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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General, Plaintiff, v. JUUL LABS, INC. Defendant.	Case No.: CV2020-000317 **STATE OF ARIZONA'S RESPONSE TO MOTION TO DISMISS** (Hon. Daniel Martin)

INTRODUCTION

JUUL peddled flavors and a new strength of nicotine that was three times more concentrated than existing e-cigarettes and then marketed, advertised and sold its nicotine product in a way that misled adult smokers and sought nicotine dependence from a new, young generation of non-smokers. As a result, Arizona Attorney General Brnovich (the "State" or "AGO") sues JUUL under the Arizona Consumer Fraud Act ("CFA"), a broad, remedial statute designed to protect Arizona consumers from deceptive and misleading advertising and sales. A.R.S. § 44-1521 *et seq*. Under similar consumer-fraud statutes, nine other states also have sued JUUL.[1] Significantly and tellingly, JUUL did not move to dismiss any of those lawsuits by arguing that federal law preempts those lawsuits[2] because JUUL knows there is no preemption of states' consumer fraud actions. JUUL is simply delaying responding to the State's Complaint – which is a textbook example of alleging illegal conduct prohibited by Arizona's CFA – because the AGO is a nationally-respected office that will steadfastly marshal a case and expeditiously take this case to trial.

JUUL is aware that the State has and continues to compile damning evidence and expert testimony. As a result, JUUL filed – after three deadline extensions – a meritless motion to dismiss in an effort to stall this litigation.[3] In addition, to distract, JUUL throughout its motion confusingly cherry-picks phrases from the Complaint and urges the Court to consider them in isolation, as though the State seeks to create an independent cause of action for each one. This is a desperate, hollow tactic. The State does not sue JUUL because it created a "sleek" device. (Mot. at 5, 7, 11, 12, 17; *see also* Compl. ¶ 101). The State sues JUUL because of a

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[1] California, Illinois, New York, North Carolina, Massachusetts, Minnesota, Mississippi, Pennsylvania, and the District of Columbia.

[2] JUUL cited federal preemption as an affirmative defense in many or all of the answers it filed in these other states but has not filed a motion to dismiss.

[3] The rules of procedure do not permit a defendant to delay discovery and other deadlines by merely filing a motion to dismiss. The State expects JUUL to cooperate immediately through counsel with the requirements of Rule 16.

sophisticated and unscrupulous marketing and sales campaign that deceived and unfairly targeted consumers, including Arizona's youth.

As evidenced by the fact that JUUL has not raised a Rule 12(b)(6) preemption argument in any of the other nine state lawsuits, the State's claims against JUUL unequivocally are not foreclosed by express or implied preemption. The authority of states to regulate the sale and advertisement of tobacco products has been well-established since Congress enacted the federal Tobacco Control Act ("TCA") over a decade ago, and the Act's saving clause expressly permits States to enforce laws regulating the sale and advertising of tobacco products, including JUUL's electronic nicotine delivery systems ("ENDS"). Moreover, it is axiomatic there can be no implied preemption where Congress expressly has permitted state action.[4]

JUUL's arguments that the State's claims are barred under the doctrine of primary jurisdiction, extraterritoriality, and the dormant Commerce Clause likewise are based on misapplications of the facts and the law. The FDA's pending evaluation of JUUL's products under the Pre-Market Tobacco Application ("PMTA") process has no nexus to the State's claim before this Court that JUUL has engaged in deceptive and unfair marketing and sales practices. Furthermore, there has been no legal authority provided that a state lawsuit may be dismissed or stayed because of the existence of a *federal* administrative process, especially one that is wholly distinct. JUUL attempts to obfuscate the State's claims by cherry-picking individual allegations and entirely missing the forest for the trees.

Finally, JUUL's argument that the State must plead its claims with particularity also is without merit. JUUL has not cited and cannot cite a case requiring the State to allege claims with particularity in a public-enforcement action seeking to recover for all injured consumers. The obvious reason is, that is not the law. Even if it were, however, the State has alleged its

[4] As discussed, *infra.*, JUUL neglects to mention that it already made and lost these exact arguments in a lawsuit brought by private plaintiffs.

claims with sufficient particularity and has provided JUUL with ample detail with which to prepare its Answer to the Complaint.[5]

LEGAL STANDARD

Dismissal, the standard for which JUUL conspicuously fails to mention, is appropriate only if the State "would not be entitled to relief under any interpretation of the facts susceptible to proof." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 (2012) (internal citation omitted). The Court "must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts." *Id*. Under Arizona's notice pleading standard, a complaint need only give JUUL "fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008).

