantly, the Commission should refrain from applying either the *per se* rule or the inherently suspect standard here. The facts and circumstances of *this* case do not necessitate or warrant additional analyses. And there are unique procedural impediments to the Commission

[1] Having erroneously concluded that Respondents did not agree that Altria would exit the e-cigarette business, the Court did not address whether that agreement was unlawful under the rule of reason.

applying new modes of Section 1 analysis for the first time at this stage of this proceeding. To begin with, the Complaint that the Commission issued did not allege that Respondents' agreement is *per se* illegal or inherently suspect, but instead *specifically* alleged that Respondents' conduct violated Section 1 "under rule of reason analysis." Compl. ¶79. Complaint Counsel is unaware of the Commission ever expressly alleging that the challenged conduct is illegal under rule of reason analysis in other Section 1 complaints. Because the Complaint (which the Commission voted out 5-0) specifically alleged a violation "under rule of reason analysis"—and not that Respondents' agreement is *per se* illegal or inherently suspect—Complaint Counsel repeatedly represented to the Court, Commission, and Respondents that its Section 1 claim would proceed under the full rule of reason. As a result, neither the *per se* rule nor the inherently suspect standard were analyzed during pre-trial motion practice, discussed during the hearing, briefed post-trial, or meaningfully raised on appeal. Federal courts of appeals have vacated orders of the Commission and other federal agencies where the government's theory changed after a trial on the merits. *See, e.g.*, *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968); *Bendix Corp. v. FTC*, 450 F.2d 534, 535, 537 (6th Cir. 1971); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 17 (7th Cir. 1971); *Indep. Elec. Contrs. of Houston, Inc. v. NLRB,* 720 F.3d 543, 552, 554 (5th Cir. 2013).

Complaint Counsel have already proven the illegality of the unwritten agreement following a 13-day hearing (with nearly 800 pages of post-trial findings) conducted under the full rule of reason. Accordingly, there is little to gain—and perhaps much to lose—by the Commission applying either the *per se* rule or inherently suspect standard to the unwritten agreement between Respondents. Complaint Counsel therefore respectfully asks the Commission to reverse the Initial Decision and find that Respondents' agreement that Altria exit the closed-

system e-cigarettes market is unlawful under the full rule of reason and that the transaction entered into between Altria and JLI violated Section 7 of the Clayton Act.

I. BACKGROUND

A. Complaint Counsel alleged that Respondents' unwritten agreement violated Section 1 under the rule of reason

On April 1, 2020, the Commission voted 5-0 to file a Complaint against Respondents arising from Altria's acquisition of a 35 percent stake in JLI.[2] Count I alleges that Altria and JLI entered "an agreement whereby Altria agreed not to compete in the U.S. e-cigarette market now or in the future, in return for a substantial ownership" interest in JLI. Compl. ¶78. More specifically, the Complaint alleges that during the deal negotiations "JLI insisted, and Altria recognized" that Altria's exit from the e-cigarette business was "a non-negotiable condition for any deal[,]" and that to meet JLI's demand, Altria "began taking steps to withdraw its e-cigarettes" from the market. Compl. ¶¶4-5. The Complaint charges that this agreement between Respondents "unreasonably restrained trade" in the closed-system e-cigarette market in violation of Section 1 of the Sherman Act "under rule of reason analysis." Compl. ¶¶78-79.

Bound by the specific allegations in the Complaint,[3] Complaint Counsel presented its Section 1 claim at trial under the full rule of reason. *See, e.g.*, Opening Statement Tr. 35 (June 2, 2021) ("Complaint Counsel has alleged that the agreement between Altria and JLI violates the rule of reason."); CCB 58-68 ("Respondents' Agreement is Unlawful under the Rule of Reason"). Complaint Counsel noted in its trial briefs that private plaintiffs have sued Altria and JLI for the same conduct under a *per se* theory, observing that such conduct "may well amount to

[2] *Press Release*, FTC Sues to Unwind Altria's $12.8 Billion Investment in Competitor JUUL (April 1, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitor-juul.

