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Docket Number: _____

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	Interrogatories	**_IN**	Questions only or questions and answers
	Trial Deposition and Discovery	**_TD**	Reports (JV ONLY) Requests for production of documents (JV ONLY) Depositions (FULL) (JV partials OK) Civil deposition affidavits
	Trial Filing	**_TF**	Statements Reports
	Trial Transcript	**_TT**	Transcripts of hearings and trials (FULL) (JV partials OK)
	Verdict, Agreement and Settlement (actuals)	**_VS**	Verdict forms submitted to jury Signed settlement agreements with no attached order Signed stipulations with no attached order Signed plea agreements with no attached order
	Jury Instruction (actual)	**_JI**	Proposed and submitted jury instructions
	Expert Depositions	**_ED**	FULL
	Expert Transcripts	**_ET**	FULL
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	Expert Report and Affidavit	**_ER**	Expert Reports Expert Affidavits
	Proposed Order, Agreement, and Settlement	**_PR**	(ALL are JV ONLY) Proposed trial order Proposed plea agreement Proposed settlement agreement Proposed verdicts Proposed judgments Findings with proposed orders Stipulations with proposed orders Unsigned stipulations; Unsigned findings; Unsigned orders or verdict sheets
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	CV	**_CV**	Curriculum Vitae

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

----------X

THE PEOPLE OF THE STATE OF NEW YORK BY LETITIA JAMES,

Plaintiff,

- v -

JUUL LABS, INC., JAMES MONSEES, ADAM BOWEN, NICHOLAS PRITZKER, RIAZ VALANI, HOYOUNG HUH

Defendant.

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INDEX NO. 452168/2019

MOTION DATE 02/15/2022

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 76, 77, 103, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 183, 192, 193, 194, 228, 229, 239, 240

were read on this motion to/for DISMISS.

This action commenced by the People of the State of New York by the New York State Office of the Attorney General (the State) arises from defendants' alleged deceptive, unfair, and illegal practices in designing, marketing, and distributing electronic nicotine delivery system (ENDS) products. Defendant JUUL Labs, Inc. (JUUL) moves pursuant to CPLR 3211 for an order dismissing the State's Amended Complaint (Amended Complaint). The State opposes the motion.

Background

JUUL is a San Francisco-based electronic cigarette company that makes an ENDS consisting of an electronic cigarette (JUUL device) and a one-time use nicotine cartridge called a JUULpod. Since 2015, JUUL has manufactured, promoted, advertised, distributed, and sold its products in New York State (NYSCEF # 53-Amended Complaint, ¶ 20). The remaining defendants in this action are JUUL's current and former officers James Monsees and Adam Bowen, and JUUL's current and former directors Nicholas Pritzker, Riaz Valani, and Hoyoung Huh (together, individual defendants) (*id.*, ¶ 1), who have filed separate motions to dismiss. The following facts are derived from the State's Amended Complaint and are accepted as true for purposes of the motion.

The State alleges that beginning in mid-2015, JUUL adopted the strategies previously used by large tobacco companies to market products to youth (*id.*, ¶¶ 34-37, 41). Briefly, the State alleges that JUUL launched its "Vaporized" marketing campaign, sold fruity and sweet flavored JUULpods, and used bright and colorful advertisements featuring sexy, youthful, and hip users of its products to appeal to young and underage demographics while misleading consumers about the safety, healthiness, and nicotine content of its products including falsely representing that its products could be used therapeutically as smoking cessation devices (*id.*, ¶¶ 34-43, 55-76). The State alleges that New York was central to JUUL's product launch and marketing campaign. As a result, the people of the State of New York were harmed by a public nuisance that led to a statewide "public health crisis" or a "teen vaping epidemic" (*id.*, ¶¶ 52-54, 160). And by targeting the youth market, JUUL was "addicting a new generation of consumers to nicotine" (*id.*, ¶ 35).

JUUL's design and flavors. With the JUULpod inserted, a JUUL device is about three and one-half inches in length and about the size and shape of a USB drive, and it can fully charge via USB port in one hour (*id.*, ¶ 7). The sleek USB-look of a JUUL device, as alleged by the State, could be easily concealed in a consumer's hand or pocket (*id.*, ¶ 63). Unlike a combustible cigarette, when used, a JUUL device heats the liquid nicotine contained in the JUULpod to release nicotine and other chemicals in aerosol particles, which a consumer then inhales (*id.*, ¶ 7).

Since 2015, JUUL has developed fruity and sweet-tasting flavors for liquid nicotine (*id.*, ¶ 36). The State alleges that, to appeal to young and underage consumers, JUUL gave the flavors fun names such as "Cool Cucumber," "Crème Brulée," "Fruit Medley," and "Cool Mint," and advertised them in its social media posts with slogans such as "Make it a Mango Monday" and "Fruit Friday" (*id.*, ¶¶ 36, 58). The State also refers to two JUUL-sponsored studies, which reveal that those fruity and sweet flavors, together with the mint flavor, are among the most attractive flavors to youth in electronic cigarette use (*id.*, ¶ 87). In response to the Food and Drug Administration (FDA)'s increasing concerns about the prevalence of youth vaping problems, JUUL ended its sale of flavored JUULpods in late 2018 and removed the mint flavor from the market in late 2019 (*id.*, ¶¶ 88, 90).

