IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, Plaintiff, v. JUUL LABS, INC. f/k/a PAX LABS, INC.; ALTRIA GROUP, INC.; ALTRIA CLIENT SERVICES LLC; ALTRIA GROUP DISTRIBUTION COMPANY; NU MARK LLC; and NU MARK INNOVATIONS, LTD., Defendants.	)	Case No. 3AN-20-09477 CI

ORDER GRANTING IN PART THE ALTRIA DEFENDANTS' MOTION TO DISMISS [CASE MOTION # 10] AND JLI'S MOTION TO DISMISS [CASE MOTION # 13]

This case arises from the State of Alaska's ("State") allegations that JUUL Labs, Inc. f/k/a PAX Labs, Inc. ("JLI") and Altria Group, Inc., Altria Client Services LLC, Altria Group Distribution Company, Nu Mark LLC, and Nu Mark Innovations, Ltd. (collectively the "Altria Defendants") engaged in a deceptive marketing campaign to increase sales of e-cigarette products to youth. The State filed a complaint seeking damages and injunctive relief against JLI and the Altria Defendants for: (1) violations of the Unfair Trade Practices and Consumer Protection Act ("UTPA"), (2) public nuisance, (3) negligence, and (4) civil conspiracy.

JLI and the Altria Defendants filed separate motions to dismiss the claims under Alaska Rule of Civil Procedure 12(b)(6). Having reviewed the motions, oppositions, and replies, and considered the oral arguments of counsel, the Motions to Dismiss are granted in part.

I. FACTUAL ALLEGATIONS

The State filed the Complaint in this case against JLI and the Altria Defendants, companies which manufacture, sell, market, promote, and distribute JUUL e-cigarette products.[1] The Complaint contains approximately 125 pages of factual allegations, some of which are summarized below.

A. E-Cigarette Products and Marketing

In June 2015, JLI launched the JUUL e-cigarette device, which "resembles a long rectangular flash drive."[2] The State alleges that JLI's e-cigarette products have gained popularity as a result of a marketing strategy which relied on advertisement campaigns similar to those relied on by the tobacco industry, and on the promotion of its products on social media.[3] The State further alleges that users, including youth, were attracted to JLI's products by its advertisements and product design, including reduced harshness, high nicotine content, discreet vapor cloud, and flavors.[4] Throughout the Complaint, the State alleges that JLI

[1] The State uses "Altria" and "Altria Defendants" interchangeably throughout the Complaint.
[2] Compl. ¶¶ 26, 28, 39.
[3] *Id.* ¶ 7.
[4] *Id.*

developed a marketing strategy directed at youth, using social media and influencers to reach youth.[5]

The Altria Defendants also manufactured and marketed e-cigarette pod-based products.[6] In 2016, they launched a pod-based e-cigarette like JUUL, also using flavors that would appeal to youth.[7] The State alleges that in the spring of 2017, Altria and JLI entered into confidential discussions, and in December 2018, Altria announced a $12.8 billion equity investment in JLI, giving Altria a 35% stake in JLI.[8] The State alleges that JLI and Altria's relationship was a "collaboration to preserve and expand JUUL's market share by concealing marketing and sales of JUUL products to youth."[9] The State also alleges that Altria "is and was working to actively help run JLI's operations and expand sales of JUUL products."[10]

The State alleges that "JLI and Altria conspired to protect and expand the market for JUUL through fraudulent means, including disseminating false statements denying JLI's efforts to target youth with nicotine products and characterizing JUUL as a cessation device that was never intended for, or marketed to, youth."[11] In addition, the State alleges that JLI and the Altria

[5] *Id.* ¶¶ 39, 88-89, 92-94, 107-08, 111, 115, 125.
[6] *Id.* ¶¶ 8, 16-20.
[7] *Id.* ¶¶ 188-90.
[8] *Id.* ¶¶ 9, 201-02.
[9] *Id.* ¶ 202.
[10] *Id.* ¶ 266.
[11] *Id.* ¶ 198.

Defendants "made false statements to the public and to regulators about actions they were purportedly taking to address rampant youth vaping, including removing certain JUULpod flavors from the market while continuing to promote Mint JUULpods with the knowledge that Mint was a preferred flavor with youth, with the intent that parents, policymakers, and regulators would rely on such false statements in a way that would allow JLI to keep selling JUUL products."[12] The State further alleges that JLI and the Altria Defendants implemented a deceptive marketing campaign, the "Make the Switch" campaign, to "support the fraudulent statements disseminated by JLI and Altria – that JUUL was only ever intended as an alternative to smoking for existing adult smokers and JLI's marketing was never aimed at youth."[13] The State also alleges that Altria provided shelf space to JLI "in order to sustain the exponential growth of underage users of JUUL products."[14]

B. E-Cigarette Use by Youth

The State alleges that while youth smoking rates decreased between 2000 and 2017, e-cigarette use among high school students nationwide has been increasing since 2017.[15] In Alaska, a 2017 survey indicated that 40% of high school students reported having tried e-cigarettes, and 15.7% reported having used

[12] *Id.* ¶ 199.
[13] *Id.* ¶ 222; *see also* ¶ 227.
[14] *Id.* ¶ 228.
[15] *Id.* ¶¶ 1-2.