[3] *See* FTC Rule of Practice ("FTC Rule") 3.11(b)(2) (16 C.F.R. § 3.11(b)(2)); FTC Rule 0.16 (16 C.F.R. § 0.16) ("The Bureau [of Competition] carries out its responsibilities by … prosecuting enforcement actions *authorized by the Commission*.") (emphasis added).

a *per se* violation of Section 1 or be unlawful under the 'inherently suspect' standard." CCPTB 51-52 n.299; CCB 58 n.17 (same); CCAB 40 n.37 (same). But Complaint Counsel was unequivocal that *its* case against Respondents was proceeding under the full rule of reason. *See* CCPTB 52 n.299 ("However, as Respondents' agreement to exit the market clearly violates the more 'thorough' rule of reason standard, Complaint Counsel's case will proceed under that standard."); CCB 58 n.17 (same); CCAB 40 n.37 (same). The Court wrote its Initial Decision accordingly. ID 15 n.11 (noting that the Complaint "expressly alleges a Section 1 violation based upon a rule of reason analysis" and that Complaint Counsel "does not rely on a *per se* theory").

B. Complaint Counsel proved that Respondents' unwritten agreement violated Section 1 under the full rule of reason

The evidence in the record demonstrates that Respondents' unwritten agreement that Altria exit the closed-system e-cigarette market violates the full rule of reason. The anticompetitive effects of Altria's exit from the market outweigh any procompetitive benefits. Moreover, Altria and JLI failed to establish that their claimed procompetitive justifications could not be achieved through less-restrictive means.

The harm resulting from Altria's decision to pull its existing products from the market and shutter its Nu Mark business is clear. Consumers lost the benefit of *all* forms of current competition from Altria. Consumers who preferred Altria's MarkTen products were directly harmed when those products were removed from the market. CCAB 41; CCFF ¶¶1493-526. Second, Altria's exit resulted in higher prices than would have occurred had it remained in the market. CCAB 41; CCFF ¶¶1416, 1525.

As Complaint Counsel showed at trial, Respondents' claimed procompetitive benefits do not justify the unwritten agreement under the rule of reason. The value of any procompetitive benefits that may arise from these regulatory support services is highly speculative and cannot be

verified. CCAB 42; CCFF ¶¶1885-87, 1903. Respondents failed to offer any evidence beyond vague and self-serving testimony from their executives as to how the collaboration has achieved benefits. CCAB 42; CCFF ¶¶1898-911; CCRRFF ¶¶1247-68. Furthermore, any claimed procompetitive benefits could have been achieved by less-restrictive alternatives. CCAB 43; CCFF ¶¶1929-41. Finally, even if a less restrictive alternative were not available, the claimed benefits arising from Altria's regulatory assistance could not compensate for the complete elimination of Altria's existing e-cigarette business from the market. CCAB 43; CCB 67-68.

II. QUESTIONS PRESENTED

Question #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?

Question #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?

Question #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?

III. ARGUMENT

A. The legal framework for analyzing Section 1 claims

Section 5 of the FTC Act, 15 U.S.C. § 45, prohibits unfair methods of competition, including conduct that violates Section 1 of the Sherman Act. A Section 1 case requires proof of (1) a contract, combination, or conspiracy that (2) unreasonably restrains trade. *See* 15 U.S.C. § 1; *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011). An agreement unreasonably restrains trade when it has or is likely to have a substantial anticompetitive effect in the relevant market, such as by increasing prices, reducing output, reducing quality, or reducing consumer choice. *See, e.g.*, *Standard Oil Co. v. United States*, 283 U.S. 163, 175 (1931); *Realcomp*, 635 F.3d at 825. Courts and the Commission have developed multiple standards for determining whether an agreement unreasonably restrains trade under Section 1, including the *per se* rule, an abbreviated analysis the Commission often calls the "inherently suspect" standard, and the full rule of reason. *See, e.g.*, *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 829-31 (3d. Cir. 2010); *Realcomp*, 635 F.3d at 825.

1. Elements for assessing an agreement under the *per se* rule

Restraints deemed *per se* anticompetitive "always or almost always tend to restrict competition and decrease output" and are therefore "presumed unreasonable without inquiry into the particular market context" in which they exist. *NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 100 (1984) (cleaned up). For example, naked horizontal price fixing and market allocation agreements are axiomatic *per se* violations due to their established "pernicious effect on competition and lack of any redeeming virtue." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Conduct that is *per se* unlawful is condemned without any further market inquiry once the conduct itself has been proven. *Realcomp*, 635 F.3d at 825.