JUUL's product launch and marketing campaign. JUUL has designed and used bright and colorful advertisements on websites, magazines, and its social media posts. The State alleges that in addition to marketing those flavored products, the advertisements also contain "flashy images of young people looking hip, cool, and sexy while holding their JUUL devices" and were "full of bright colors, funky patterns, and attractive, young models. . . . The ads portray JUUL as a hip and fun brand for millennials and young people" (*id.*, ¶¶ 36-37, 41).

In 2015, to launch its products, JUUL started a multifaceted "Vaporized" marketing campaign and hosted multiple product launch events in New York. The

State alleges that JUUL branded itself on magazines and social media platforms widely used by adolescents with the hashtag "#Vaporized," using stylish young models, bold colors, and memorable imagery (*id.*, ¶¶ 39-41). As part of the "Vaporized" campaign, JUUL also advertised its products on its Times Square video billboards in midtown Manhattan (*id.*, ¶ 42). Additionally, JUUL promoted itself via an email subscription list that was not age-restricted (*id.*, ¶¶ 46, 83).

According to the Amended Complaint, JUUL's in-person marketing campaign in New York primarily involved product launch parties and outreach efforts to high school students. The State alleges that in 2015 JUUL invited young and underaged celebrities and influencers to its launch parties, with youth-focused invitations circulated on social media platforms, and it also recruited young people as "brand ambassadors" to distribute JUUL products without requiring proof of age (*id.*,¶¶ 43-47). The State adds that JUUL directly reached out to high schoolers in New York and gave presentations that largely consisted of propaganda and promotion of JUUL (*id.*, ¶¶ 48-49), during which a JUUL representative assured that JUUL products are "totally safe" and "a safer alternative than smoking cigarettes" (*id.*, ¶ 50). The JUUL representative also allegedly represented that JUUL products were in FDA approval at that time and that "the FDA was about to come out and say that JUUL was 99% safer than cigarettes" (*id.*, ¶ 51).

JUUL's safety statement. Nicotine is an addictive substance and particularly dangerous for young people in their brain development (*id.*, ¶ 56). The State alleges that JUUL failed to mention nicotine or its harmful effects in its advertisements and social media posts until approximately 2017 and failed to do so in its promotional emails until April 2016 (*id.*, ¶¶ 57-58). In addition, the State alleges that JUUL took many steps to deceptively suggest that its products were safer than traditional cigarettes and could be used therapeutically as smoking cessation devices, including its focus on the use of the word "vapor" to connote cleanliness and lightness, its "#SmokingEvolved" marketing campaign, its "Make the Switch" campaign, and other misrepresentations about JUUL products' safeness (*id.*, ¶¶ 59-61). In connection with the above, the State alleges that JUUL marketed its products as modified risk tobacco products without FDA approval (*id.*, ¶¶ 91-97).

JUUL also declared on its website and product packaging that one JUULpod contains ~0.7 mL with 5% nicotine by weight, equivalent to about one pack of cigarettes (*id.*, ¶¶ 67-68). The State alleges that this statement is misleading and cites studies showing that the pulmonary absorption of nicotine in JUUL products may be four times that of a combustible cigarette for reasons including that (1) the vaporized nicotine in JUUL products is easier for human body to inhale and absorb than the nicotine in cigarettes; (2) the less throat irritation from using JUUL products will cause ingestion of more nicotine; (3) the flavored vapor can result in inhaling more nicotine; and (4) unlike a cigarette that continuously burns, all the liquid nicotine in a JUULpod could be inhaled and consumed (*id.*, ¶¶ 69-74, 76). The

State also points to other aspects of JUUL products that make vaping more accessible and frequent for consumers than smoking combustible cigarettes (*id.*, ¶ 75).

Sale of JUUL products to underage consumers. The State alleges that JUUL offered its products for sale through its website with a deficient age verification system, allowing underage purchasers to buy JUUL products online (*id.*, ¶¶ 79-82). The State also alleges that, until approximately August 2018, JUUL had sent mass promotional emails to hundreds of thousands of consumers who had not passed its age verification system (*id.*, ¶ 83). Moreover, the State alleges that JUUL has sold its products to minors through retail stores in New York and continued business with retailers that failed JUUL's "shopper audit" regarding age verification practices (*id.*, ¶¶ 84-85). JUUL counters that it had stopped selling JUUL products to New York residents through its website before the vapor-products shipping ban took effect in 2020 (NYSCEF # 77 at 9).

The practices above have led to what the State alleges a youth vaping epidemic in New York, leaving countless New Yorkers including teenagers addicted to the harmful JUUL products (Amended Complaint, ¶¶ 1-4, 52-54). The State alleges that the JUUL device became the "it" product for high schoolers to have (*id.*). As an illustration, between 2017 and 2018, electronic cigarette product use increased 78% among high-school students and 48% among middle-school students, while JUUL represents 70% share of this market (*id.*, ¶¶ 2-4). The State also cites to two surveys: one conducted in 2016 shows that more than half of American teenagers believed that JUUL and other ENDS products caused little harm and that one-third of all teenagers believed that these vape products were competently harmless (*id.*, ¶ 65). The other survey, conducted in 2018, shows that 63% of JUUL users between the ages of 15 and 24 did not know that JUUL products contained nicotine at all (*id.*). In response, school districts throughout the State of New York, the New York State Department of Health, and the New York City Department of Health and Mental Hygiene have spent significant resources on combating the youth-vaping epidemic (*id.*, ¶ 4).