an e-cigarette within the past 30 days.[16] Nationwide, in 2019, "more than one in every four high schoolers" reported using e-cigarettes.[17] A 2019 survey of Alaska high school students reflected that 45.8% reported having tried an e-cigarette or vapor product, and 26.1% reported having used an e-cigarette within the past 30 days.[18]

The State alleges that increased nicotine exposure from the use of JUUL devices has serious health consequences, and that youth are particularly vulnerable to nicotine addiction.[19] The State also alleges that the effects of nicotine exposure include addiction, reduced impulse control, deficits in attention and cognition, mood disorders, and cardiovascular, reproductive and immunosuppressive problems.[20] In an attempt to address the epidemic of youth e-cigarette use, the U.S. Food and Drug Administration ("FDA") banned flavored e-cigarette pods, other than tobacco and menthol flavors.[21]

The State alleges that school districts across the nation have had to expend resources to address the widespread problem of youth vaping at schools.[22] For example, school districts have installed camera surveillance and other monitors, have increased in-person monitoring, and have created and implemented anti-

[16] *Id.* ¶ 4.
[17] *Id.* ¶ 3.
[18] *Id.* ¶ 322.
[19] *Id.* ¶¶ 287, 289.
[20] *Id.* ¶¶ 296-97.
[21] *Id.* ¶¶ 175-77.
[22] *Id.* ¶¶ 304-07.

vaping curricula offered outside of regular school hours.[23] The State alleges that youth vaping has disrupted school operations in Anchorage, requiring school administrators and security personnel to confiscate hundreds of vape devices and address related disciplinary issues.[24] The State alleges that the student vaping trend is occurring in schools across the state of Alaska.[25]

The State further alleges that it has invested substantial amounts of time and money to respond to the increase in youth vaping statewide.[26] Since 1994, the Department of Health and Social Services has implemented a Tobacco Prevention and Control ("TPC") Program.[27] One of the program's goals is to prevent youth from starting to use tobacco products.[28] The TPC Program has given presentations to administrators, school nurses, and teachers regarding the best practices for developing, implementing, and enforcing tobacco-free policies and developing alternative forms of discipline.[29] The TPC Program also coordinates with the Rural Alaska Community Action Program to raise awareness about nicotine addiction.[30]

School districts across Alaska have sought assistance from state agencies to address the problem of youth vaping, but the TPC Program does not have the

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[23] *Id.* ¶¶ 310-11.
[24] *Id.* ¶¶ 325-27.
[25] *Id.* ¶ 328.
[26] *Id.* ¶ 329.
[27] *Id.* ¶ 331.
[28] *Id.* ¶ 332.
[29] *Id.* ¶ 334.
[30] *Id.* ¶ 335.

resources or staffing necessary to "combat the crisis of youth vaping and nicotine addiction created by Defendants' conduct."[31] The State has provided support and assistance to schools to provide trainings and seminars, and to develop educational materials about youth vaping and its health impact.[32]

II. LEGAL STANDARD

Under Civil Rule 12(b)(6), a claim may be dismissed for "failure to state a claim upon which relief can be granted." "[M]otions to dismiss are disfavored, and should be granted only if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief."[33] "The fact it is possible to prove a claim based on the facts alleged is all that is necessary to make the statement of claim good as against a motion to dismiss."[34] Yet "[w]hile 'the [Rule 12(b)(6)] threshold may be low, it is real.'"[35] To survive a motion to dismiss, the complaint must "allege a set of facts 'consistent with and appropriate to some enforceable cause of action.'"[36]

When reviewing a motion to dismiss under Rule 12(b)(6), courts construe the complaint liberally and treat all factual allegations as true.[37] In Alaska, "[i]f, within the framework of the complaint, evidence may be introduced which will

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[31] *Id.* ¶¶ 332-34.
[32] *Id.* ¶ 340.
[33] *Alleva v. Municipality of Anchorage*, 467 P.3d 1083, 1088 (Alaska 2020) (quotations omitted).
[34] *Maier v. City of Ketchikan*, 403 P.2d 34, 38 (Alaska 1965).
[35] *Valdez Fisheries Dev. Ass'n, Inc. v. Alyeska Pipeline Serv. Co.*, 45 P.3d 657, 667 (Alaska 2002).
[36] *Guerrero v. Alaska Hous. Fin. Corp.*, 6 P.3d 250, 253 (Alaska 2000) (quoting *Odom v. Fairbanks Mem'l Hosp.* 999 P.2d 123, 128 (Alaska 2000)).
[37] *Guerrero*, 6 P.3d at 253 (citing *Kollodge v. State*, 757 P.2d 1024, 1026 n.4 (Alaska 1988)).

sustain a grant of relief to the plaintiff, the complaint is sufficient."[38] Though a complaint does not require detailed factual allegations, "even on a motion to dismiss, a court is not obliged to accept as true 'unwarranted factual inferences and conclusions of law.'"[39] Where a complaint fails to allege facts regarding the elements of a claim, dismissal is proper.[40]

III. DISCUSSION

A. Preemption

1. Express Preemption

JLI argues that the State's claims are preempted by the federal Tobacco Control Act ("TCA"). The TCA's preemption clause provides, in relevant part:

> (A) In general. No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product 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.
>
> (B) Exception. Subparagraph (A) does not apply to 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, or relating to fire safety standards for tobacco products.[41]

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[38] *Kollodge*, 757 P.2d at 1025 (quoting *Linck v. Barokas & Martin*, 667 P.2d 171, 173 (Alaska 1983)).
[39] *Forrer v. State*, 471 P.3d 569, 585 (Alaska 2020) (quoting *Haines v. Comfort Keepers, Inc.*, 393 P.3d 422, 429 (Alaska 2017)).
[40] *Kollodge*, 757 P.2d at 1028 (citing 2A J. Moore & J. Lucas, Moore's Fed. Prac. ¶ 12.07, at 12-63 (1986)).
[41] 21 U.S.C. § 387p(a)(2).

JLI argues that, through this litigation, the State is attempting to impose additional labeling or product standard requirements, which is prohibited by the express preemption clause. While the State makes factual allegations in the Complaint related to the labeling and design of JLI's products, the State's claims of UTPA violations, negligence, and civil conspiracy are not based on the labeling or design of JLI's products. Instead, those claims are based on the marketing, advertising, and promotion of JLI's products.

The TCA preemption clause is not one which "sweeps widely."[42] The plain language of the TCA preemption clause allows the imposition of additional requirements relating to the "sale, distribution, . . . advertising and promotion of, or use of" tobacco products. Because the State's claims of UTPA violations, negligence, and civil conspiracy are based on the marketing, advertising, and promotion of JUUL products, they are not expressly preempted by the TCA.

The State's public nuisance claim, however, is based on allegations that JLI created a public nuisance by "*producing*, promoting, distributing, and marketing JUUL products for use by underage users."[43] As discussed above, to the extent that the claim is based on the advertising, promotion, and distribution of JLI's products, the claim is not expressly preempted by the TCA. But to the extent that the State alleges a claim based on JLI's production of JUUL products, the claim is expressly preempted by the TCA. The plain language of the TCA preemption

[42] *Nat'l Meat Assoc. v. Harris*, 565 U.S. 452, 459 (2012).
[43] Compl. ¶ 361 (emphasis added).

clause prohibits the imposition of additional requirements relating to "tobacco product standards, . . . misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products." The portion of the public nuisance claim which is based on the production and related standards for JUUL products is expressly preempted by the TCA.

2. Implied Preemption

The Defendants argue that the State's fraud-on-the-FDA theory is impliedly preempted by the Food, Drug, and Cosmetic Act (FDCA) under *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001). In *Buckman*, the United States Supreme Court held that state-law fraud-on-the-FDA claims were impliedly preempted by the FDCA because such claims conflict with the federal statutory scheme empowering the FDA to punish and deter fraud against the FDA.[44] The fraud claims at issue in *Buckman* existed "solely by virtue of the FDCA disclosure requirements."[45]

Unlike the claim at issue in *Buckman*, the claims here do not exist solely by virtue of a federal statute, and the State is not asserting a fraud-on-the-FDA claim. In *Allergan, Inc. v. Athena Cosmetics, Inc.*, the Federal Circuit Court of Appeals similarly distinguished the facts of its case from those in *Buckman* and held that the FDCA does not impliedly preempt California's unfair competition law.[46] In

[44] 531 U.S. at 348.
[45] *Id.* at 353.
[46] 738 F.3d 1350 (Fed. Cir. 2013).

Allergan, the Federal Circuit concluded that there was no "clear purpose by Congress to preempt the state law claim at issue" and "the California Health Code is not an obstacle to realizing federal objectives."[47]

The Alaska Supreme Court has recognized that conflict preemption "occurs when a state law and a federal law are in conflict, either because compliance with both state and federal law is impossible or because the state law 'stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress.'"[48] The State's claims for UTPA violations, public nuisance, negligence, and civil conspiracy are based on the marketing, advertisement, promotion, and sale of JUUL products. While the Complaint includes allegations about statements made to the FDA, the claims asserted by the State are not based on those statements. Alaska state laws regarding unfair trade practices, negligence, public nuisance, and civil conspiracy do not stand as an obstacle to accomplishment and execution of the full purposes and objectives of Congress, including the FDA's role in enforcing the TCA or fraud against the FDA. In addition, there is no indication that compliance with both the federal TCA and Alaska state laws regarding unfair trade practices, negligence, public nuisance, and civil conspiracy is impossible. Accordingly, the State's claims are not impliedly preempted by the TCA.

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[47] *Id.* at 1355-56.
[48] *Allen v. State, Dep't of Health & Social Services*, 203 P.3d 1155, 1162 (Alaska 2009) (quoting *Roberts v. State, Dep't of Revenue*, 162 P.3d 1214, 1223 (Alaska 2007)).