ARGUMENT

I. The State's CFA Claims Are Not Preempted

JUUL bears a high burden to show that the State's consumer-fraud claims are preempted by the TCA. The State's claims that JUUL engaged in deceptive and unfair advertising and sales fall directly within the TCA's "saving clause," which *expressly* reserves the precise claims at issue in this lawsuit. Yet, JUUL contemptuously attempts to brush away the saving clause in a mere sentence (Mot. at 8:20), after spending two pages examining a clause that the saving clause expressly supersedes (Mot. at 6-8).

A. The State's Claims Are Not Expressly Preempted

State law may be preempted expressly per the text of a federal statute. *Dashi v. Nissan N. Am.*, 247 Ariz. 56, 58 ¶ 8 (App. 2019). However, "[t]he exercise of federal supremacy is not to be lightly presumed." *E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 206 Ariz. 399, 405 ¶ 18 (App. 2003). Moreover, when a state exercises its traditional police powers, the presumption against preemption is heightened. *Id.*; *Altria Group, Inc. v. Good*, 555 U.S. 70, 77

[5] The State reserves its right to amend the Complaint. The State also objects to JUUL's Exhibit 1 on grounds that JUUL offers it improperly in support of a motion to dismiss, it constitutes hearsay, it lacks foundation by failing to have any connection to the specific allegations of the Complaint, and it is not relevant to the claims or defenses in this matter.

(2008). Only the clear and manifest intent of Congress to displace a state's right to protect the health and safety of its citizens can tip the balance towards preemption. *Altria Group,* 555 U.S. at 77. "[I]f there is any ambiguity as to whether the local and federal laws can coexist, [the Court] must uphold the ordinance." *U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York*, 708 F.3d 428, 433 (2nd Cir. 2013).

The continuing authority of states to regulate the sale and advertisement of tobacco products has been well-established since Congress enacted the TCA over a decade ago. The TCA contains three clauses pertinent to JUUL's Motion: the preservation clause, the preemption clause, and the saving clause. 21 U.S.C. § 387p.

The TCA first preserves the authority of states to enforce any laws or regulations "in addition to, or more stringent than" the requirements of the statute, including measures "relating to . . . advertising and promotion of" tobacco products.[6] 21 U.S.C. § 387p(a)(1). It then preempts "any requirement which is different from, or in addition to, any requirement under the provisions of this subchapter relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products." 21 U.S.C. § 387p(a)(2)(A). The saving clause then clarifies and ***specifically permits*** states to establish and enforce "requirements relating to **the sale**, distribution, possession, information reporting to the State, exposure to, access to, **the advertising and promotion of**, or use of, tobacco products by individuals of any age . . . ." 21 U.S.C.A. § 387p(a)(2)(B) (emphasis added).

The saving clause is intentionally broad in its plain text. State laws are permitted regarding the sale, advertising and promotion of tobacco products. *U.S. Smokeless Tobacco*, 708 F.3d at 433. This principle is bolstered by the overarching language of the preservation clause maintaining states' rights to place additional requirements on the sale and advertising of

[6] On May 10, 2016, the FDA published the Deeming Rule which deemed ENDS, like e-cigarettes, to be "tobacco products" subject to FDA authority. Deeming Rule, 81 Fed. Reg. 28973-01, 29074 (May 10, 2016) (codified at 21 C.F.R. parts 1100, 1140, 1143).

tobacco products. All three clauses read together confirm Congress's manifest intent to "preserve for the states a robust role in regulating . . . tobacco products." *Id.* at 436.

JUUL fails to cite any cases finding a state action preempted under the TCA.[7] On the contrary, courts routinely have held the three clauses as manifesting the express intent of Congress to preserve the ability of states to act.[8] The TCA essentially assigns to the federal government the duty of regulating the manufacturing stage of tobacco products and patently reserves to the states the right to regulate "sales and other consumer-related aspects of the industry." *U.S. Smokeless Tobacco*, 708 F.3d at 434. Indeed, courts have found that even flavored tobacco regulations are not preempted. *Id.* at 435 (holding that although a flavor regulation may have an effect on manufacturing, it was not preempted because it was a "requirement relating to the sale" of tobacco products).[9]