On November 19, 2019, the State commenced this action by filing a summons and complaint naming JUUL as the sole defendant. On May 6, 2021, the State filed its amended summons and complaint, adding individual defendants as parties. In the Amended Complaint, the State alleges that all defendants (i) violated General Business Law § 349 for deceptive acts and practices; (ii) violated General Business Law § 350 for false advertising; (iii) committed repeated and persistent fraud in violation of Executive Law § 63(12); (iv) caused public nuisance; and violated Executive Law § 63(12) by engaging in illegal conduct that violated: (v) General Business Law §§ 349 and 350; (vi) Public Health Law § 1399-cc(3); (vii) the Federal Trade Commission Act § 5; and (viii) Section 911 of the Federal Food, Drug & Cosmetic Act.

In the instant motion, JUUL moves to dismiss the complaint, arguing that first, the cause of action for violation of Public Health Law § 1399-cc should be dismissed since the statute does not apply to JUUL and its conduct; second, many of the State's allegations are barred by the three-year statute of limitations; and third, a large number of the State's allegations are expressly and impliedly preempted by federal law.

In opposition, the State argues that first, Public Health Law § 1399-cc applies to internet vendors like JUUL; second, its claims are timely because the limitations period for claims under Executive Law § 63(12) is six years rather than three years and that there is no statute of limitations for equitable remedies under a public nuisance claim; and lastly, its claims are not preempted under either the Food, Drug, and Cosmetic Act (FDCA) or the Federal Trade Commission Act (FTC Act).

Discussion

I. Public Health Law § 1399-cc Claim

The State brings its sixth cause of action pursuant to Executive Law § 63(12), alleging that JUUL violated Public Health Law § 1399-cc(3) by selling its products to New York consumers under the age of 18. Specifically, the State alleges that JUUL offered its products for sale through its website with a deficient age verification system that allowed minors to place online orders, and continued to supply its products to New York retail stores that failed to check the identification of underage consumers according to JUUL's own audits. JUUL moves to dismiss this count, arguing that it is not subject to the regulation of Public Health Law § 1399-cc, which applies only to in-person sales. JUUL's argument has merit.

Public Health Law § 1399-cc prohibits "[a]ny person operating a place of business wherein tobacco products, ... liquid nicotine, ... or electronic cigarette, are sold or offered for sale" from selling such products to "individuals under eighteen years of age" (Public Health Law § 1399-cc[2]).[1] While this sub-provision does not explicitly specify whether "a place of business" includes online sales, it is followed by the requirement that a person operating such a business shall "post in a conspicuous place a sign" stating that age restriction and printed "on a white card in red letters at least one-half inch in height"—a requirement that can only be complied with in a physical store (*id.*). The next sub-provision, § 1399-cc(3), requires that retailers who sell those products verify a purchaser's age by checking an identification card with the exception of "any individual who reasonably appears to be at least twenty-five years of age" (Public Health Law § 1399-cc[3]). This requirement also pertains to in-person sales in a brick-and-mortar store. Thus,

[1] As the State notes, this law was amended in July 2019 to raise the minimum age for purchasing nicotine products from 18 to 21, effective on November 13, 2019 (NYSCEF # 53-Amended Complaint ¶ 77 n 40).

limiting the application of § 1399-cc to in-person sales comports with the principle that a statute "must be construed as a whole and that its various sections must be considered together and with reference to each other" (*Matter of N.Y. County Lawyers' Assn. v Bloomberg*, 19 NY3d 712, 721 [2012]).

There is a concern that reading § 1399-cc strictly to apply exclusively to in-person sales would frustrate the Legislature's purpose of preventing the sale of tobacco products to minors, since minors can still make purchases online or via telephone or mail order. Instead of leaving courts to interpret § 1399-cc broadly, the Legislature has addressed this issue and filled the gap by enacting § 1399-ll, which makes it unlawful for sellers of cigarettes to ship cigarettes to any person in New York State that does not fall within the three exceptions codified in § 1399-ll(1).

A review of the legislative history for § 1399-ll shows that this provision, as opposed to § 1399-cc, regulates remote sales such as JUUL's online sales (Mem of Senate Bill S8177, Bill Jacket, 2000, ch 262).[2] Particularly, while the then-existing Public Health Law "significantly reduce the ability of minors to obtain cigarettes," "they remain available to young would-be purchasers by means other than face-to-face sales. For example ... by mail-order or Internet purchases" (*id.*). "Recognizing this problem and the proliferation of Internet sales, this bill would make it unlawful for persons who sell cigarettes to ship or cause cigarettes to be shipped to any person in the State" (*id.*). As a result of the enactment of § 1399-ll, individual consumers in New York can only purchase cigarettes and vapor products at a registered retail store, where a sign must be posted and customers' identification must be checked pursuant to § 1399-cc. This parallel regulatory scheme "ensure[s] that the Public Health Law's proof of age requirements would not be evaded by underage purchasers" (*id.*).

"When the statutory language at issue is but one component in a larger statutory scheme, it must be analyzed in context and in a manner that harmonizes the related provisions and renders them compatible" (*Matter of Mestecky v City of N.Y.*, 30 NY3d 239, 243 [2017] [internal quotation marks and citation omitted]). Accordingly, "a statutory construction which renders one part meaningless should be avoided" (*Matter of Springer v Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 27 NY3d 102, 107 [2016]). Here, a construction expanding the scope of § 1399-cc to cover online sales would render § 1399-ll meaningless. Moreover, applying § 1399-cc to online sales would mean that online sales of cigarettes and vapor products are lawful so long as the Internet vendors implement a sufficient age verification system, which directly contradicts § 1399-ll's ban on selling those products remotely despite the age of the consumers. To avoid the conflict and to give each section its

[2] Of relevance here, § 1399-ll previously covered only cigarettes and was inapplicable to JUUL. In 2020, the Legislature amended the statute to include shipping of vapor products (§1399-ll[1a]). JUUL alleged that it stopped selling vapor products to New York residents over the Internet before the amendment took effect (NYSCEF # 77 at 9).