B. UTPA Claim

1. State's UTPA Allegations

The State alleges that the Defendants committed unfair and deceptive acts or practices in violation of AS 45.50.471 by "market[ing], distribut[ing], and sell[ing] vape products in a manner that targets children and adolescents and intentionally attracts them to begin or continue to use vape products," in violation of declared Alaska public policy.[49] The State also alleges that Defendants' "unfair and deceptive conduct occurred in the course of advertising, offering for sale, selling, and/or distributing e-cigarettes, flavor pods, and accessories, and involved soliciting and receiving money or property."[50]

2. UTPA

The State asserts violations under AS 45.50.471(b)(4), (b)(11), and (b)(12).[51] Those UTPA subsections include the following acts:

> (4) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;
> . . .
> (11) engaging in any other conduct creating a likelihood of confusion or of misunderstanding and that misleads, deceives, or damages a buyer or a competitor in connection with the sale or advertisement of goods or services;
> . . .
> (12) using or employing deception, fraud, false pretense, false promise, misrepresentation, or knowingly concealing, suppressing,

[49] Compl. ¶ 355. The State cites AS 11.76.100, AS 11.76.105, and AS 11.51.130(a)(1) as statements of Alaska public policy.
[50] *Id.* ¶ 357.
[51] *Id.* ¶ 354.

> or omitting a material fact with intent that others rely upon the concealment, suppression, or omission in connection with the sale or advertisement of goods or services whether or not a person has in fact been misled, deceived, or damaged.[52]

The UTPA covers practices that are either unfair or deceptive.[53] "As a general matter, a prima facie case of unfair or deceptive acts or practices under the UTPA requires proof of two elements: '(1) that the defendant is engaged in trade or commerce; and (2) that in the conduct of trade or commerce, an unfair act or practice has occurred.'"[54]

The Alaska Supreme Court has adopted a multi-factored approach to determine whether a practice is unfair under AS 45.50.471(a):

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers....[55]

It is not necessary that all three factors are present for a finding of unfairness.[56] "A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser degree it meets all three."[57] In contrast, "whether an

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[52] AS 45.50.471(b)(4), (11), (12).
[53] *Merdes & Merdes, P.C. v. Leisnoi, Inc.*, 410 P.3d 398, 412 (Alaska 2017).
[54] *Id.*at 410 (Alaska 2017) (quoting *Kenai Chrysler Ctr., Inc. v. Denison*, 167 P.3d 1240, 1255 (Alaska 2007)).
[55] *Id.* (quoting *Borgen v. A &M Motors, Inc.*, 273 P.3d 575, 590 (Alaska 2012)).
[56] *Alaska Tr., LLC v. Ambridge*, 372 P.3d 207, 226 n.113 (Alaska 2016).
[57] *Id.*

act is 'deceptive' is determined simply by asking whether it 'has the capacity or tendency to deceive.'"[58]

3. Dormant Commerce Clause and Extraterritoriality

JLI moves to dismiss the UTPA claim on the grounds that the State's attempts to regulate JLI's actions violate the dormant Commerce Clause and the presumption that state laws do not have extraterritorial effect.

The UTPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce."[59] The United States Supreme Court has recognized that "[l]aws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states."[60] The dormant Commerce Clause is violated when "the practical effect of [a State law] is to control conduct beyond the boundaries of the State."[61] "[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."[62]

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[58] *Merdes & Merdes, P.C.*, 410 P.3d at 410 (quoting *Borgen v. A &M Motors, Inc.*, 273 P.3d 575, 591 (Alaska 2012)).
[59] AS 45.50.471(a).
[60] *Huntington v. Attrill*, 146 U.S. 657, 669 (1892). *See also Bigelow v. Virginia*, 421 U.S. 809, 822-23 (1975) ("The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State.").
[61] *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).
[62] *Id.*

Here, the State asserts that it is enforcing the UTPA as to the Defendants' commerce in Alaska. When a state enforces a statute regulating conduct occurring within the state, the application of the statute is not impermissibly extraterritorial.[63] To the extent that the State's UTPA claim is based on allegations that the Defendants engaged in unfair or deceptive acts in Alaska, the application of the UTPA does not violate the dormant Commerce Clause.

4. Allegations Against Altria Defendants

The State alleges that Defendants have engaged in unfair and deceptive acts in the course of selling e-cigarette products in Alaska. The State lists categories of alleged unfair and deceptive acts against all Defendants related mainly to the marketing of the products.[64] The State also includes some specific allegations against the Altria Defendants, such as "fraudulently representing Mint JUUL pods as a 'tobacco or menthol-based product' despite their knowledge that mint flavor is popular with youth."[65] The State also alleges that the Altria Defendants fraudulently assert that JUUL products were never marketed to youth.[66]

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[63] *See Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1029 (9th Cir. 2021) ("A state law is not impermissibly extraterritorial unless it directly regulates conduct that is wholly out of state."); *see also Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 433 (9th Cir. 2014) (California statute requiring captioning did not have extraterritorial application because website could enable captioning option for California visitors); *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1308 (10th Cir. 2008) (Kansas statute not held to have prohibited effect on extraterritorial commerce where there was only speculation that Kansas statute would have extraterritorial effect and State conceded that website advertisement does not trigger application of the statute even though website is accessible in Kansas); *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 194 (2d Cir. 2007) (Connecticut statute did not violate dormant Commerce Clause where State stipulated that law applies only to sales in Connecticut).
[64] Compl. ¶¶ 350, 354.
[65] *Id.* ¶ 352.
[66] *Id.*