Before summary condemnation, however, a "plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects."[4] *Mushroom Direct Purchaser Antitrust Litig.*, 2015 WL 6322383, at *15, n.22 (E.D. Pa. May 26, 2015) (citing *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 298 (1985)); *see also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ("Areeda & Hovenkamp") ¶ 1910b (4th Ed. 2022) ("Of course, even in the per se case the relevant facts have to be established and the restraint has to be 'characterized' for inclusion or exclusion from the per se category.").

The Supreme Court has expressed "reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 887 (2007) (citation omitted); *see also Texaco Inc. v. Dagher*, 547 U.S. 1, 6–8, n.1 (2006) (holding that a legitimate joint venture was not *per se* illegal).[5]

2. Elements for assessing an agreement under the inherently suspect standard

Some restraints fall between the type that are condemned as *per se* anticompetitive and those that are analyzed under the full rule of reason. *1-800 Contacts, Inc. v. FTC*, 1 F.4th 102,

[4] Complaint Counsel did not attempt to make any such showing during the evidentiary hearing.
[5] A finding by the Commission that Respondents' unwritten agreement was a *per se* violation could have criminal implications. *See* Federal Trade Commission, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act,* Commission File No. P221202 (Nov. 10, 2022), p. 12 n.71, https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf ("Under appropriate circumstances, the Commission will refer evidence of per se illegal cartel agreements to the Department of Justice for criminal prosecution."), citing Federal Trade Commission, *Commission Statement Regarding Criminal Referral and Partnership Process,* Commission File No. P094207 (Nov. 18, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598439/commission_statement_regarding_criminal_referrals_and_partnership_process_updated_p094207.pdf.

115 (2d Cir. 2021) (citation omitted); *see also Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34-36 (D.C. Cir. 2005).

The Commission applies an abbreviated rule of reason analysis, sometimes known as an "inherently suspect" standard, when there is a "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 at 37.[6] This mode of inquiry is appropriate when "the great likelihood of anticompetitive effects can easily be ascertained." *Cal. Dental*, 526 U.S. at 770 (citations omitted). The precise showing necessary to classify a restraint as inherently suspect depends upon "the circumstances, details, and logic of a restraint" and varies from case to case. *Id.* at 781. Establishing that a restraint is classified as "inherently suspect" is one way to make a prima facie case.

3. Elements for assessing an agreement under the full rule of reason

Most restraints challenged under Section 1 of the Sherman Act are analyzed under the full rule of reason to determine if they likely harm competition. *See, e.g.*, *Deutscher Tennis Bund*, 610 F.3d at 829-830. The rule of reason is thus a well-established, common mode of analysis for Section 1 violations. *Leegin*, 551 U.S. at 885 ("The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1."); *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 343 (1982) ("we have analyzed most restraints under the so-called 'rule of reason'"). "[T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition."

[6] Complaint Counsel does not take a position on whether the "inherently suspect" standard differs from what the Supreme Court has called "abbreviated or 'quick-look' analysis." *See Cal. Dental*, 526 U.S. at 770.

Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978); *see also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986).

The rule of reason employs a flexible burden-shifting framework. *Impax Labs., Inc. v. FTC*, 994 F.3d 484, 492 (5th Cir. 2021) (citing *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)); *see also Nat'l Collegiate Athletic Ass'n v. Alston,* 141 S. Ct. 2141, 2160 (2021). First, the "initial burden is on the FTC" to establish a prima facie case of harm. *Impax*, 994 F.3d at 492. While "there is generally no categorical line to be drawn" between ways for Complaint Counsel to make such a prima facie showing, they can carry their initial burden by demonstrating (1) Respondents' market power along with the likely effect of the challenged conduct or (2) direct evidence of anticompetitive effects. *Cal. Dental*, 526 U.S. at 780-81; *Realcomp*, 635 F.3d at 825; *Indiana Fed'n of Dentists*, 476 U.S. at 460-61.