"due, and conjoint effect" (*N.Y. State Psychiatric Assn, Inc. v N.Y. State Dept. of Health*, 19 NY3d 17, 24 [2012]), § 1399-cc shall only regulate in-person sales in brick-and-mortar stores and does not extend its application to JUUL and its conduct.

In light of the above, as the State does not bring any claim under § 1399-ll, its Executive Law § 63(12) claim based on Public Health Law § 1399-cc is dismissed.

II. Statute of Limitations

JUUL moves to dismiss a large portion of the State's allegations as time-barred. Specifically, JUUL argues that the State (1) cannot pursue its General Business Law (GBL) claims and public nuisance claims for conduct that occurred before November 19, 2016, and (2) cannot pursue its Executive Law § 63(12) claims for conduct that occurred before August 26, 2016. Both categories of claims are addressed separately below.

A. The State's GBL § 349, GBL § 350, and Public Nuisance Claims

JUUL first argues that a three-year limitations period applies to the State's GBL § 349 claim (Count I), GBL § 350 claim (Count II) and public nuisance claim (Count IV). As the State commenced this action on November 19, 2019, JUUL contends that any alleged acts took place before November 19, 2016 are time-barred.

General Business Law prohibits "[d]eceptive acts or practices" (GBL § 349) and "[f]alse advertising" (GBL § 350) "in the conduct of any business, trade or commerce." The two statutes allow the Attorney General to bring an action to enjoin such unlawful conduct and to obtain restitution (GBL § 349[b]) or civil penalty (GBL § 350-d). As such, the State's claims brought under GBL §§ 349 and 350 are subject to the three-year limitations period imposed by CPLR 214(2), which applies to actions "to recover upon a liability, penalty or forfeiture created or imposed by statute" (CPLR 214[2]; *Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 788-789 [2012]).

In opposition, the State does not dispute that a three-year statute of limitations applies; instead, it points to a tolling agreement between the State and JUUL effective on October 31, 2018, which expressly suspended the limitations period for GBL § 349, GBL § 350, and Executive Law § 63(12) claims for twelve months to allow the State to pursue its investigation and evaluate litigation (NYSCEF # 176-Popp Aff., Ex. QQQ). Considering the tolling effect of the agreement, for Counts I and II, only the portion of the claims concerning JUUL's conduct prior to October 31, 2015 is time-barred (NYSCEF # 183-Def. Reply at 5).

As to the public nuisance claim, for which the tolling agreement does not cover (NYSCEF # 176), both parties concede that under New York law, the State may only seek damages to the extent that they were sustained for the period of three years prior to the commencement of the action (CPLR 214[4][5]; *Kearney v Atl. Cement Co.*, 33 AD2d 848, 849 [3d Dept 1969]) (NYSCEF # 77-Def. Brief at 10; NYSCEF # 180-Opp at 34). Yet, the parties dispute whether the State can seek injunctive relief and prospective abatement, which are equitable remedies not subject to the three-year statute of limitations.

The three-year limitations period applies "only to actions to recover damages," and "[i]t does not then affect or purport to affect the availability to a party of seeking injunctive equitable relief" (*Jensen v Gen. Elec. Co.*, 82 NY2d 77, 89-90 [1993]). "The rule with respect to nuisance or other continuing wrongs is that the action accrues anew on each day of the wrong, so that the right to maintain the cause of action continues as long as the nuisance exists" (*In re Opioid Litig.*, 2018 WL 3115102, *12 [Sup Ct, NY County, Jun. 18, 2018]; *Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017] [the doctrine applies where there is "a series of continuing wrongs"]). Significantly, this doctrine may only be predicated on continuing wrongs, or "a series of independent, distinct wrongs," but not on an earlier "single wrong that has continuing effects" (*Henry*, 147 AD3d at 601; *see also Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1032 [2013] [finding no continuing wrongs since the nuisance claim is tied to one single negligent act ceased over twenty years ago]).

In reply, JUUL argues that the "earliest wrongful conduct" alleged by the State, such as JUUL's "Vaporized" marketing campaign and product launch, ceased years before the State commenced this action so they do not constitute a continuing wrong (NYSCEF # 183 at 6). This misreads the nature of the action. The State's claim is not tied to the lingering effects of one single marketing campaign or one discrete launch event in 2015; rather, the State has pled "a continuous series of wrongs" including JUUL's comprehensive and multifaceted marketing scheme that have continued up to the commencement of the action (*see Capruso v Vil. Of Kings Point*, 23 NY3d 631, 640 [2014]; *see also In re Opioid Litig.*, 2018 WL 3115102, *12 [deceptive marketing practices that have continued for years are continuing wrongs]). Thus, taking the State's factual allegations as true for purposes of this motion, the court finds that the State has pled continuing wrongs and may seek equitable remedies based on those wrongs, including injunctive relief and prospective abatement.

B. The State's Executive Law § 63(12) Claims

For the Executive Law § 63(12) claims based on conduct made illegal by statute (Counts V-VIII), JUUL argues that allegations regarding conduct that

occurred before August 26, 2016, are barred by the three-year limitations period under CPLR 214(2).