Throughout the Complaint, the State alleges that the Altria Defendants joined JLI in "cover-up activities" related to the sale of e-cigarette products to youth, including the "Make the Switch" campaign and other distribution, retail and advertising services.[67]

The Altria Defendants argue that the Complaint fails to state a UTPA claim against them because the Complaint relies on conclusory statements which fail to distinguish between the named defendants, and the Complaint fails to assert specific factual allegations to support the UTPA claim against the Altria Defendants. The State responds that the Complaint sufficiently pleads that the Altria Defendants engaged in conduct in violation of the UTPA. The State argues that the Complaint includes allegations regarding the "Make the Switch" campaign because it was "part of a larger misleading spin campaign to cover up JLI's previous targeting of youth while maintaining sales to a customer base comprised largely of teens, deflect public scrutiny, and continue selling JUUL products to a predominantly underage customer base."[68]

The only question before the Court at this time is whether the Altria Defendants have shown that the State can prove no set of facts that would entitle it to relief.[69] The answer is no. The State's allegations on their face are sufficient to state a UTPA claim against the Altria Defendants. The State's allegations that the

[67] *Id.* ¶¶ 262-66; 276-78.
[68] Opp'n at 8.
[69] *Alleva v. Municipality of Anchorage*, 467 P.3d 1083, 1088 (Alaska 2020).

Altria Defendants have participated in deceptive marketing campaigns, and made fraudulent representations, in connection with selling e-cigarette products suffice to state a UTPA claim.

5. Statements to the FDA

The State also asserts that Altria's statements made in an October 25, 2018 letter to the FDA and on an earnings call the same day support the UTPA claim. The Defendants argue that such statements cannot be the basis for a UTPA claim because: (1) the letter to the FDA did not involve or pertain to a consumer transaction; (2) communications with the government are protected by the *Noerr-Pennington* doctrine; (3) "fraud-on-the-agency" claims are preempted; (4) Altria's statements in the letter to the FDA and earnings call show that Altria was not working to advance JLI's interests; and (5) Altria's letter did not impact the FDA's policy decisions.

The arguments raised regarding the statements made to the FDA do not warrant dismissal of the claims. Instead, the arguments are more properly raised in a motion in limine or other evidentiary objection. "Under the *Noerr-Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct."[70] The Ninth Circuit Court of Appeals has described that the *Noerr-Pennington* rule of statutory construction requires courts to "avoid burdening

[70] *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006).

conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise."[71] In *Sosa v. DIRECTV, Inc.*, the Ninth Circuit Court of Appeals held that DIRECTV was immune from liability for RICO claims based on sending demand letters to settle claims under the Federal Communications Act.[72]

But here, the State's claims are not based on the Defendants' statements made to the FDA. The State has alleged violations of the UTPA based on the Defendants' marketing of products. The State points to the Defendants' statements to the FDA to show the Defendants' knowledge, state of mind, or intent: "Defendant Altria represented to the FDA that products and practices like Defendant JLI's were contributing to the youth vaping crisis and that Altria's 'action plan' for addressing youth vaping included voluntarily removing its pod-based products from the market – but then, less than two months later, Altria invested $12.8 billion in JLI."[73] The State has sufficiently alleged that Defendants' conduct in the marketing of products was unfair or deceptive. Defendants are not immune from liability under the UTPA based on the *Noerr-Pennington* doctrine.

Other arguments raised regarding the statements to the FDA, including whether such evidence is admissible, the relevancy of such evidence, or what such

[71] *Id.* at 932.
[72] *Id.* at 942.
[73] Compl. ¶ 352.

evidence may establish, are premature at this time. Defendants' Motions to Dismiss the UTPA claim are denied.

C. Public Nuisance Claim

The State asserts a novel public nuisance claim against all Defendants based on Alaskans' right "to be free from conduct that injures their health."[74] The State further alleges that the Defendants "have substantially and unreasonably interfered with that right by creating, contributing to, and assisting in the creation of a public health crisis of youth vaping."[75] Specifically, the State alleges that the Defendants' actions of "producing, promoting, distributing, and marketing JUUL products for use by underage users" have created a public nuisance.[76] The State alleges that JLI marketed directly to youth, and advertised, marketed, and distributed JUUL products at sampling events without providing any nicotine warning.[77] The State also alleges that the Altria Defendants created a public nuisance "[b]y investing billions of dollars in JLI and actively working to promote the sale and spread of JUUL products with knowledge of JLI's practice of marketing its products to youth and failure to control youth access to its products."[78]

[74] *Id.* ¶ 360.
[75] *Id.* ¶ 360-61.
[76] *Id.* ¶ 361.
[77] *Id.* ¶ 365.
[78] *Id.* ¶ 365.

JLI argues that the Complaint fails to state a public nuisance claim because the State fails to allege an interference with a public right, and the public nuisance claim is actually a veiled claim for product liability or negligence. The Altria Defendants similarly argue that the Complaint fails to state a public nuisance claim because the claim does not assert interference with a "public or common right." In addition, the Altria Defendants argue that the State's claims are derivative of harm allegedly incurred by minors who used JUUL products, and that the Altria Defendants did not have a tangible role in creating or carrying out the alleged public nuisance.