Once a complainant makes the requisite showing, then the burden shifts to respondents to "demonstrate that the restraint produced procompetitive benefits." *Impax*, 994 F.3d at 492; *see also Ohio v. Am. Express Co.*, 138 S. Ct. at 2284; *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 317 (2d Cir. 2008). In addition, the respondent must provide evidence that supports the proposed justification, and that the challenged conduct is reasonably necessary—and no broader than necessary—to achieve the alleged procompetitive benefits. *See, e.g.*, *Realcomp*, 635 F.3d at 835 (finding the alleged procompetitive justification—the prevention of free-riding—insufficient where the petitioner "ha[d] not demonstrated a connection between the [restraint] and the prevention of free-riding"). Even if a plaintiff "fails to demonstrate a less restrictive alternative way to achieve the procompetitive benefits, the court must balance the anticompetitive and procompetitive effects of the restraint." *Impax*, 994 F.3d at 492 (citing *Apani Sw., Inc. v. Coca-Cola Enters., Inc.,* 300 F.2d 620, 627 (5th Cir. 2002)); *see also Polygram*, 416

F.3d at 36. "If the anticompetitive harm outweighs the procompetitive benefits, then the agreement is illegal." *Impax*, 994 F.3d at 492. As noted in Section I.B, *supra*, Complaint Counsel has met its burden under the full rule of reason framework.

B. There are unique, substantial procedural impediments to deviating from the rule of reason standard pled and tried in this case

While it is possible the type of conduct at issue in this case may appropriately be addressed under *per se* or inherently suspect theories depending on the underlying facts, there are procedural impediments to applying these standards in *this* case. Any benefits from applying the *per se* or inherently suspect standards at this stage of the litigation are easily outweighed by these procedural impediments. Because of the circumstances surrounding *this* case, the Commission should not apply a different standard even though it has *de novo* review of the Initial Decision.[7]

The first procedural impediment to applying the *per se* or inherently suspect standards to *this* case at this stage is that those analytical frameworks were neither raised nor fully developed in the record here. The Complaint that the Commission voted out unanimously was very explicit and unusual: not only did it omit any reference to the *per se* or inherently suspect standards, but it also *specifically* stated that Respondents' conduct violates Section 1 "under rule of reason analysis." Compl. ¶79. Complaint Counsel is unaware of any previous case in which the FTC's complaint has specified a Section 1 violation based solely on the rule of reason.[8] Moreover, in its

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[7] "The Commission reviews the ALJ's factual findings, legal conclusions, and discretionary decisions *de novo*; it 'exercise[s] all the powers which it could have exercised if it had made the initial decision.'" *In the Matter of Axon Enterprise and Safariland*, Dkt. No. 9389, 2020 WL 5406806, at *5 (F.T.C. Sept. 3, 2020) (citing FTC Rule 3.54(a) (16 C.F.R. § 3.54(a)); 5 U.S.C. § 557(b)). *See also* FTC Rules 3.51-3.54 (16 C.F.R. §§ 3.51-3.54).

[8] *Cf. In the Matter of Benco/Schein/Patterson*, FTC Dkt. No. 9379, Complaint (Feb. 12, 2018) (alleging per se and inherently suspect theories), a*vailable at* https://www.ftc.gov/system/files/documents/cases/docket_no_9379_bsp_part_3_complaint_provisionally_redacted_public_version.pdf; *In the Matter of 1-800 Contacts, Inc.*, FTC Dkt. No. 9372, Complaint (Aug. 8, 2016) (alleging inherently suspect theory), *available at* https://www.ftc.gov/system/files/documents/cases/160808_1800contactspt3cmpt.pdf; *In the Matter of Realcomp II Ltd.*, FTC Dkt. No. 9320, Complaint (Oct. 12, 2006) (alleging inherently suspect theory), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2006/10/061012admincomplaint_0.pdf; *In the Matter of*

briefing, Complaint Counsel consistently affirmed to Respondents, the Court, and the Commission that it was litigating this case under the more "thorough" rule of reason standard, as opposed to the inherently suspect standard or the *per se* rule.[9]