The Court of Appeals, in 2018, held that "to determine whether such a claim is timely, courts must 'look through' Executive Law § 63(12) and apply the statute of limitations applicable to the underlying liability," meaning that the catch-all three-year limitations period of CPLR 214(2) applied to actions created by statute (*People v Credit Suisse Sec. (USA) LLC*, 31 NY3d 622, 633-634 [2018]). But a year after the *Credit Suisse* decision, the New York State Legislature amended CPLR 213(9), effective on August 26, 2019. The amendment made clear that a six-year limitations period governs actions brought by the State Attorney General under Executive Law § 63(12).

JUUL argues that this 2019 amendment to CPLR 213(9) does not change the analysis since it does not apply retroactively. In opposition, the State argues that CPLR 213(9) applies retroactively considering its remedial nature.

"Amendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated" (*Matter of Gleason*, 96 NY2d 117, 122 [2001]; *see also Matter of Regina Metro. Co. LLC v N.Y. State Div. of Hous. and Community Renewal*, 35 NY3d 332, 371 [2020] ["it is a bedrock rule of law that, absent an unambiguous statement of legislative intent, statutes that revive time-barred claims if applied retroactively will not be construed to have that effect"]). To examine whether the Legislature has expressed a sufficiently clear intent to apply an amendment retroactively, the statutory language is usually the clearest indicator (*Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 583 [1998]). However, the text of CPLR 213(9) is silent on the issue, requiring the court to further examine the legislative purpose of the amendment (*Clean Earth of N. Jersey, Inc. v Northcoast Maintenance Corp.*, 142 AD3d 1032, 1037 [2016] ["the reach of the statute ultimately becomes a matter of judgment made upon review of the legislative goal"]; *Regina*, 35 NY3d at 370 ["There is certainly no requirement that particular words be used—and, in some instances, retroactive intent can be discerned from the nature of the legislation."]).

Legislation with the goal to remedy should be given retroactive effect; otherwise, its beneficial purpose would be frustrated (*Gleason*, 96 NY2d at 122; *Majewski*, 91 NY2d at 584 ["An equally settled maxim is that remedial legislation or statutes governing procedural matters should be applied retroactively."]). The Court of Appeals in *Gleason* has provided guidance as to the factors to consider in the retroactivity analysis—specifically, whether the amendment "conveyed a sense of urgency;" whether the amendment was designed to correct "an unintended judicial interpretation;" and whether "the legislative history establishes that the purpose of the amendment was to clarify what the law was always meant to do and say" (*Gleason*, 96 NY2d at 122-123).

Here, the Legislature amended CPLR 213(9) in 2019 in direct response to the 2018 *Credit Suisse* decision. In addition to its swift response to remedy *Credit Suisse*, the Legislature also conveyed a sense of urgency by directing that this act shall take effect immediately. The legislative history further evinces that the legislation is remedial in nature to restore the six-year statute of limitations and clarify what the law was meant to do (*see* Mem of Assembly Bill A08318 ["A recent Court of Appeals decision overturned this precedent ... . This turned on its head literally decades of case law."; "Clarifying that the statute of limitations for claims under the Martin Act and the Executive Law is six years will allow New York State to better protect investors and consumers, obtain more relief for consumers ...."]; Mem of Senate Bill S6536 [same]). These *Gleason* factors together show that the Legislature intended CPLR 213(9) to take effect retroactively (*People v Allen*, 2021 WL 394821, *5 (Sup Ct, NY County, Feb. 04, 2021), *affd* 198 AD3d 531 [1st Dept 2021]; *see also People v Pennsylvania Higher Educ. Assistance Agency*, 2022 WL 951048, *4-5 [SD NY, Mar. 30, 2022] [the six-year statute of limitations in CPLR 213(9) applies retroactively to the Executive Law § 63(12) claims]).

Regina (35 NY3d 332), the case primarily relied on by JUUL, is distinguishable. The First Department, in affirming *Allen*, found that while the *Regina* defendants acted in reliance on the previous statute of limitations, the defendants in *Allen* would not have relied on the three-year limitations period under *Credit Suisse* except for a brief period between the entry of *Credit Suisse* decision – June 12, 2018, and the enaction of CPLR 213(9) – August 26, 2019 (*Allen*, 198 AD3d at 532). Likewise, JUUL would not be prejudiced by the retroactive application since it could not have relied on *Credit Suisse*.[3]

Regina is inapplicable for another reason: the amendment in *Regina* not only extended the limitations period from four years to six years, but also "substantially alter[ed] the nature of the liability" under the law (*Regina*, 35 NY3d at 372). For example, the amendment changed the base-date rent, abolished the preclusion of rent history examination, and allowed treble damages recoverable for six years instead of two years (*id.* at 363-364). Here, unlike the statute in *Regina*, CPLR 213(9) only functions to extend the statute of limitations, leaving the substantive nature of the statute untouched and resulting in minimal concerns over fairness and due process.

For the reasons above, the six-year statute of limitations in CPLR 213(9) applies retroactively to the State's Executive Law § 63(12) claims and these claims are brought timely.

[3] Even if JUUL has acted in reliance of a three-year statute of limitations during the brief period of time, its conduct in that period would not be barred by the three-year limitations.