The State responds that it has stated a claim for public nuisance because the Defendants interfered with a public right, namely public health, by significantly contributing to a youth vaping crisis by changing societal norms regarding youth tobacco use. The State also argues that the claim is based not on the JUUL product itself, but on JLI's alleged conduct and the consequences of its conduct. In addition, the State points to specific allegations against the Altria Defendants regarding their role in the development of a public relations strategy designed to mislead the public about JLI's role in the youth cigarette crisis.[79] The State further responds that its claims are not derivative of individual injuries.

[79] *Id.* ¶¶ 205–20.

The Alaska Supreme Court has not defined the scope of an actionable common law claim for public nuisance.[80] In *Friends of Willow Lake, Inc. v. State*, the Alaska Supreme Court assumed that a public nuisance claim requires a plaintiff to show that the defendant created "an unreasonable interference with a right common to the general public."[81] In *Maier v. City of Ketchikan*, the Alaska Supreme Court reversed the dismissal of a public nuisance claim because a conceivable set of facts could be proved against a city for its maintenance of high voltage electrical wires.[82] The Alaska Supreme Court clarified that a plaintiff must show that the "condition would be injurious to those who came in contact with [the high voltage electrical wires] in the exercise of a public or common right."[83]

In *Friends of Willow Lake* and *Maier*, the Alaska Supreme Court cited the Restatement (Second) of Torts. According to the Restatement (Second) of Torts, a public nuisance is an unreasonable interference with a public right, which may include circumstances where "the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the

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[80] *See Budd v. City of Houston*, 2000 WL 34545798, at *3 (Alaska Mar. 22, 2000) (reversing summary judgment because public nuisance claim may exist against a city for allowing the public uncontrolled access to a right of way where there were alleged public health hazards, pollution problems, and unauthorized open fires).
[81] *Friends of Willow Lake, Inc. v. State, Dep't of Transp. & Pub. Facilities, Div. of Aviation & Airports*, 280 P.3d 542, 548 (Alaska 2012) (quoting Restatement (Second) of Torts § 821B(1) (Am. Law. Inst. 1979)).
[82] *Maier v. City of Ketchikan*, 403 P.2d 34, 38 (Alaska 1965).
[83] *Id.*

public convenience."[84] In order to constitute a public nuisance, there must be more than interference with the rights of a large number of persons. The Restatement explains the requirement that there must be interference with a public right:

> There must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.[85]

Black's Law Dictionary similarly defines public nuisance as "[a]n unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property."[86]

In *Budd v. City of Houston*, the Alaska Supreme Court addressed a public nuisance claim involving use and enjoyment of property, and indicated that a public nuisance includes "any 'conduct regarded as so inimical to so many people' that government units are entitled to enjoin the conduct through criminal prosecution or through abatement to 'protect the general welfare.'"[87] The Alaska legislature expressly has identified a variety of public nuisances, including animal and agricultural products in violation of regulations,[88] wire fences,[89] unlicensed

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[84] Restatement (Second) of Torts § 821B(2) (Am. Law Inst. 1979).
[85] *Id.*, Comment g.
[86] *Nuisance*, Black's Law Dictionary (11th ed. 2019).
[87] *Budd*, 2000 WL 34545798, at *3 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 90, at 643 (5th ed. 1984) and citing 58 Am. Jur. 2d *Nuisances* §§ 33-34, 36, 49 (1989)).
[88] AS 03.05.050.
[89] AS 03.30.030.

nursing practice,[90] places used for certain illegal activities,[91] fish and game equipment in violation of regulations,[92] and unlawful advertising.[93] The Alaska legislature has not identified the unlawful sale, use, or marketing of e-cigarettes as a public nuisance. But there are criminal laws regarding e-cigarettes in Alaska. Alaska law prohibits selling or giving an electronic smoking product or a product containing nicotine to a minor.[94] Similarly, it is illegal for a minor to possess tobacco, electronic smoking products, or products containing nicotine.[95]

Courts in other states have addressed the question of whether there exists an actionable public nuisance claim for the marketing and selling of e-cigarettes, opiods, and firearms, and have reached different conclusions. Recently, the Oklahoma Supreme Court concluded that Oklahoma public nuisance law does not apply to the manufacturing, marketing, and selling of prescription opiods.[96] The Oklahoma Supreme Court rejected the state's characterization of the suit as an interference with a public right of health.[97] Other courts similarly have held that the failure to identify a collective public right is fatal to a public nuisance claim.[98] Conversely, other courts have held that a public nuisance action can be maintained

[90] AS 08.68.360.
[91] AS 09.50.170.
[92] AS 16.05.800.
[93] AS 19.25.150.
[94] AS 11.76.109.
[95] AS 11.76.105.
[96] *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021).
[97] *Id.* at 727.
[98] *See State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 455 (R.I. 2008); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004); *see also State v. Juul Labs, Inc.*, 2020 WL 8257333 at *5 (D. Ct. Colo. Dec. 14, 2020).

where there is an allegation of widespread harm and costs to the public.[99] For other courts, the analysis has turned on whether there is proximate cause or sufficient control over the source of interference with a public right, resulting in dismissal of the public nuisance claim where there is not proximate cause or sufficient control over the source of interference with a public right.[100]