Not only does JUUL fail to cite any relevant authority, it neglects to mention that JUUL already made and lost these exact arguments in a lawsuit brought by private plaintiffs. *See Colgate v. JUUL Labs, Inc. (Colgate I)*, 345 F. Supp. 3d 1178, 1187 (N.D. Cal. 2018) ("The [saving] clause expressly excepts advertisements from preemption and no aspect of plaintiffs' claims based on an [sic] allegedly misleading or fraudulent advertising is preempted by the

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[7] The only case JUUL cites that deals with tobacco-related preemption actually deals with a different federal statute – the Federal Cigarette Labeling and Advertising Act ("FCLA"), 15 U.S.C. § 1334. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001). Unlike the TCA, the FCLA's saving clause only permits states to regulate the "time, place, and manner" of advertising, not the content. *Compare* 15 U.S.C. § 1334(c) with 21 U.S.C.A. § 387p(a)(2)(B). JUUL appears to have gotten the two statutes confused, as its Motion incorrectly asserts that the TCA contains this language. (*See* Mot. at 8:20.) In fact, ENDS products, like e-cigarettes, are not subject to the FCLA.

[8] *U.S. Smokeless Tobacco*, 708 F.3d at 436; *see also Indep. Gas & Serv. Stations Ass'n v. City of Chicago*, 112 F. Supp. 3d 749, 753 (N.D. Ill. 2015).

[9] *See also Indep. Gas & Serv. Stations Ass'n*, 112 F. Supp. 3d at 753 (finding that the flavored tobacco ordinance fell within the exception despite undoubtedly having an effect on manufacturing); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence,* 731 F.3d 71, 85 (1st Cir. 2013) (noting that the saving clause "overrides the standards preemption" to allow regulations relating to the sale of tobacco products).

TCA, including the issue of warning consumers about the potency and addictiveness of JUUL's benzoic acid and nicotine salt formulation."). The *Colgate* court also specifically held that the plaintiffs' claims regarding JUUL's misrepresentations about nicotine content were not preempted because they related to advertising. *Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728, 745 (N.D. Cal. 2019) ("*Colgate II*"). The court further held that the claim that referenced JUUL's warning label was in fact related to advertising and therefore not preempted. *Id*.

JUUL's cursory sentence addressing the saving clause demonstrates that JUUL is disingenuously trying to upend the purpose intended by Congress. JUUL admits that the saving clause includes advertising, but argues that the preemption clause governs because it prohibits regulation of "misbranding." (*See* Mot. at 5; 8.) Even if it could be argued that both clauses include general consumer advertising on their face, the saving clause governs, as it clarifies (and as courts have acknowledged) that the preemption clause "does not apply" to state requirements relating to advertising. 21 U.S.C.A. § 387p(a)(2)(B).[10]

The Court should reject JUUL's contrived (bordering on bad faith) preemption argument that blatantly misconstrues a statute that expressly preserves the State's right to bring this action. The State seeks to hold JUUL accountable for its sales and marketing transgressions – not sleek design or labeling. Thus, the State's efforts are not only not preempted – they are expressly permitted by the TCA.

B. <u>The State's Claims Cannot Be Impliedly Preempted</u>

Implied preemption can occur when: (i) Congress evidences an intent to occupy a given field; or (ii) state law actually conflicts with federal law or presents an obstacle to congressional objectives.[11] Neither form of implied preemption applies here.

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[10] Even if one were to misread the statute and focus exclusively on the preemption clause, the CFA does not impose any "different or additional requirements," but rather an identical bar against false or misleading advertising.

[11] *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983) (intent to occupy field); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (conflict); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (obstacle).

As a preliminary and dispositive matter, implied preemption cannot lie where Congress has expressly made clear what state action is permitted and what state action is prohibited. *See Graham v. R.J. Reynolds Tobacco Company*, 857 F.3d 1169, 1189 (11th Cir. 2017) (express-preemption provision of the statutory language supports an inference that there is no implied preemption; pre-emptive scope is governed by the express language). Congress made clear, and the FDA has echoed, that the TCA's saving clause explicitly "exempts state and local advertising restrictions from preemption." Deeming Rule, 81 Fed. Reg. at 28989 (commentary regarding "Preemption of State Law Warning Requirements"); 21 U.S.C. § 387p(a)(2)(B); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870-71 (2000) ("We do not claim that Congress lacks the constitutional power to write a statute that mandates such a complex type of state/federal relationship [to foreclose implied preemption].").