III. Federal Preemption

JUUL argues that significant aspects of the State's claims are expressly preempted by the Tobacco Control Act (TCA) because the State, through this action, seeks to impose state-law requirements "different from, or in addition to" federal law regarding labeling, packaging, nicotine content, ingredients, flavors, product designs, and modified-risk statements (NYSCEF 77 at 13-19). JUUL also contends that the State's claims are impliedly preempted since these claims would interfere with the regulatory scheme established in the FDCA. Further, JUUL argued that Counts VII and VIII should be dismissed for an additional reason that the State cannot assert its Executive Law § 63(12) claims solely and exclusively based on violations of the FDCA and the FTC Act.

The U.S. Constitution's Supremacy Clause "may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law" (*Balbuena v IDR Realty LLC*, 6 NY3d 338, 356 [2006]). As the Supreme Court has noted, "the ultimate touchstone" in every preemption case is the purpose of Congress, and "Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose" (*Altria Group, Inc. v Good*, 555 US 70, 76 [2008]). "Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law" (*id.* at 76-77).

A. Express preemption

When assessing if a statutory provision expressly preempts state law, a court must "start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (*Medtronic, Inc v Lohr*, 518 US 470, 485 [1996]). The relevant statute, TCA, amends the FDCA and gives the FDA comprehensive power to regulate tobacco products. In 2016, the FDA issued a regulation "deeming" ENDS products as "tobacco products" subject to its regulation (21 CFR Parts 1100, 1140, and 1143 [2016]).

The TCA contains a preservation clause, a preemption clause, and a savings clause (21 USC § 387p[a]). Section 387p starts with expressly preserving for state's traditional police power to regulate "the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products" (21 USC § 387p [a][1]). The TCA's preemption clause follows that no state may establish "any requirement which is different from, or in addition to, any requirement ... relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products" (21 USC § 387p[a][2][A]). Lastly, a savings clause is added to carve out from the preemption any requirements regarding "the sale, distribution, ... the

advertising and promotion of, or use of, tobacco products ..." (21 USC § 387p[a][2][B]). The three clauses indicate that instead of occupying the entire field of "tobacco products," Congress has designed a comprehensive scheme that carefully maps out areas for states and federal agencies to regulate separately. For the areas regulated by federal law, the TCA also allows states to impose requirements that do not deviate from federal standards.

Advertising and promotion

Significantly, claims based on advertising and promotion are not preempted (21 USC §§ 387p[a][1], 387p[a][2][B]; *Colgate v JUUL Labs, Inc.*, 345 F Supp 3d 1178, 1190 [ND Cal 2018] [*Colgate I*]). A large portion of the State's allegations rests on JUUL's allegedly misleading or deceptive advertising, marketing, and promotion, such as JUUL's marketing campaigns on social media platforms and in-person launch events and presentations. Claims based on these facts are not challenged by JUUL and are not preempted under the TCA.

Labeling and packaging

JUUL primarily attacks the State's allegations that JUUL misstated the potency of its products and misled consumers about the nicotine content in each JUULpod on its website and product packaging, arguing that those allegations relate to "labeling," "misbranding," and "packaging" and are therefore preempted. This argument is without merit as it mischaracterizes the State's claims.

Addressing a similar issue, the court in *Colgate I* held that any claims based on JUUL's mislabeling of "the dosage of nicotine" and "the strength of nicotine in their pods" are not preempted (*Colgate I*, 345 F Supp 3d at 1189; *see also Colgate v JUUL Labs, Inc.*, 402 F Supp 3d 728, 745 [ND Cal 2019] [*Colgate II*] ["None of these allegations are preempted because they are either about advertisements or about the strength of JUUL's nicotine liquid that I have ruled are not preempted."]; *In re JUUL Labs, Inc., Mktg., Sales Practices, and Prods. Liab. Litig.*, 497 F Supp 3d 552, 584 [ND Cal 2020] [false advertising and related claims based on the allegation that JUUL mislabels the nicotine content were not preempted]). On the other hand, claims based on "the product label failing to disclose the greater potency and addictiveness of JUUL's benzoic acid and nicotine salt formulation" are preempted as such claims "would constitute a usurpation of the power vested in the FDA by Congress to regulate the content of the warnings on covered tobacco products" (*Colgate I*, 345 F Supp 3d at 1188-89).

Here, the State does not seek to hold JUUL liable for failing to warn the greater potency of its products or to disclose its nicotine salt formulation on the packaging, which would be a higher standard than what the FDA requires for warning label under 21 CFR §§ 1143.3(a)(1)(2). Rather, the State's claims allege

that JUUL's statement that "one JUULpod contains nicotine equivalent to about one pack of cigarettes" misleads consumers about the potency and addictiveness of its products in many ways such as that the pulmonary absorption of nicotine in JUUL products may be four times that of a combustible cigarette (Amended Complaint, ¶¶ 69-76). These allegations, taken as true for purposes of the motion to dismiss, essentially pertain to false advertising and misleading labels (*Colgate I*, 345 F Supp 3d at 1189; *In re JUUL Labs, Inc.*, 497 F Supp 3d at 589). To the extent the allegations concern misbranding, the State does not impose any requirement "different from, or in addition to" the federal requirement since "this type of conduct would likewise be prohibited under the TCA" (*Minnesota v Juul Labs, Inc.*, 2021 WL 2692131, *14 [D Minn, June 21, 2021]; *see also In re JUUL Labs, Inc.*, 497 F Supp 3d at 589-590 ["Absent the FDA's actions defining or proscribing specific 'misbranding' on JLI's products, there is nothing further to address at this juncture."]). Thus, in light of the nature of these allegations, the claims based on false advertising and misleading labels are not expressly preempted under the TCA.