Here, the State alleges that Alaskans "have a right to be free from conduct that injures their health."[101] The State asserts that "Defendants by their affirmative acts and omissions, have substantially and unreasonably interfered with that right by creating, contributing to, and assisting in the creation of a public health crisis of youth vaping."[102] The facts alleged are not akin to the examples provided in the Restatement (Second) of Torts regarding interference with public health, such as keeping diseased animals, maintaining a pond breeding malarial mosquitoes, or threat of communication of small pox.[103] In *State ex rel. Hunter*, the Oklahoma Supreme Court similarly distinguished the asserted claim before it from cases where it is "anticipated that an injury to the public health would occur, e.g.,

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[99] *See In re JUUL Labs, Inc., Mktg., Sales Practices, and Products Liab. Litig.*, 497 F. Supp. 3d. 552, 648 (N.D. Cal. 2020); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142-43 (Ohio 2002).

[100] *See Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 671-73 (8th Cir. 2009); *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540-42 (3d Cir. 2001); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 707 (9th Cir. 2001); *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 920-21 (8th Cir. 1993); *Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192 (N.Y. App. Div. 2003); *but see Ileto v. Glock Inc.*, 349 F.3d 1191, 1213 (9th Cir. 2003) (lack of control not fatal to public nuisance claim).

[101] Compl. ¶ 360.

[102] *Id.*

[103] Restatement (Second) of Torts § 821B, Comments b, g.

diseased animals, pollution in drinking water, or the discharge of sewer on property."[104]

This Court declines to recognize a public nuisance cause of action based on a public right as broad as proposed by the State in this case – a right to be free from conduct that injures Alaskans' health. To the extent that the State focuses on the problem of youth vaping, the State has failed to identify a collective right of the public. Instead, the State has identified potential individual injuries. The allegation that Defendants' conduct has impacted a large number of persons does not convert the alleged interference to an interference with a public right.[105] The Restatement distinguishes between an individual right not to be defrauded, and a public right common to all members of the general public. The State's allegations that the Defendants have promoted, distributed, and marketed JUUL products for use by youth do not satisfy the threshold requirement of a public nuisance action being based on a right common to the general public. In addition, the State's allegations of a misleading or deceptive marketing campaign do not constitute a "significant interference with the public health." Because the Complaint in this case fails to identify a public right, the public nuisance claim is dismissed.

Defendants' Motions to Dismiss the public nuisance claim are granted.

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[104] *State ex rel. Hunter*, 499 P.3d at 727.
[105] *See* Restatement (Second) of Torts § 821B, Comment g.

D. Negligence Claim

The Defendants seek to dismiss the negligence claim on the grounds that they did not owe a duty to the State. In addition, the Altria Defendants argue that the State fails to articulate conduct showing a breach of any duty, or injury caused by a breach.

The State asserts that the Defendants owed the State the following duties: (1) "to exercise due care in the marketing, advertisement, promotion, and sale of e-cigarette products," including a duty not to cause foreseeable harm to others; (2) "to exercise due care in promoting and selling potent and addictive nicotine products;" and (3) "not to make deceptive or misleading statements about the risks of using Defendants' products."[106] In addition, the State points to numerous paragraphs in the Complaint alleging conduct by the Altria Defendants constituting breach, together with injuries sustained by the State.

"'In order to establish a cause of action for negligence, a plaintiff must show a duty of care owed to him by the defendant, a breach of that duty, and that damage was proximately caused by the breach.'"[107] Alaska courts apply "a three-step process to determine whether a duty of care exists."[108] First, courts determine whether a statute imposes a duty.[109] If no statutory duty exists, then courts

[106] Compl. ¶¶ 374–76.
[107] *Est. of Mickelsen ex rel. Mickelsen v. North-Wend Foods, Inc.*, 274 P.3d 1193, 1198 (Alaska 2012) (quoting *Shooshanian v. Kodiak Elec. Ass'n*, 672 P.2d 455, 464 (Alaska 1983)).
[108] *Id.* at 1199.
[109] *Id.*

determine if the case "falls in the class of cases controlled by existing precedent."[110] Finally, if neither statute nor case law impose a duty of care, then courts apply the public policy factors set forth in *D.S.W. v. Fairbanks North Star Borough School District* to determine whether an actionable duty of care exists.[111]

Here, the State points to criminal laws as a source of duty imposed on the Defendants. Specifically, the State relies on the laws prohibiting selling or giving electronic smoking products to minors, possession of such products by minors, and contributing to the delinquency of a minor.[112] While the statutes allow the State to prosecute an individual or company for a criminal offense, they do not serve as a source of a duty of care to the State.

Because there is no statutory duty and this case is not controlled by existing precedent, the Court must consider the following *D.S.W.* factors to decide whether a duty of care exists:

> The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.[113]

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[110] *Id.*
[111] *Id.*
[112] AS 11.51.130, AS 11.76.105, AS 11.76.109.
[113] *D.S.W. v. Fairbanks North Star Borough School District*, 628 P.2d 554, 555 (Alaska 1981).

The Court's analysis of the factors at this time is based solely on the allegations in the Complaint because this case is at the stage of a motion to dismiss.