Several aspects of Complaint Counsel's trial presentation underscore this point. For example, Complaint Counsel did not attempt to establish that the agreement between Altria and JLI is a market allocation agreement (and thus a *per se* violation of Section 1). *See Mushroom Direct Purchaser Antitrust Litig.*, 2015 WL 6322383, at *15, n.22 (citing *Nw. Wholesale Stationers*, 472 U.S. at 298) ("A plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects."); *see also* Areeda & Hovenkamp ¶ 1910b ("Of course, even in the per se case the relevant facts have to be established and the restraint has to be 'characterized' for inclusion or exclusion from the per se category."). Instead, Complaint Counsel assessed the unwritten agreement's lawfulness in connection to the transaction and the services provided therewith, consistent with the Complaint's allegations (*see*, *supra*, Section I).[10]

Complaint Counsel also did not attempt to argue that the unwritten agreement is an inherently suspect restraint that bears a "close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare." *Polygram*, 416 F.3d at 37. In cases involving the inherently suspect standard, courts have carefully considered whether particular restraints are properly analyzed under that framework. *See*, *e.g.*, *1-800 Contacts, Inc.*, 1 F.4th at 114-17; *In the Matter of Realcomp II Ltd.*, Dkt. No. 9320, 2007

MiRealSource, Inc., FTC Dkt. No. 9321, Complaint (Oct. 12, 2006) (alleging inherently suspect theory), *available at* https://www.ftc.gov/legal-library/browse/cases-proceedings/0610266-mirealsource-inc-matter.

[9] CCPTB 51-52 n.299; CCB 58 n.17; CCAB 40 n.37.

[10] Complaint Counsel likewise did not attempt to establish the transaction itself was a sham. *See Texaco*, 547 U.S. at 6 n.1.

WL 6936319, at *21-27 (F.T.C. Oct. 30, 2009), *aff'd by Realcomp*, 635 F.3d at 819, 826-27; *Polygram*, 416 F.3d at 36-37. Since the Complaint specified a rule of reason analysis, Complaint Counsel did not attempt to brief or argue inherently suspect, and it was not necessary under the full rule of reason.

In light of the procedural history outlined above, there is also a distinct possibility that applying the inherently suspect or *per se* framework to *this* case on appeal could invite scrutiny under the Administrative Procedures Act ("APA"), leading a circuit court to vacate the Commission's order. The APA, 5 U.S.C. § 554(b)(3), requires that Respondents were "timely informed of … the matters of fact and law asserted." This requirement is satisfied, and there is no due process violation, if Respondents "understood the issue" and were "afforded full opportunity to justify" their conduct. *NLRB v. Mackay Radio & Tel. Co.,* 304 U.S. 333, 350 (1938). Respondents must be "reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled." *L.G. Balfour Co.*, 442 F.2d at 19 (citations omitted); *see also Savina Home Indus. v. Sec'y of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979); *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935, 941 (5th Cir. 1971).

Although the case law is not uniform,[11] Commission orders have been overturned when the Commission made findings on an issue that was not litigated and the party proceeded against was not given an opportunity to defend itself. *See, e.g.*, *Rodale Press*, 407 F.2d at 1256-57 ("[I]t

[11] *See, e.g.*, *ECM Biofilms, Inc. v. FTC*, 851 F.3d 599, 617 (6th Cir. 2017) (dismissing petitioner's due process claim on the ground that "an issue need not be raised in the administrative complaint if the responding party receives fair notice and a full opportunity to litigate the issue"); *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 215-16 (2d Cir. 1976); *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 884 (9th Cir. 1972) (neither the APA nor due process was violated when the complaint charged defendants with violation of § 2 of the Sherman Act, but they were found to have violated § 7 of the Clayton Act); *Tashof v. FTC*, 437 F.2d 707, 712-13 (D.C. Cir. 1970) (in affirming Commission order, court rejected appellant's argument that it was "not fairly apprise[d]" of a charge due to vague wording in the complaint because appellant "pointed to no evidence it might have introduced if it had been given clearer notice of the charge").

is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change…. The evil at which the statute strikes is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the opportunity to present argument under the new theory of violation, which must be supplied.").

In *Bendix Corp. v. FTC*, the Commission issued an order that a merger violated Section 7 of the Clayton Act based on a theory that had not been pled in the complaint or advanced during the evidentiary hearing—the toehold theory of illegality. 450 F.2d at 535-36. The Sixth Circuit found that the Commission violated the petitioner's right to notice under the APA and vacated the Commission's order, reasoning that:

> [The theory] was never charged, raised, nor tried during the administrative hearing; never presented for consideration by the Hearing Examiner; and not raised as an issue or discussed by Complaint Counsel in the appeal to the Commission from the order of the Hearing Examiner dismissing the complaint. [Petitioner] 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.