Product design and flavor

JUUL also argues that the State's allegations regarding JUUL device's "sleek" physical design, "youth-oriented" flavors, and the "more palatable" nicotine formulation and delivery methods are expressly preempted because they would impose state-law requirements relating to "tobacco product standards" that are "different from, or in addition to" federal requirements (NYSCEF # 77 at 16-17).

Notably, the FDA has not proscribed any actual design or product standards for ENDS products. When specific federal requirements are imposed on a certain area, it strongly supports the finding of preemption (*Colgate I*, 345 F Supp 3d at 1188). Vice versa—the absence of a regulatory scheme indicates that the FDA does not want to do anything other than "maintain[ing] the status quo" with respect to ENDS product designs and standards (*Lohr*, 518 US at 494 ["That status quo included the possibility that the manufacturer of the device would have to defend itself against state-law claims of negligent design."]). Thus, "[w]ithout the existence of any defined 'standards,' there can be no supposed preemption of state law standards that are 'different from or in addition to' the federal ones" (*In re JUUL Labs, Inc.*, 497 F Supp 3d at 587; *see also GoodCat, LLC v Cook*, 202 F Supp 3d 896, 912 [SD Ind 2016] ["the clause does not operate unless the FDA regulates the adulteration of tobacco products"]; *Minnesota*, 2021 WL 2692131, *14 ["the preemption clause does not foreclose states from imposing any requirement related to tobacco products standards"]; *Lara v Cool Clouds Distrib., Inc.*, 2021 WL 613842, *9 [D NJ, Feb. 16, 2021] [same]). Accordingly, this aspect of the State's claims is not expressly preempted.

Modified-risk tobacco statements

JUUL argues that the State's allegations on JUUL's marketing its products as safer than combustible cigarettes are also preempted by the "adulteration" and "modified risk tobacco products" clauses of § 387p (NYSCEF # 77 at 17-18). The State makes these allegations in connection with two separate sets of claims: the first is the State's claims alleging that JUUL misled consumers about the safety of JUUL products; and the second is the State's eighth cause of action alleging that JUUL violated the FDCA because it did not obtain FDA approval while making the modified-risk statements. As Count VIII will be discussed separately, the court addresses only the first set of claims here.

Although modified-risk tobacco products are in the realm of federal regulation, "[t]he mere fact that defendants allegedly misleadingly portrayed their products as something they were not does not bring the claims (or, in fact, the products) under the separate modified-risk regulations" (*In re JUUL Labs, Inc.*, 497 F Supp 3d at 591). As reasoned in the labeling section, the State does not seek to impose requirements "different from, or in addition to" federal standards; rather, the State's claims pertain to misleading advertising that JUUL allegedly misrepresented its products as safer than cigarettes when they are not, which "fit squarely within the savings clause" (*Minnesota*, 2021 WL 2692131, *14). In this connection, the State's claims are not expressly preempted under the TCA.

B. Implied Preemption

JUUL also argues that the State's claims are impliedly preempted by federal law because those claims "would upset the careful regulatory scheme established by federal law" and "stand as an obstacle to the accomplishment and execution of ... federal objectives" (NYSCEF # 77 at 19, citing *Geier v Am. Honda Motor Co.*, 529 US 861, 862, 881 [2000]).[4] Specifically, JUUL contends that Congress's objective was to have "the FDA to 'regulate tobacco products and the advertising and promotion of such products,' with the goal of reducing the harmful effects of combustible tobacco products" (NYSCEF # 77 at 20) (citing TCA § 2[12]; Pub L 111-31, 123 US Stat 1776, 1777 [111th Cong, 1st Sess, Jan. 4, 2009]).

The question of whether the State's claims are a sufficient obstacle for purposes of preemption "is a matter of judgment, to be informed by examining the federal law as a whole and identifying its purpose and intended effects" (*Sutton 58 Assocs. LLC v Pilevsky*, 36 NY3d 297, 309 [2020], *cert denied* 142 S Ct 53 [2021] [internal citation and quotation omitted]). To support a finding of preemption, the repugnance or conflict must be "so direct and positive that the two acts cannot be reconciled or consistently stand together" (*id.* at 309); otherwise, "[t]he mere fact of

[4] JUUL does not argue field preemption in this motion.

tension between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditionally police power" (*id.* at 315).

The FDA has broad regulatory authority over tobacco products including JUUL products. So far, however, its regulations are limited to the nicotine-addiction warning requirement but have not extended to other areas. Although the savings clause does not foreclose the operation of implied preemption (*In re JUUL Labs, Inc.*, 497 F Supp 3d at 592-93), the text and structure of the TCA, together with the limited actions taken by the FDA, suggest that states are empowered to step in to regulate and exercise their police power regarding public health matters (*Pilevsky*, 36 NY3d at 309). The State's claims here mostly focus on misleading advertising, and to the extent they concern product standards, designs, and flavors, they do not frustrate the federal objectives since those areas remain an open ground with no ceiling or floor set by the FDA (*In re JUUL Labs Inc.*, 497 F Supp 3d at 594 ["defendants' arguments that allowing state law claims generally 'frustrate' federal objectives is not well-taken"]; *cf. Geier*, 529 US at 877-879 [finding implied preemption because the state's requirement for installing airbags could not reconcile with the federal standard that expressly allows a range of choices among different passive restraint devices]). As such, the State's claims are not impliedly preempted.