The Alaska Supreme Court has stated that "'[t]he most important single criterion for imposing a duty of care is foreseeability.'"[114] The State alleges that the Defendants' marketing, advertisement, and promotion of e-cigarette products to youth has directly facilitated the spread of youth vaping in Alaska. To the extent that the State alleges harm in the form of increased youth vaping and increased costs to the State to address increased youth vaping, the State has alleged foreseeable harm.[115] The State has also sufficiently alleged that it suffered injury and that there is a close connection between the Defendants' conduct and the harm suffered by the State. JLI argues that the State's alleged injuries are for the downstream economic consequences of individuals using JLI's products, not for JLI's products or deceptive marketing. But that dispute "should be resolved in the context of causation, not duty."[116] The State has alleged conduct that is morally blameworthy and contrary to existing policies and laws prohibiting possession of e-cigarette products by minors, the sale and giving of such products to minors, and the encouragement and inducement of minors to possess such products. Recognizing a duty of care is consistent with the policy of preventing future harm and will not impose new burdens on the Defendants as there are

[114] *Bolieu v. Sisters of Providence in Wa.*, 953 P.2d 1233, 1236 (Alaska 1998) (quoting *Division of Corrections v. Neakok*, 721 P.2d 1121, 1125 (Alaska 1986)).
[115] Compl. ¶¶ 329, 370.
[116] *Bolieu*, 953 P.2d at 1237.

already laws in place prohibiting deceptive and unfair trade practices in the marketing of goods. The last factor in the analysis is the availability, cost and prevalence of insurance for the risk involved, but the Court is unable to address this factor in the context of a motion to dismiss. Overall, the *D.S.W.* factors weigh in favor of finding a duty of care owed by Defendants to exercise reasonable care in the marketing, advertising, promotion, and sale of e-cigarette products.

The Altria Defendants have not shown that the State can prove no set of facts that would entitle it to relief. The State has sufficiently alleged that the Altria Defendants have failed to exercise reasonable care in the marketing, advertising, promotion, and sale of e-cigarette products, and the injuries sustained by the State are separate and distinct from injuries sustained by individual consumers.

Defendants' Motions to Dismiss the negligence claim are denied.

E. Civil Conspiracy Claim

The Defendants seek to dismiss the State's civil conspiracy claim on the grounds that civil conspiracy requires an underlying wrong, and without a public nuisance, negligence, or UTPA claim, the State cannot assert civil conspiracy as an independent tort. JLI also argues that the civil conspiracy claim is not based on a separate set of facts, but on the same facts underlying the claims. The Altria Defendants also argue that the allegations against it are insufficient to state a claim.

The Alaska Supreme Court has not decided yet whether civil conspiracy constitutes a separate wrong.[117] Other states and treatises indicate that civil conspiracy consists of "(1) an agreement between two or more individuals, (2) to do an unlawful act or to do a lawful act in an unlawful way, (3) resulting in injury to plaintiff inflicted by one or more of the conspirators, and (4) pursuant to a common scheme."[118] In addition, other states have held that a civil conspiracy claim must be predicated on "a cognizable and separate underlying claim."[119]

Here, because there is a cognizable UTPA claim, there is no basis to dismiss the civil conspiracy claim at this time. The State alleges that the Defendants conspired to market e-cigarettes to youth and made false, deceptive, and misleading statements in furtherance of the conspiracy and to conceal JLI's marketing to youth.[120] The State has alleged conduct and statements by both Defendants in furtherance of the conspiracy.[121] Because the State has alleged facts sufficient to state a claim, Defendants' Motions to Dismiss the civil conspiracy claim are denied.

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[117] *Davis v. King Craig Tr.*, 2017 WL 2209879, at *3 n.9 (Alaska May 17, 2017).
[118] 16 Am. Jur. 2d Conspiracy § 53; *see also Gossen v. JPMorgan Chase Bank*, 819 F. Supp. 2d 1162, 1171 (W.D. Wash. 2011); *Morasch v. Hood*, 222 P.3d 1125, 1132 (Or. App. 2009).
[119] *Gossen*, 819 F. Supp. 2d at 1171; *see also Cain v. Champion Window Co. of Albuquerque, LLC*, 164 P.3d 90, 98-99 (N.M. Ct. App. 2007); 15A C.J.S. *Conspiracy* § 8 (2022) ("[A] plaintiff alleging a conspiracy must ordinarily have a valid underlying claim, and dismissal of the substantive tort claim defeats the related claim for a civil conspiracy.").
[120] Compl. ¶¶ 384-85, 395-96.
[121] *Id.* ¶¶ 388-96.

IV. CONCLUSION

For the foregoing reasons, the Altria Defendants' Motion to Dismiss [Case Motion # 10] and JLI's Motion to Dismiss [Case Motion # 13] are granted in part as follows: Count Two of the Complaint asserting a public nuisance claim is dismissed. Defendants are directed to file an Answer to the Complaint as to the remaining UTPA, negligence, and civil conspiracy claims within 20 days of the date of this Order.

DATED this 23rd day of February 2022, at Anchorage, Alaska.

Yvonne Lamoureux
Yvonne Lamoureux
Superior Court Judge

I certify that on 2-23-22
a copy of the above was emailed to:

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