Id. at 536. The Sixth Circuit noted, "[t]his court repeatedly has held that an administrative agency must give a clear statement of the theory on which a case will be tried." *Id.* at 541 (citations omitted); *see also L.G. Balfour Co.*, 442 F.2d at 17 (finding that petitioners lacked notice and reversing the Commission); *Rodale Press,* 407 F.2d at 1256-57 (finding that petitioners were deprived of fair notice and hearing where the Commission applied a contrary theory than was pled and litigated); *Indep. Elec. Contrs.,* 720 F.3d at 552 (citing *Bendix*, the court stated that "the Board knows that it cannot 'change theories in midstream without giving respondents reasonable notice of change'").

In this case, the Complaint explicitly states that the standard is rule of reason while omitting reference to either the *per se* rule or inherently suspect framework, Complaint Counsel repeatedly affirmed that it was proceeding under that standard, and the trial was conducted under that standard.[12] Because of the procedural impediments described above, the fact that the case law is mixed, and that Complaint Counsel satisfied its burden under a full rule of reason analysis, it is unnecessary and risky for the Commission to analyze the conduct under *per se* or inherently suspect at *this* stage of *this* case.

C. Applying the *per se* rule or the inherently suspect standard to Respondents' unwritten agreement is unnecessary

During the administrative hearing, Complaint Counsel established under the full rule of reason that Respondents' agreement violated Section 1. *See, supra,* Section I.B. Respondents failed to rebut the showing of anticompetitive effects with procompetitive justifications and failed to show that the agreement was necessary to achieve the transaction's purported pro-competitive benefits. CCB 65-67. With Complaint Counsel having met its burden, and in light of the risks described above (*supra,* Section III.B), the Commission need not employ an alternative framework in order to find liability in this matter.

The transaction closed four years ago, and this litigation has been pending for over two years under the full rule of reason, during which all parties expended time and costs throughout discovery, extensive motion practice, oral arguments, the evidentiary hearing, and this current appeal. These resources have already been expended and therefore could not be saved via application of an alternative framework. *See Maricopa Cty*, 457 U.S. at 343-44 (describing cost

[12] Unlike the Commission here, the private plaintiffs expressly alleged *per se* violations of Section 1 in their complaints. Indirect Purchaser Plaintiffs' Consolidated Class Action Complaint, *In re Juul Labs, Inc., Antitrust Litig*., Dkt. No. 132, ¶¶ 2, 109, 183, Case No. 3:20-cv-02345-WHO (N.D. Cal. Nov. 13, 2020); Indirect Reseller Plaintiffs' Consolidated Class Action Complaint, *In re Juul Labs, Inc., Antitrust Litig*., Dkt. No. 133-2, ¶¶ 2, 106, 179, Case No. 3:20-cv-02345-WHO (N.D. Cal. Nov. 13, 2020); Consolidated Class Action Complaint, *In re Juul Labs, Inc., Antitrust Litig*., Dkt. No. 135, ¶ 166, Case No. 3:20-cv-02345-WHO (N.D. Cal. Nov. 13, 2020).

savings afforded by *per se* analysis as compared with the elaborate inquiry into the reasonableness of a restraint required by the full rule of reason); Areeda & Hovenkamp ¶ 1910(b) ("Anticipating this possibility, the plaintiff is then obliged to present a rule of reason case in order to avoid summary judgment. If later the court decides to apply the per se rule, many of the cost savings available from per se treatment will have been lost.").

Since the Commission has no impediments to deciding under the full rule of reason based on the facts that have been established and the record already before it, application of the full rule of reason is the most appropriate avenue here.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Commission reverse the Initial Decision and find that Respondents violated Section 1 of the Sherman Act and Section 5 of the FTC Act under the rule of reason, and that the transaction violated Section 7 of the Clayton Act.

Respectfully submitted,

Dated: December 5, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 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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The Honorable D. Michael Chappell
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I also certify that I delivered via electronic mail a copy of the foregoing document to:

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