JUUL does not argue field preemption.[12] Instead, JUUL preposterously argues that the State's claims create a conflict with federal law, and that allowing the case to move forward will stand as an obstacle to federal objectives. (Mot. at 8-12.) JUUL's argument is baseless on both counts. There is no implied preemption here because the TCA's saving clause shows that Congress clearly reserved to states the authority to continue to restrict and regulate the sale and advertisement of ENDS. Further, the State's claims do not hinge on complying with federal standards. JUUL easily could have complied with the FDA's requirements without engaging in marketing and selling to youth, misleading consumers regarding nicotine content, or concealing the potency and harm of its products in its advertising. Providing state remedies to redress such deception and unfairness furthers federal law and does not conflict with the TCA or FDA regulations.[13]

JUUL heavily relies on *Geier,* which is easily distinguishable factually and legally.

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[12] The State did not identify a single case that has held that the TCA preempts the field of vaping products.

[13] JUUL presumes that all relief requested by the State is forward-looking despite that the Complaint's restitution, civil penalty, and disgorgement remedies are based on past conduct.

Geier involved a preemption analysis of a completely different regulatory framework, the National Traffic and Motor Vehicle Safety Act ("Safety Act") and Federal Motor Vehicle Safety Standard ("FMVSS") 208. *Geier*, 529 U.S. 861 (2000). Unlike the TCA's saving clause, which emphatically preserves the State's ability to regulate the sale and advertising of ENDS, the Safety Act's saving clause merely clarified that compliance with federal safety standards did not "exempt any person from any liability under common law." *Id.* at 868; *see id.* at 869 (Safety Act's saving clause merely barred "a defense that compliance with a federal standard automatically exempts a defendant from state law"). As such, the court concluded that the saving clause did not foreclose the possibility of implied preemption, and moved on to that analysis. *Id.* In comparison, the Court cannot reach the implied preemption analysis, because Congress has foreclosed implied preemption by making clear in the TCA's saving clause that the states may bring actions like this one.[14]

In its implied preemption analysis, the *Geier* court found that the Department of Transportation ("DOT") did not view FMVSS 208 as a minimum standard but as a "standard that deliberately provided the manufacturer with a range of choices among different passive restraint devices," *id*. at 875, in part because of the high cost of airbags and public opposition to safety mandates, *id.* at 876-78. Consequently, the court found that the petitioners' tort claim against the manufacturer for negligence in failing to equip an automobile with a driver's side airbag essentially would require all cars to have air bags, *id.* at 881, in contrast with FMVSS 208, which "deliberately sought a *gradual* phase-in of passive restraints," *id.* at 879. As such, the court concluded that such a requirement would stand as an obstacle to DOT's objectives. *Id*. at 881. Conversely, in this case, the State's claims that JUUL appealed to, targeted, and exploited Arizona youth are not an obstacle to the Deeming Rule's objective to "reduce the death and disease from tobacco products." Deeming Rule, 81 Fed. Reg. at 28975. On the contrary, JUUL's practices have led to a youth-vaping epidemic, and the relief the State seeks

[14] In addition, the Deeming Rule's commentary clearly illustrates an objective of broad state enforcement power for advertisements of "newly deemed products" and reinforces congressional intent evidenced by the saving clause. Deeming Rule, 81 Fed. Reg. at 28989.

supports and augments the Deeming Rule's objective.

Because JUUL cannot identify any actual conflict or obstruction of federal objectives, it attempts to manufacture one through the use of a straw man – that the State is trying to obtain a "nationwide injunction" to prohibit the JUUL device's "sleek" design or JUUL's use of nicotine salt.[15] (*See* Mot. at 11.) The Complaint seeks nothing of the sort. Instead, it seeks relief, injunctive and otherwise, regarding JUUL's deceptive and unfair sales, advertising, and marketing. (*See* Compl. at ¶¶ 174-180.) JUUL also argues that the State is seeking to require it to report nicotine levels by volume instead of weight. (*See* Mot. at 11.) This is closer to the mark, but is still inaccurate. The State's allegation is that JUUL deceptively advertised its nicotine content by weight when the industry standard used volume, and failed to disclose the nicotine content by volume. (*See* Compl. at ¶¶ 149-152, 177.) The Motion is accurate in asserting that the State seeks to have JUUL provide additional information to cure omissions in its advertising to consumers. (*See* Mot. at 11.) However, a requirement to provide truthful, accurate information in advertising no way conflicts with federal objectives. In fact, JUUL acknowledges the opposite when it notes that federal law prohibits false or misleading advertising.[16] (*See* Mot. at 3-4, *citing* Deeming Rule, 81 Fed. Reg. at 29051.)

Finally, JUUL's argument that remedying the State's allegations concerning misrepresentations and omissions of nicotine content will produce "conflicting standards throughout the country" also is purposefully misguided. (Mot. at 12.) The standard in state laws across the country is the same – companies must not engage in deceptive and unfair

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[15] JUUL's assertion about a nationwide injunction is another false and misleading argument. The State asks for injunctive relief protecting Arizona's citizens.

[16] Furthermore, the Deeming Rule's commentary makes apparent that the FDA's objective regarding misbranding and labeling, which JUUL mistakenly conflates with general marketplace advertising, concerns quality control of the chemicals to address issues with "variability between *labeled* content and concentration and *actual* content and concentration." Deeming Rule, 81 Fed. Reg. at 29003 (emphasis added). It was possible for JUUL to match its chemical content in manufacturing with its labeling and branding, and for JUUL to do so without making false equivalencies with cigarettes or implementing gimmicks to minimize nicotine content in its advertising.

practices – and federal law supports the same objectives. For example, JUUL misrepresented through various marketing means that its pods contained an amount of nicotine approximately equivalent to a pack of cigarettes. (Compl. ¶¶ 148, 155-156, 178.) Any relief associated with this claim could not conflict with any conceivable federal law because that law would have to condone misrepresentations or promote misrepresentations as an objective. JUUL also fails to mention that the "weight versus volume" claim is the same allegation it is currently facing in a number of other pending state consumer-fraud cases and that the State's claim focuses on how JUUL deviated in its advertising from industry norms in order to downplay its products' potent nicotine strength. (*Id*. ¶¶ 149-152.) In no way does this case present an unworkable or irrational outcome such that federal preemption should foreclose the State's claims. (*See* Mot. at 12.) The State's Complaint presents no conflict with federal law or obstacle to federal objectives and, therefore, JUUL has failed to establish implied preemption.

II. JUUL's Argument for the Doctrine of Primary Jurisdiction is Meritless

The doctrine of primary jurisdiction is only appropriate when a regulatory proceeding is actually material to the issues to be adjudicated in the civil lawsuit. The civil lawsuit here asserts deceptive and unfair conduct by JUUL, and does not turn on the secondary issues the FDA may address in the PMTA process. Moreover, JUUL's cited precedents each concern civil actions within the same forum – i.e., a state proceeding may be affected by a state administrative action, or a federal proceeding may be affected by a federal administrative action. JUUL makes up a radical and novel expansion of the primary jurisdiction doctrine, arguing that an Arizona state court should dismiss or stay a lawsuit filed by the Arizona Attorney General based on Arizona law, because of the existence of an unrelated federal administrative process. (Mot. at 12-14.) Not surprisingly, JUUL cites no support for this proposition, as the Motion exclusively cites cases dealing with related administrative actions in the same forum.

The FDA's PMTA process that JUUL cites cannot function to dismiss or stay the State's claim because it would not adjudicate disputed material facts in this matter. In contrast to the facts in *Waddell* and *Tanner*, two Arizona decisions upon which JUUL relies, the FDA is not

better suited to decide whether JUUL has violated the CFA by engaging in deceptive and unfair acts and practices, and the FDA is not being asked to do so. *See Original Apartment Movers, Inc. v. Waddell*, 179 Ariz. 419, 420 (App. 1993) (dismissing declaratory action involving tax dispute because issue of whether plaintiff was a "taxpayer" as defined by statute was better suited for determination by Arizona Department of Revenue in administrative process than by litigation); *Tanner Cos. v. Ariz. State Land Dept.*, 142 Ariz. 183, 186-87 (App. 1984) (dismissing declaratory action involving mineral leases on ground that Arizona State Land Department was better suited than the court to decide whether the Department should renew an applicant's request for a mineral lease in Pima County). JUUL argues that the pending PMTA that it has filed with the FDA somehow extinguished the Arizona Attorney General's statutory power under Arizona law to seek CFA claims and remedies. The PMTA is merely an exercise of the FDA's gatekeeping powers in determining which new tobacco products may enter the marketplace. The FDA will determine only whether certain of JUUL's products, as they stand at the time of JUUL's application, are "appropriate for the protection of public health," including a balancing test between potential benefits to existing smokers, the creation of new nicotine addicts, and the relapse of nicotine users who have successfully quit. 21 U.S.C. §§ 387f(d). This forward-looking evaluation of JUUL's products has no nexus to, and will not adjudicate, the State's allegation that JUUL has engaged in deceptive and unfair marketing practices that targeted youth and misled consumers about the nicotine content of its products.

Similarly, JUUL's citation to federal authority is not analogous to the facts of this case. Federal courts decline to invoke the doctrine of primary jurisdiction when there is an insufficient basis for the assertion of regulatory expertise, and this is especially true when questions of deceptive conduct are at issue.[17] The question of whether advertisements and marketing are misleading is "not a technical area in which the FDA has greater technical

[17] *See Rikos v. Procter & Gamble Co.*, 782 F. Supp. 2d 522, 530 (S.D. Ohio 2011) (declining to apply primary jurisdiction doctrine where issue was whether advertisements of food supplements "are likely to deceive a reasonable consumer" under California's consumer fraud statutes); *Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028, 1035 (N.D. Cal. 2009); *Chacanaca v. Quaker Oats Co.*, 752 F. Supp. 2d 1111, 1124 (N.D. Cal. 2010).

expertise than the courts – every day courts decide whether conduct is misleading." *Rikos*, 782 F. Supp. 2d at 530; *see also Astiana v. Hain Celestial Group, Inc.*, 783 F. 3d 753, 757 (9th Cir. 2015).

In *Astiana*, the Ninth Circuit held that "primary jurisdiction is not required when a referral to the agency would significantly postpone a ruling that a court is otherwise competent to make." *Id*. at 761. Here, the Complaint describes a wide range of actions by JUUL, from various marketing practices targeted at youth to a failure to warn consumers about the addictive potential of its products, all of which ultimately contributed substantially to the youth vaping epidemic in Arizona. JUUL proposes that this Court wait for the immaterial and irrelevant decision of the FDA regarding whether, on balance, allowing certain JUUL products to enter the market would be "appropriate for the protection of public health." 21 U.S.C. §§ 387f(d), 387j(c)(1)(B). This determination would provide no guidance as to whether JUUL engaged in deceptive and unfair practices under the CFA and would cause lengthy and unnecessary delays. The Court is clearly vested and competent to make a ruling under the CFA and should deny the plea that it be the first Arizona court to dismiss or stay a state-law proceeding due to a markedly distinct federal-administrative proceeding.

Finally, JUUL's four federal citations all involve cases where federal courts concluded that federal regulatory review should take precedence over the lawsuit.[18] Likewise, *Waddell* and *Tanner* involved lawsuits filed under Arizona law in which an Arizona administrative review was pending. *Waddell*, 179 Ariz. at 420; *Tanner*, 142 Ariz. At 186-87. JUUL has cited no cases, and the State is unaware of any, in which an Arizona state court stayed a civil lawsuit pending before it in favor of a *federal* regulatory process.

III. The Complaint Does Not Seek to Regulate Extraterritorial Conduct

JUUL's assertion that the State's Complaint is an attempt to "regulate conduct outside Arizona's borders" fails under both Arizona and federal constitutional law. JUUL neglects to

[18] *Weinberger v. Bentex Pharm.*, 412 U.S. 645, 648 (1973); *United States v. W. Pac. R. R. Co.*, 352 U.S. 59, 60 (1956); *Kane v. Chobani*, LLC, 645 F. App'x 593, 594 (9th Cir. 2016); *Snyder v. Green Roads of Fla., LLC*, 2020 WL 42239, *1 (S.D. Fla. Jan. 3, 2020).

mention a ruling by the Arizona Court of Appeals that squarely decided against its position. *State ex rel. Corbin v. Goodrich*, 151 Ariz. 118, 124 (App. 1986) (rejecting arguments that the CFA did not apply to a Michigan entity that conducted business within Arizona). JUUL is not situated differently than the Michigan entity at issue in *Goodrich*. Like that defendant, JUUL has pointed to aspects of its conduct that occurred outside of Arizona to argue that this is "largely . . . out-of-state conduct." (*Compare* Mot. at 15 *with Goodrich*, 151 Ariz. at 124). However, JUUL ignores that the Complaint outlines specific harms inflicted within Arizona on Arizona consumers by JUUL's conduct (*e.g.*, Compl. ¶ 25), and the fact that such conduct generated tens of million dollars for JUUL *in Arizona alone* (*id*. ¶ 33). Regardless of where a corporation is conducting its activities, if the activities target and harm Arizona consumers, *Goodrich* makes clear that the CFA applies.

JUUL's argument regarding the dormant Commerce Clause is equally meritless because it fails to explain how the State's Complaint burdens or discriminates against interstate commerce. The Motion cites the U.S. Supreme Court's holding in *Healy* but fails even to mention the three prongs of a *Healy* analysis, explain which of the three JUUL asserts, or apply any of them to the State's allegations. (Mot. at 15-16). *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 335-36 (1989). *Healy* held that a state's activity may violate the Commerce Clause if it (1) governs commerce "wholly outside of the State's borders," specifically concerning price regulation, (2) has the practical effect of controlling conduct beyond the state's boundaries, or (3) threatens to enforce "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id*. at 336-37.

Of these, JUUL initially suggests that it is asserting the first prong, but then cites cases related entirely to the third prong. (Mot. at 15) (quoting the third, "projection" prong in *Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2nd Cir. 2003)). JUUL broadly refers to "internet advertising or social media activity" (Mot. at 15), but offers no analysis drawing any connection between the State's purported regulation of such conduct and the corresponding burden on interstate commerce. JUUL argues that the CFA cannot apply to national conduct "if it would have extraterritorial impact." (Mot. at 15). This is a bare misstatement of law that

is not supported by *Healy*, and of course many state consumer-fraud actions have the potential to change how companies advertise and sell their products in other states.

By failing to develop this argument, JUUL waives it for purposes of its motion. *Boswell v. Fintelmann*, 242 Ariz. 52, 54 n.3 (App. 2017). Furthermore, whichever prong JUUL had intended to assert, its reliance on *Healy* and *Dean* fails. In *Healy*, the state of Connecticut passed a statute forcing distributors of beer to reduce their prices to Connecticut wholesalers compared to beer sold to Massachusetts, New York, and Rhode Island. *Healy*, 491 U.S. at 324. *Dean*, which JUUL cites for the proposition that a state's Internet regulation is a violation of the dormant Commerce Clause, is an out-of-circuit holding from the earlier years of the Internet that subsequently has been distinguished or called into question by a number of other cases. For example, in *National Federation of the Blind v. Target Corporation*, 452 F. Supp. 2d 946, 961 (N.D. Cal. 2006), the Northern District of California noted that *Dean* relied on a 1997 case that demonstrated an incorrect understanding of the Internet. The *Target* court held that, in fact, websites can identify the geographic location of their users and show different content to users in different areas. *Id.* As a result, Target's argument that it would have to modify its nationwide website to accommodate a California law failed, because Target could design a California-specific site to which California users would be redirected. *Id.*[19] JUUL's conclusory dormant Commerce Clause assertion likewise fails.

IV. JUUL's Rule 9(b) Argument is Meritless

Arizona Rule of Civil Procedure 9(b) does not apply to the State's CFA claims, and even if it did, the State has pleaded its case with more than sufficient particularity.

[19] *See also SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 194 (2d Cir. 2007) (refusing to apply the dormant Commerce Clause to a state consumer protection law regulating gift card fees, and noting that "because consumer protection is a field traditionally subject to state regulation, '[w]e should be particularly hesitant to interfere with the [State's] efforts under the guise of the Commerce Clause.'" The *Blumenthal* court further distinguished *Dean*, noting that internet retailers can distinguish whether purchasers are from a particular state via their credit card billing addresses. *Id.* at 195.

A. Particularity Is Not Required for Public Enforcement of the CFA

The Motion cites no case, and the State is unaware of any, that would force the State to allege claims with particularity in a public enforcement action seeking to recover for all injured consumers. Indeed, courts have rejected the application of the particularity requirement to public consumer fraud enforcement actions. *See, e.g.*, *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 314-15 (S.D.N.Y. 2008) (citing cases). Two contrasting cases from Delaware are instructive. In *State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111, 117 (Del. Ch. 2001), the court found the particularity requirement did not apply to a state consumer fraud enforcement action, observing that:

> [A] requirement that the State plead with particularity the 'who, what, where, and when' of each and every one of 750,000 violations alleged would serve only to defeat the legislative mandate to the Attorney General in bringing actions such as these on behalf of the citizens of this State.

In contrast, when a private claim was brought under the same statute, the District of Delaware found that the particularity requirement applied. *Coleman Dupont Homsey v. Vigilant Ins. Co.*, 496 F. Supp. 2d 433, 439 (D. Del. 2007).

This is a perfectly logical distinction. In the case of private consumer-fraud claims, a particularity requirement is reasonable, given that plaintiffs in such actions must prove reliance and individual harm. The CFA, however, does not require the State to prove reliance or harm. A.R.S. § 44-1522. Indeed, CFA claims brought by the State only require two elements: (1) unfair or deceptive acts or practices; (2) in connection with the sale or advertisement of merchandise. *See* RAJI Commercial Torts Instructions (2017) at 16, n. 4. The State is alleging a series of unlawful practices to which hundreds of thousands of consumers were subjected. The State is not required to supply the "who, what, where, and when" of each and every consumer who was deceived because the State, as mandated by the Legislature, is empowered to remedy state-wide fraudulent marketing and sales.

Moreover, even if the Court were to create a new doctrine that the State must plead consumer fraud claims with particularity, this rule would have no effect on the Complaint's

allegations that JUUL's acts and practices were not only deceptive but unfair. (Compl. at ¶¶ 173-79.) An act or practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n); *see* A.R.S. § 44-1522(c). Unfairness is not a claim sounding in fraud, and thus no particularity requirement applies. *See Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Services, Inc.*, 536 F.3d 663, 670 (7th Cir. 2008) ("[A] cause of action for unfair practices [brought even by private plaintiffs] under [Illinois'] Consumer Fraud Act need only meet the notice pleading standard of Rule 8(a), not the particularity requirement in Rule 9(b).").

B. <u>The State Has Stated Its Claims with Particularity</u>

Even if the heightened pleading standard of Ariz. R. Civ. P. 9(b) were applicable (which it is not), the allegations of the Complaint meet that standard in the context of a State enforcement action of the CFA. The purpose of the particularity requirement is "to provide notice to the opposing parties so that [they] can prepare an adequate answer." *Steinberger v. McVey ex rel. County of Maricopa*, 234 Ariz. 125, 141, ¶ 73, 318 P.3d 419, 435 (App. 2014) (applying particularity requirement to private, common-law consumer fraud claim). The State's claims in its 36-page Complaint have been stated against JUUL with more than sufficient particularity. Notably, JUUL previously complained about the heavy level of detail in the State's Complaint. (*See* Mot. for Excessive Page Limits, April 14, 2020 (withdrawn)). JUUL now takes the opposite approach and argues that the Complaint was not detailed enough.

JUUL makes three meritless arguments to support its contention that the Complaint was not pled with enough particularity. JUUL first argues that the State fails to plead "any actionable *in-state* conduct with particularity." (Mot. at 16) (emphasis added). JUUL's attempts to cherry pick isolated facts from the Complaint (Mot. at 16), however, belie the Arizona-specific allegations which the full body of the Complaint supports. (*See, e.g.*, Compl. ¶¶ 25, 33, 145-46.) Second, JUUL claims that the State asserts a theory of vicarious liability, pointing to "non-affiliated users" who promoted JUUL products and retail outlets that sold JUUL products to minors. (Mot. at 17). However, the State's references to third parties are

made in the context of detailed allegations about *JUUL's own conduct*. (*See* Compl. ¶¶ 75-91 (alleging that JUUL harnessed the power of viral, organic marketing methods by paying influencers to help create a grassroots community of "JUULers" who perpetuated JUUL's advertising and promoted its products to teenagers); *id.* ¶¶ 144-46 (noting that, as of September 2019, JUUL had not sanctioned a single retail seller in Arizona with termination, even for repeated violations of age-verification standards).) Finally, JUUL argues that certain details are purportedly missing from the Complaint by, once again, isolating allegations in the Complaint from their context. The cited reference to Instagram (Mot. at 17), for example, is in fact part of a 20-paragraph section explaining in great detail JUUL's deceptive and unfair social marketing strategies. (Compl. ¶¶ 72-91).

Contrary to JUUL's claim, the Complaint provides ample detail for JUUL to be able to prepare an Answer.

CONCLUSION

The motion to dismiss is suitable for a ruling on the written briefs alone. To avoid the obvious delay JUUL so conspicuously seeks, the State opposes JUUL's request for oral argument. The State respectfully requests that the Court deny the Motion.[20]

Respectfully submitted this 1st day of May, 2020.

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[20] If the Court grants the Motion, the State requests leave to amend its Complaint.

CERTIFICATE OF SERVICE

Document electronically transmitted to
the Clerk of the Court for filing using
AZTurboCourt this 1st day of May, 2020.

COURTESY COPY emailed this 1st day of
May, 2020, to:

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