

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Scheduling Conference
Altria Group and Juul Labs

8/3/2020

1 Arnold & Porter Kaye Scholer LLP
2 601 Massachusetts Avenue, N.W.
3 Washington, DC 20001-3743
4 (202) 942-6594
5 debbie.feinstein@arnoldporter.com

6

7 ON BEHALF OF JUUL LABS:

8 DAVID I. GELFAND, ESQ.

9 JEREMY CALSYN, ESQ.

10 JESSICA HOLLIS, ESQ.

11 Cleary Gottlieb Steen & Hamilton LLP

12 2112 Pennsylvania Avenue, N.W.

13 Washington, DC 20037

14 (202) 974-1690

15 dgelfand@cgsh.com

16 and

17 MICHAEL L. SIBARIUM, ESQ.

18 Pillsbury Winthrop Shaw Pittman

19 1200 Seventeenth Street, N.W.

20 Washington, DC 20036

21 (202) 663-9202

22 michael.sibarium@pillsburylaw.com

23

24

25

Scheduling Conference
Altria Group and Juul Labs

8/3/2020

1 P R O C E E D I N G S

2 - - - - -

3 JUDGE CHAPPELL: This is the initial prehearing
4 scheduling conference in Docket Number 9393 in the
5 matter of Altria Group, Inc. and Juul Labs. This
6 prehearing conference is being connected telephonically
7 and is being transcribed by a court reporter who is on
8 the line with us. Will the court reporter state their
9 name for the record.

10 MADAM REPORTER: Sally Jo Quade. Thank you,
11 Your Honor.

12 JUDGE CHAPPELL: I will need everyone to mute
13 your phones when you are not speaking.

14 I need to know, is anyone on this call who is
15 not with one of the parties in this case? Someone from
16 each party needs to let me know. I'll start with the
17 government.

18 MR. VOTE: Your Honor, this is Dominic Vote on
19 behalf of complaint counsel. As far as I'm aware,
20 everybody who has dialed in from our team is from the
21 FTC.

22 JUDGE CHAPPELL: All right, so I'll take that as
23 your appearance, Mr. Vote. Anyone else you want to add
24 to your appearance for the government?

25 MR. VOTE: Yes, Your Honor. With me virtually

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 is James Abell and Meredith Levert. Thank you, Your
2 Honor.

3 JUDGE CHAPPELL: I'll take appearances from the
4 respondents, please.

5 MR. WOLINSKY: Good afternoon, Your Honor, this
6 is Marc Wolinsky from Wachtell Lipton. I am also joined
7 by Jonathan Moses, one of my partners, and two of the
8 lawyers from Altria in-house legal counsel are also on
9 the line.

10 JUDGE CHAPPELL: Okay. And Juul?

11 MR. GELFAND: Good afternoon, Your Honor. This
12 is David Gelfand on behalf of Juul, or JLI as we refer
13 to it, and I would like to introduce to Your Honor
14 Jeremy Calsyn, and Jessica Hollis, both from my law
15 firm. We also have a couple of in-house lawyers from
16 JLI on the phone as well. And as far as I know, nobody
17 from outside.

18 JUDGE CHAPPELL: I need both respondents to
19 acknowledge like the government's counsel in that you
20 have no one that you have knowledge of that has dialed
21 in that is not part of your trial team?

22 MR. GELFAND: That is correct, Your Honor.

23 MR. WOLINSKY: Your Honor, Marc Wolinsky. The
24 same, no one outside the client and lawyers at my firm,
25 and also, I should have introduced Debbie Feinstein from

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 Arnold & Porter is on, which I don't anticipate she will
2 have a speaking role today.

3 JUDGE CHAPPELL: All right. And before anyone
4 makes any statements, I will need that person to
5 identify him or herself for the court reporter. Madam
6 Reporter, can you understand me? You'll know when it's
7 my voice?

8 MADAM REPORTER: Yes, sir.

9 JUDGE CHAPPELL: All right.

10 MR. GELFAND: Your Honor, Michael Sibarium from
11 the Pillsbury firm, also representing JLI. He's on the
12 phone as well.

13 JUDGE CHAPPELL: All right.

14 MR. GELFAND: Thank you, Your Honor.

15 JUDGE CHAPPELL: A letter was received from a
16 member of the press regarding access to this phone
17 conference. For reasons which are stated in the order
18 issued on July 28th, 2020, scheduling this phone
19 conference, access to the scheduling conference is
20 limited to the parties.

21 I could not in fairness allow one member of the
22 press to join the phone conference after the public has
23 been on notice by the order that this live phone
24 conference is not accessible by the public. The purpose
25 of this conference is to discuss initial scheduling

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 order. There is no evidence, there is no testimony
2 presented. In addition, a transcript of this conference
3 will be made available to the public. I've asked that
4 the completion of the final transcript be expedited so
5 that it will be available to the public as soon as
6 possible, and I am told the final transcript will be
7 available some time tomorrow.

8 Moving on. I need everyone to mute their phones
9 when they are not speaking on the conference call. If I
10 said that already, I'm reading my agenda backwards.

11 Let me talk about the scheduling order. The
12 parties provided joint edits to the proposed scheduling
13 order my office sent out. I have looked over the joint
14 proposal and with one exception, the proposed changes
15 are fine. A suggested date fell on a Saturday, March
16 20th, that date will be changed to March 19th. I will
17 issue a scheduling order incorporating the parties'
18 proposed changes shortly.

19 Who wants to provide a status on settlement
20 discussions?

21 MR. VOTE: Your Honor, this is Dominic Vote on
22 behalf of complaint counsel. I can start if you would
23 like.

24 JUDGE CHAPPELL: Go ahead.

25 MR. VOTE: We have a date on the calendar

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 scheduled for a very preliminary discussion with
2 defendants, and that will be the first discussion we
3 will have had. So too early to tell Your Honor where
4 that will lead, but certainly we plan to keep the Court
5 apprised of any developments on that front.

6 JUDGE CHAPPELL: All right. Anything from the
7 respondents?

8 MR. WOLINSKY: Your Honor, Marc Wolinsky. We're
9 on the same page as Mr. Vote.

10 JUDGE CHAPPELL: JLI?

11 MR. GELFAND: Nothing further from us, Your
12 Honor. Same page.

13 JUDGE CHAPPELL: I am still getting an echo.
14 Everyone on this call who is not speaking, please mute
15 your phones.

16 Each side may present a brief case overview of
17 not more than 10 minutes. If you refer to photos, these
18 will not be exhibits and they will not be part of the
19 record. The transcript of this conference will be made
20 available to the public, so you are instructed not to
21 present any confidential information in your overview.

22 Government, go first, do you wish to give us an
23 overview?

24 MR. VOTE: Yes, Your Honor.

25 JUDGE CHAPPELL: Go ahead. I'm timing it.

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 MR. VOTE: This case is about the largest
2 tobacco company in the United States, Altria, joining
3 forces and agreeing not to compete with Juul, the
4 dominant e-cigarette company in the U.S. Prior to the
5 agreement at issue in this case, the two companies
6 competed aggressively with one another in the market for
7 closed tank e-cigarettes and consumers benefited
8 significantly from that competition.

9 But in late 2018, that competition was lost when
10 Altria abruptly exited the e-cigarette market and nearly
11 simultaneously announced a \$12.5 billion investment in
12 Juul, along with a six-year noncompete agreement broadly
13 covering the e-cigarette space.

14 I would like to start by telling you a little
15 bit about the e-cigarette products at issue in this case
16 and what we mean by closed tank e-cigarettes. I will
17 then turn briefly to the agreements between the parties,
18 and then provide some color as to why we allege that
19 those agreements have eliminated both current and future
20 competition.

21 E-cigarettes are battery-powered devices that
22 vaporize a liquid solution containing nicotine. There
23 are two very different categories of e-cigarettes,
24 closed tank systems and open tank systems. Closed tank
25 systems, which are the kind of products sold by Juul and

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 Altria, and the ones at issue in our complaint, often
2 look a lot like a small USB drive, though some products
3 are developed to look like a cigarette.

4 But the key fact is this: They use prefilled
5 cartridges of e-liquids. Consumers cannot refill them
6 with their own liquids.

7 JUDGE CHAPPELL: Are you saying tank or take?

8 MR. VOTE: Tank, Your Honor.

9 JUDGE CHAPPELL: T A N K?

10 MR. VOTE: Exactly.

11 JUDGE CHAPPELL: Go ahead.

12 MR. VOTE: They are typically sold in
13 convenience stores, and they used to be available in a
14 wide variety of flavors, but now are only available in
15 tobacco and menthol flavors. So that's closed tank
16 products I'm talking about now.

17 By contrast, open tank systems are more
18 customizable devices that allow consumers to refill
19 whatever e-liquids they prefer. They are typically sold
20 in vape shops that also market a wide range of flavored
21 liquids that can be used in these devices, among many
22 other tobacco products. If you see one on the street,
23 the open tank systems are the device that cause a very
24 large puff of vapor when you use them.

25 Now, our complaint alleges that because of the

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Scheduling Conference

Scheduling Conference
Altria Group and Juul Labs

8/3/2020

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 JUDGE CHAPPELL: Yes, go ahead.

2 MR. WOLINSKY: Okay, thank you.

3 Your Honor, I want to start with an overview of
4 the e-vapor category and then talk about the regulatory
5 scheme. The big difference between e-vapor products and
6 cigarettes is that e-vapor products do not have many of
7 the harmful chemicals generated by burning tobacco and
8 that's why the FDA recognizes that they may be less
9 harmful than cigarettes.

10 You heard about Cigalike products. NuMark sold
11 a Cigalike product and it looks like a cigarette. Juul
12 is a well-known example of a pod-based product, and as
13 you have heard, it looks like a thumb drive. It's
14 modern looking. Other products in this category include
15 Vuse Alto, which is sold by R. J. Reynolds, NJOY, Ace
16 and MyBlu. And those are on the pictures I sent in for
17 your reference.

18 Turning to the regulatory scheme, e-vapor
19 products are highly regulated by the FDA and generally
20 must be authorized before they can be sold. To get
21 authorization, a manufacturer has to submit what is
22 known as a PNTA, or Premarket Tobacco Product
23 Application, which I think we're on accord with the FTC,
24 this is an extremely expensive, burdensome, and
25 years-long process.

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 Under a regulation called the Deeming Rule, the
2 FDA allows products that were on the market before
3 August 8, 2016, to stay on the market pending the filing
4 of a PMTA by a deadline which is met next month, and any
5 product not on the market as of 8/8/16 can't be sold
6 without authorization. And if a manufacturer wants to
7 make certain modifications to the product, it's deemed
8 to be a new product, and again, you can't materially
9 modify a new -- an existing product without getting PMTA
10 authorization.

11 In order to get approval, the applicant has to
12 show with extensive evidence that it is -- statutory
13 language -- "appropriate for the protection of public
14 health," because, among other things, it converts
15 smokers. If you can't convert smokers, you're not
16 likely to reduce the risk to the population and it's not
17 in the public interest.

18 Your Honor, I wanted to go over some regulatory
19 framework, because it is central to understanding why
20 the FTC's case is so flawed. You heard from opposing
21 counsel that Altria discontinued its e-vapor products in
22 the months and weeks before the JLI deal was signed, and
23 that is true. What is not true is the allegation in the
24 complaint that JLI negotiated to secure Altria's exit in
25 order to "eliminate a threat to JLI's market dominance."

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 That allegation is not true for two reasons.
2 First, JLI did not secure Altria's exit from e-vapor.
3 Altria withdrew its products for its own independent
4 reasons, including regulatory reasons. And second,
5 Altria's products were not and were never going to be a
6 threat to JLI's market dominance.

7 The decisions to withdraw the products came at
8 two separate times. The final decision to discontinue
9 Elite was made in September 2018 after the FDA sent a
10 letter to the leading manufacturers highlighting the
11 risks of e-vaping and encouraging them to remove their
12 flavored products from the market. Before the FDA sent
13 that letter, and at a time when JLI negotiations had
14 broken off, Altria had already concluded that Elite had
15 no future and had begun the process to stop working on a
16 PMTA.

Scheduling Conference
Altria Group and Juul Labs

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 associated with e-cigarettes. They also didn't have
2 nicotine salts and the high levels of nicotine.

3 So the FTC is not going to be able to prove that
4 there was an implicit or explicit agreement. There is
5 an express agreement which the FTC is challenging under
6 a rule of reason analysis, as an agreement that as long
7 as Altria held a significant investment in JLI in the
8 future, it would not develop or acquire new e-vapor
9 products.

10 This noncompete does satisfy the rule of reason,

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 the PMTA process.

2 Finally, a word about remedies. The remedy that
3 the FDA is seeking is not going to promote competition.
4 NuMark, the MarkTen Elite, and MarkTen products are not
5 coming back to the market. As for the future products,
6 they are years and years -- if they were to be
7 redeveloped, they are years off into the future, and the
8 market will be evolving significantly over the coming
9 years as PMTA applications are made by other applicants.

10 So in conclusion, the FTC's position boils down
11 to two ideas. One, that Altria should have continued
12 selling products that it concluded could not get FDA
13 authorization because they were not effective in
14 reducing the risks of smoking. Consumers were not
15 benefitting from these consumers. And two, that Altria
16 should have continued selling product that had lost
17 hundreds of millions of dollars, and was projected to
18 lose hundreds more. Again, consumers would not be
19 benefited by this money-losing proposition of a product
20 that would fail.

21 In a case that's governed by a rule of reason
22 standard, those positions are decidedly unreasonable.
23 Your Honor, if you have any other questions, I'd be
24 happy to -- any questions, I would be happy to answer.

25 JUDGE CHAPPELL: Thank you. I have none.

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 MR. GELFAND: Thank you, Your Honor. This is
2 David Gelfand on behalf of JLI. Just a few additional
3 points.

4 First, by way of introduction of my client, JLI,
5 it was founded by a couple of Stanford students as a
6 startup back in 2007. They were former smokers looking
7 to develop alternatives to cigarettes, but it was not
8 until 2015 that they actually introduced the products
9 that are at issue in this case. So just three years
10 before the transaction at issue.

11 As Mr. Wolinsky explained, that product hit the
12 right cord with adult smokers because it was well
13 designed and used proprietary nicotine salt formulation
14 that satisfied smokers. It's that product design that
15 helped JLI increase its sales.

16 The company is greatly proud in the success of
17 transitioning smokers away from traditional cigarettes
18 and you will hear that's a big part of their mission.

19 I don't want to repeat what Mr. Wolinsky said,
20 I'll just tell you a couple of things from JLI's
21 perspective. First, JLI's witnesses will be adamant,
22 Your Honor, that they had no agreement with Altria that
23 Altria would cease selling its NuMark products. In
24 fact, they didn't see that coming. The FTC's case is
25 based on exchanges of term sheets, none of which became

For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 agreements. There were various terms that were being
2 discussed as possible inclusion in a future transaction
3 document.

4 Second, the evidence will also be clear that JLI
5 viewed the Altria products as competitively irrelevant.
6 My client did not adjust their prices, did not adjust
7 their competitive strategy because of those products,
8 either while they were on the market or as a result of
9 Altria's decision to stop selling them.

10 Third, JLI had good reason to ask for this
11 noncompete that's at the center of some of the complaint
12 counsel's allegations. Altria was going to have access
13 to very sensitive information, and they were going to be
14 providing very important services to JLI to get this
15 product approved by the FDA and distributed. And
16 because of that, they had good reason to not want Altria
17 to be able to dilute its attention, take the
18 confidential information they were going to have access
19 to and turn around in the market and compete against
20 them with new products.

21 Fourth, there is cognizable benefit from the
22 services that Altria provided to JLI, Your Honor.

23 JUDGE CHAPPELL: I don't know if you heard me,
24 you have onem uC yry. around ieJhav Tc 11.16 0 0 11.16 114.72 176

Scheduling Conference

Altria Group and Juul Labs

8/3/2020

1 benefits, including critical assistance on the PMTA
2 application, which was recently filed. That application
3 was more robust as a result of the assistance that
4 Altria provided and more likely to be accepted and
5 consumers will benefit from that.

6 Finally, the market remains dynamic and
7 competitive. Our client sees this every day. As it
8 contains in its mission of transitioning adult smokers
9 away from combustible cigarettes, they have many other
10 products to choose from. The evidence will show that
11 consistent with the FDA's regulations, other competitors
12 have been successful in going after consumers, the
13 market has remained competitive, and other companies
14 continue to win business.

15 For these reasons, and others that we will
16 develop through discovery and in a trial, Your Honor,
17 complaint counsel's claims are without merit. Thank
18 you.

19 JUDGE CHAPPELL: All right. Anything further?

20 MR. VOTE: Not from complaint counsel, Your
21 Honor.

22 MR. WOLINSKY: Your Honor, Marc Wolinsky.
23 Nothing from me.

24 MR. GELFAND: Nor from me. This is David
25 Gelfand, Your Honor. Thank you.

Scheduling Conference
Altria Group and Juul Labs

8/3/2020

1 JUDGE CHAPPELL: Thank you. Hearing nothing
2 further, we are adjourned.

3 (Whereupon, at 3:36 p.m., the hearing was
4 adjourned.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Scheduling Conference
Altria Group and Juul Labs

8/3/2020

1 CERTIFICATE OF REPORTER

2

3 I, Sally Jo Quade, CERT, do hereby certify that
4 the foregoing proceedings were recorded by me via
5 stenotype and reduced to typewriting under my
6 supervision; that I am neither counsel for, related to,
7 nor employed by any of the parties to the action in
8 which these proceedings were transcribed; and further,
9 that I am not a relative or employee of any attorney or
10 counsel employed by the parties hereto, nor financially
11 or otherwise interested in the outcome of the action.

12

13

14

15

16

17 SALLY JO QUADE, CERT

18

19

20

21

22

23

24

25