C. Counts VII and VIII

Counts VII and VIII pose an additional question that involves the State's enforcement of federal law. JUUL argues that the two counts are impliedly preempted because, if allowed to proceed, they would exert an extraneous pull on the FDA's and the FTC's exclusive authority to enforce the FDCA and FTC Act respectively (NYSCEF # 77 at 21-22, relying on *Buckman Co. v Plaintiffs' Legal Comm.*, 531 US 341, 353 [2001]).

Executive Law § 63(12) provides a mechanism for the State Attorney General to investigate and bring an enforcement action against "illegality" in business practices, which includes violations of state law, common law, and federal law (*e.g. People v World Interactive Gaming Corp.*, 185 Misc 2d 852 [Sup Ct, NY County 1999]). However, the State's enforcement authority is not without boundaries. The preemption doctrine maintains that states must give way to federal law where Congress intends so (*Altria Group*, 555 US at 76 [the purposes of Congress is the "ultimate touchstone" of preemption analysis in each case]).

As JUUL points out, a state-law claim attempting to directly and exclusively enforce the FDCA should be preempted and foreclosed under *Buckman* (531 US at 341). In *Buckman*, the plaintiff brought a state-law fraud action, claiming that defendant made fraudulent representations to the FDA when it sought FDA's

approval for marketing a certain type of screws (*id.*). The Supreme Court held that the state-law fraud claims were preempted because those "fraud-on-the-FDA" claims "exist[ed] solely by virtue of the FDCA disclosure requirements" and "the relationship between a federal agency and the entity it regulates is inherently federal in character" (*id.* at 347-348, 353). The federal statute discussed in *Buckman*, § 510(k), "imposes upon applicants a variety of requirements that are designed to enable the FDA to make its statutorily required judgment as to whether the device qualifies [for approval]" (*id.* at 348-349).

Similarly, § 387k, the basis for Count VIII, sets forth a comprehensive scheme for the FDA to review the applicant's submissions and issue an order to approve any marketing of a modified risk tobacco product (21 USC § 387k[g]). Significantly, this disclosure and application duty is "owed to the FDA," not the State or any private plaintiff (*Glover v Bausch & Lomb Inc.*, 6 F4th 229, 238-239 [2d Cir 2021]), and "originates from, is governed by, and terminates according to federal law" (*Buckman*, 531 US at 347; *see also Brooks v Mentor Worldwide LLC*, 985 F3d 1272, 1281 [10th Cir 2021] [finding preemption because "the [federal] government retains the exclusive right to enforce [FDA-mandated] post-approval requirements for continued testing"]).

In opposition, the State argues that Count VIII is "grounded in traditional state-law requirements regarding ... fraud and illegality" (NYSCEF # 180-Opp at 43). However, as Executive Law § 63(12) functions as a conduit that does not itself impose any substantive requirement on modified risk tobacco products, what the State alleges in Count VIII, in essence, is that JUUL failed to obtain the FDA approval as required in the FDCA. Like in *Buckman*, Count VIII "exist[s] solely by virtue of the FDCA's [] requirements" (531 US at 353). By bringing this claim, the State is policing the FDA's interest and vindicating the public interest in seeing federal law enforced. Therefore, Count VIII is impliedly preempted under *Buckman*.

On the flip side, a state-law claim may survive preemption if the plaintiff sues for conduct that violates federal law but also actionable under state law independently of the federal law (*Buckman*, 531 US at 353 [state-law claims that "parallel" federal requirements are allowed]; *Glover*, 6 F4th at 237, 241 [state-law claim that "exists separately from" the federal law are allowed]). This speaks of the State's Count VII.

Count VII is brought under Executive Law § 63(12) based on JUUL's alleged violation of FTC Act § 5, which prohibits unfair acts or practices (15 USC § 45[a][1]). The underlying allegations are that JUUL has engaged in "unfair acts and practices in the marketing, promotion and sales of JUUL products" including its misleading marketing campaigns and false advertising (NYSCEF # 53-Amended Complaint ¶ 180). The same allegations form the basis for other traditional state-law claims that exist separately from and parallel to the FTC Act § 5's fairness requirement (*see e.g.*

Counts I-III, V) and do not contemplate any duty exclusively owed to and regulated by the FTC. Thus, there was no federal preemption or exclusion as to Count VII.

Conclusion

In view of the above, it is

ORDERED that the branch of defendant JUUL's motion to dismiss the State's first cause of action for deceptive acts and practices under GBL § 349 and the second cause of action for false advertising under GBL § 350 as time-barred is granted only to the extent of dismissing the aspect of the claims for conduct occurred before October 31, 2015; it is further

ORDERED that the branch of defendant JUUL's motion to dismiss the State's fourth cause of action for public nuisance as time-barred is granted only to the extent of dismissing the aspect of the claim for conduct occurred before November 19, 2016, with no limitation to the State on the availability of seeking remedies of injunctive relief including abatement; it is further

ORDERED that the branch of defendant JUUL's motion to dismiss the State's fifth, sixth, seventh, and eighth causes of action under Executive Law § 63(12) as time-barred is denied; it is further

ORDERED that the branch of defendant JUUL's motion to dismiss the sixth cause of action for violation of the Public Health Law § 1399-cc is granted; it is further

ORDERED that the branch of defendant JUUL's motion to dismiss the State's claims as preempted by federal law is granted only as to the State's eighth cause of action for violation of the FDCA and otherwise denied; and it is further

ORDERED that defendant JUUL is to serve an answer to the Amended Complaint within 20 days of the entry of this order.

This constitutes the Decision and Order of the court.

07/05/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE