

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

**In the Matter of**

**Altria Group, Inc.  
a corporation;**

**and**

**JUUL Labs, Inc.  
a corporation.**

**DOCKET NO. 9393**

**COMPLAINT COUNSEL'S POST-TRIAL BRIEF**

Mark Woodward  
Acting Deputy Director

Jennifer Milici  
Chief Trial Counsel

Dominic E. Vote  
Assistant Director

Peggy Bayer Femenella  
Deputy Assistant Director

Federal Trade Commission  
Bureau of Competition  
600 Pennsylvania Ave., N.W.  
Washington, DC 20580  
Telephone: (202) 326-2470  
Facsimile: (202) 326-3496  
Email: jbell@ftc.gov

Stephen Rodger  
James Abell  
Jeanine Balbach  
Michael Blevins  
Erik Herron  
Frances Anne Johnson  
Joonsuk Lee  
Meredith Levert  
Nicole Lindquist  
Michael Lovinger  
David Morris  
Kristian Rogers  
Attorneys

Dated: August 23, 2021

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... iv

INTRODUCTION ..... 1

ARGUMENT ..... 4

I. Background ..... 4

    A. The Rise of E-Cigarettes ..... 4

        1. E-Cigarettes Are a Fast Growing Tobacco Segment ..... 4

        2. Closed-System E-Cigarettes Differ From Open-Tank E-Cigarettes..... 5

        3. Closed-System E-Cigarettes Include Cigalikes and Pod-Based Products ..... 6

        4. FDA Regulations Restrict the Number of Firms That Can Compete in the E-Cigarette Market..... 6

    B. The Market for Closed-System E-Cigarettes in the United States Is Dominated by a Very Small Group of Competitors ..... 7

        1. Altria ..... 7

        2. JLI ..... 8

        3. Reynolds ..... 8

        4. ITG..... 9

        5. JTI ..... 9

        6. NJOY ..... 9

    C. Altria Was a Meaningful and Well-Positioned Competitor That Was Committed to the E-Cigarette Category over the Long Term..... 9

        1. Altria Was a Major Competitor in Closed-System E-Cigarettes ..... 9

        2. Altria Was Committed to Competing in E-Cigarettes Long Term, and Was Well Positioned to Do So ..... 11

    D. JLI’s Growth Threatened Altria ..... 13

    E. As Part of Its Agreement to Acquire an Interest in JLI, Altria Agreed to—and Did—Exit the E-Cigarette Business..... 13

    F. The Transaction Includes a Non-Compete Provision Prohibiting Altria from Competing in E-Cigarettes ..... 15

II. The Relevant Market Is Sales of Closed-System E-Cigarettes in the United States..... 16

    A. Closed-System E-Cigarettes Are a Relevant Product Market Based on the *Brown Shoe* Factors ..... 18

- 1. It Is Appropriate to Include Both Cigalikes and Pod-Based Products in the Same Closed-System E-Cigarette Market ..... 20
- 2. It Is Appropriate to Exclude Open-Tank E-Cigarettes from the Relevant Product Market ..... 24
- B. The Hypothetical Monopolist Test Confirms That Closed-System E-Cigarettes Are a Relevant Product Market..... 26
- III. Respondents’ Agreement for Altria to Exit the E-Cigarette Market Violates Section 1 of the Sherman Act ..... 28
- A. Altria and JLI Agreed that Altria Would Exit the U.S. E-Cigarette Market In Exchange for a Stake in JLI ..... 28
- 1. The Totality of the Evidence Shows that Respondents Agreed that Altria Would Exit the U.S. E-Cigarette Market in Exchange for a Stake in JLI ..... 29
- a. The Evidence Shows That Altria and JLI Agreed that Altria Would Exit E-cigarettes..... 31
- b. The Timeline of Events Supports an Inference that Altria Exited Pursuant to an Agreement with JLI..... 38
- c. Altria Ceasing to Operate Its E-cigarette Business Benefited Altria and JLI..... 45
- d. Exiting E-Cigarettes Was Against Altria’s Economic Interest Absent the JLI Transaction ..... 47
- e. The January 2020 Amendment to the Non-Compete Shows that but for the JLI Transaction, Altria would have Continued Competing in E-cigarettes..... 50
- 2. Altria’s Proffered Explanations For Its Decision to Exit the E-Cigarette Market Are Pretextual And Inconsistent with the Evidence ..... 51
- a. Altria’s Purported Commercial Challenges Are Pretextual and Inconsistent with the Evidence ..... 51
- b. Altria’s Purported Concerns About Youth E-Cigarette Use are Pretextual and Inconsistent with the Evidence..... 54
- c. Altria’s Purported Regulatory Challenges Are Pretextual and Inconsistent with the Evidence ..... 56
- B. Respondents’ Agreement is Unlawful under the Rule of Reason ..... 58
- 1. The Agreement Has Harmed and Will Continue to Harm Consumers..... 60
- 2. Respondents Cannot Show Procompetitive Justifications for Their Agreement..... 65
- 3. Even if Respondents Could Show Procompetitive Justifications for Their Agreement, The Agreement is Not Necessary to Achieve Them..... 66
- 4. The Competitive Harm Outweighs Any Benefits..... 67

- C. Standing Alone, the Written Non-Compete Also Violates Section 1 of the Sherman Act ..... 68
  - 1. Respondents Cannot Show the Non-Compete Agreement is Ancillary to An Otherwise Lawful Transaction..... 69
  - 2. Even if the Non-Compete Agreement Was Ancillary to An Otherwise Lawful Transaction, the Non-Compete Agreement Violates the Rule of Reason ..... 70
- IV. The Transaction Violates Section 7 of the Clayton Act..... 72
  - A. Applicable Legal Standard Under Section 7 ..... 72
  - B. The Transaction Is Presumptively Unlawful in the Market for Sales of Closed-System E-Cigarettes in the U.S..... 75
  - C. Evidence of Competitive Harm Bolsters the Presumption..... 77
  - D. Respondents Cannot Rebut the Strong Presumption of Harm ..... 83
    - 1. Entry and Expansion Will Not Be Timely, Likely, or Sufficient to Counteract the Anticompetitive Effects of the Transaction ..... 83
      - a. *De Novo* Entry is Unlikely..... 83
      - b. Repositioning By Existing U.S. Tobacco Companies Will Not Replace Lost Competition ..... 85
      - c. Repositioning by PMI Will Not Replace Lost Competition..... 86
    - 2. The Claimed Efficiencies Are Insufficient to Rebut the Presumption of Harm ..... 89
      - a. Respondents’ Claimed Efficiencies Cannot be Verified ..... 90
      - b. Respondents’ Claimed Efficiencies Are Not Merger-Specific..... 92
  - E. The Transaction Also Violates Section 7 Under the Potential Competition Theory ..... 94
    - 1. It Is Most Appropriate to View the Transaction as a Merger Between Actual Competitors..... 94
    - 2. Even Evaluating the Transaction Under the Actual Potential Competition Theory, the Transaction Is Likely to Result in Substantial Anticompetitive Effects..... 95
- V. Requested Relief..... 98
- CONCLUSION..... 99

## TABLE OF AUTHORITIES

### Cases

<i>Am. Tobacco Co. v. United States</i> , 328 U.S. 781 (1946).....	30
<i>Apani Sw., Inc. v. Coca-Cola Enters., Inc.</i> , 300 F.2d 620 (5th Cir. 2002) .....	59
<i>Axon Enterprise, Inc. v. FTC</i> , 986 F.3d 1173 (9th Cir. 2021) .....	4
<i>Bhan v. NME Hosps., Inc.</i> , 929 F.2d 1404 (9th Cir. 1991).....	60
<i>Blue Cross &amp; Blue Shield United of Wis. v. Marshfield Clinic</i> , 65 F.3d 1406 (7th Cir. 1995) 1, 59	
<i>Board of Trade v. United States</i> , 246 U.S. 231 (1918).....	58
<i>Brown Shoe Co. v. United States</i> , 370 U.S. 294 (1962) .....	17, 18, 73
<i>California Dental Ass’n v. FTC</i> , 526 U.S. 756 (1999) .....	58
<i>Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.</i> , 996 F.2d 537 (2d Cir. 1993) ...	66
<i>Chicago Bridge &amp; Iron Co. N.V. v. FTC</i> , 534 F.3d 410 (5th Cir. 2008) .....	74
<i>City of Tuscaloosa v. Harcros Chems., Inc.</i> , 158 F.3d 548 (11th Cir. 1998) .....	29, 50
<i>Cont’l Ore Co. v. Union Carbide &amp; Carbon Corp.</i> , 370 U.S. 690 (1962) .....	30, 36
<i>Deutscher Tennis Bund v. ATP Tour, Inc.</i> , 610 F.3d 820 (3d. Cir. 2010) .....	58,70
<i>Esco Corp. v. United States</i> , 340 F.2d 1000 (9th Cir. 1965) .....	30, 36
<i>Fragale &amp; Sons Beverage Co. v. Dill</i> , 760 F.2d 469 (3d. Cir. 1985) .....	51
<i>FTC v. Actavis, Inc.</i> , 570 U.S. 136 (2013).....	68
<i>FTC v. Arch Coal</i> , 329 F. Supp. 2d 109 (D.D.C. 2004) .....	16
<i>FTC v. B.A.T. Industries</i> , 104 F.T.C. 852 (1986) .....	96
<i>FTC v. Cardinal Health</i> , 12 F. Supp. 2d 34 (D.D.C. 1998).....	91, 92
<i>FTC v. CCC Holdings</i> , 605 F. Supp. 2d 26 (D.D.C. 2009) .....	16, 83, 89

<i>FTC v. H.J. Heinz Co.</i> , 246 F.3d 708 (D.C. Cir. 2001) .....	74, 75, 89
<i>FTC v. Indiana Fed’n of Dentists</i> , 476 U.S. 447 (1986) .....	16, 58
<i>FTC v. Peabody Energy Corp.</i> , 492 F. Supp. 3d 865 (E.D. Mo. 2020).....	<i>passim</i>
<i>FTC v. Penn State Hershey Med. Ctr.</i> , 838 F.3d 327 (3d Cir. 2016) .....	73, 74
<i>FTC v. PPG Indus.</i> , 798 F. 2d 1500 (D.C. Cir. 1986) .....	75, 76
<i>FTC v. Procter &amp; Gamble Co.</i> , 386 U.S. 568 (1967).....	82
<i>FTC v. Ruberoid Co.</i> , 343 U.S. 470 (1952) .....	98
<i>FTC v. Staples (“Staples I”)</i> , 970 F. Supp. 1066 (D.D.C. 1997) .....	90
<i>FTC v. Staples, Inc. (“Staples II”)</i> , 190 F. Supp. 3d 100 (D.D.C. 2016).....	<i>passim</i>
<i>FTC v. Steris Corp.</i> , 133 F. Supp. 3d 962 (N.D. Ohio 2015) .....	95
<i>FTC v. Swedish Match</i> , 131 F. Supp. 2d 151 (D.D.C. 2000).....	85
<i>FTC v. Sysco Corp.</i> , 113 F. Supp. 3d 1 (D.D.C. 2015).....	16, 17, 83, 92
<i>FTC v. Tronox Ltd.</i> , 332 F. Supp. 3d 187 (D.D.C. 2018).....	17, 75, 76
<i>FTC v. Univ. Health, Inc.</i> , 938 F.2d 1206 (11th Cir. 1991).....	73, 76
<i>FTC v. Wilh. Wilhelmsen Holding ASA</i> , 341 F. Supp. 3d 27 (D.D.C. 2018).....	17, 89
<i>Hospital Corp. of America v. FTC</i> , 807 F.2d 1381 (7th Cir. 1986).....	74
<i>Impax Labs., Inc. v. FTC</i> , 994 F.3d 484 (5th Cir. 2021) .....	<i>passim</i>
<i>In re Benco Dental Supply Co.</i> , Docket No. 9379, 2019 WL 5419393 (F.T.C. Oct. 15, 2019) ..	16, 27, 28, 29
<i>In re Flat Glass Antitrust Litig.</i> , 385 F.3d 350 (3d Cir. 2004).....	28
<i>In re High Fructose Corn Syrup Antitrust Litig.</i> , 295 F.3d 651 (7th Cir. 2002) .....	28
<i>In re McWane, Inc.</i> , Docket No. 9351, 2012 WL 4101793 (F.T.C. Sept. 14, 2012).....	47

*In re McWane, Inc.*, Docket No. 9351, 2014 WL 556261 (F.T.C. January 30, 2014) ..... 96

*In re Otto Bock HealthCare N. America, Inc.*, Docket No. 9378, 2019 WL 5957363  
(F.T.C. Nov. 1, 2019)..... 17, 18

*In re PolyGram Holding, Inc.*, 136 F.T.C. 310 (July 24, 2003) ..... 98

*In re Polypore Int’l, Inc.*, Docket No. 9237, 2010 WL 9549988 (F.T.C. Nov. 5, 2010).. 17, 74, 82

*In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968 (N.D. Ohio 2015)..... 30, 50

*In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 988 F. Supp. 2d 696 (E.D. La. 2013)..... 48

*In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51 (2d Cir. 2012)..... 29

*In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827 (N.D. Ill. 2010)..... 69

*In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145 (D. Kan. 2012)..... 38

*In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d 728 (8th Cir. 2014) ..... 29

*Int’l Shoe Co. v. FTC*, 280 U.S. 291 (1930) ..... 94

*Intel Corp. v. Fortress Invest. Group LLC*, 511 F. Supp. 3d 1006 (N.D. Cal. 2021) ..... 60

*Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)..... 1, 58

*Lektro-Vend*, 660 F.2d at 265; *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001) ... 68, 69, 70

*Mercantile Tex. Corp.*, 638 F.2d at 1265-70) ..... 95

*N. Am. Soccer League, LLC v. U.S. Soccer Fed’n Inc.*, 883 F.3d 32 (2d Cir. 2018)..... 66

*Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978)..... 58

*NCAA v. Alston*, -- U.S. --, 141 S. Ct. 2141 (2021) ..... 1, 59

*Ohio v. Am. Express Co.*, -- U.S. --, 138 S. Ct. 2274 (2018)..... 16, 58, 66

*In re Otto Bock HealthCare N. America, Inc.*, Docket No. 9378, 2019 WL 2118886, at \*28  
(F.T.C. May 6, 2019) 2019 WL 2118886, at \*28 ..... 85

*Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990) ..... 58, 68

*Perceptron, Inc. v. Sensor Adaptive Machines, Inc.*, 221 F.3d 913 (6th Cir. 2000)..... 69

*Polypore Int’l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012)..... 17, 95

*Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011) ..... 27, 59

*Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133 (2000)..... 57

*Rossi v. Standard Roofing, Inc.*, 156 F.3d 452 (3d. Cir. 1998)..... 51

*Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) ..... 69

*Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982)..... 95

*Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) ..... 58

*Toys “R” Us v. FTC*, 221 F.3d 928 (7th Cir. 2000) ..... 47

*U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986 (11th Cir. 1993) ..... 17

*United States Greater Buffalo Press, Inc.*, 402 U.S. 459 (1971)..... 54

*United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) ..... 68, 69

*United States v. Aetna Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017) ..... 76, 78, 93, 94

*United States v. Anthem, Inc.*, 236 F. Supp. 3d 171 (D.D.C. 2017) ..... 78

*United States v. Apple, Inc.*, 791 F.3d 290 (2nd Cir. 2015)..... 45

*United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013)..... 29, 47

*United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990)..... 74, 75, 77

*United States v. Bazaarvoice, Inc.*, No. 13-cv-133, 2014 U.S. Dist. LEXIS 3284 (N.D. Cal. Jan. 8, 2014) ..... 76

*United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850 (6th Cir. 2005)..... 98

*United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957) ..... 73, 97, 98

*United States v. Energy Sols.*, 265 F. Supp. 3d 415 (D. Del. 2017) ..... 54



*United States v. First Nat’l State Bancorp.*, 499 F. Supp. 793 (D. N.J. 1980) ..... 83

*United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) ..... 82

*United States v. H&R Block*, 833 F. Supp. 2d 36 (D.D.C. 2011) ..... 85, 89, 90, 92

*United States v. Marine Bancorp.*, 418 U.S. 602 (1974) ..... 83, 95

*United States v. Philadelphia Nat’l Bank*, 374 U.S. 321 (1963) ..... 74

*United States v. W.T. Grant Co.*, 345 U.S. 629 (1953)..... 94

*W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85 (3d Cir. 2010)..... 29

*White v. RM Packer Co., Inc.*, 635 F.3d 571 (1st Cir. 2011)..... 51

*Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981)..... 73, 95, 96

**Statutes**

15 U.S.C. § 1 (Sherman Act) ..... 16, 27, 28

15 U.S.C. § 18 (Clayton Act)..... 16, 72

15 U.S.C. § 45 (FTC Act)..... 4, 27, 28

21 U.S.C. § 387j(c) ..... 57

**Other Authorities**

C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM L. REV. 927 (2016) ..... 66

U.S. Dep’t of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (“*Merger Guidelines*”) ..... *passim*

Joshua P. Davis & Ryan J. McEwan, *Deactivating Actavis: The Clash Between the Supreme Court and (Some) Lower Courts*, 67 RUTGERS U.L. REV. 557 (2015)..... 59

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1203 (4th Ed. 2013-2018)..... 72

Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* ¶ 14.03(b) (4th ed. 2011)..... 29

William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV.  
393 (2011) ..... 29

## INTRODUCTION

This case comes down to a single fundamental truth: but for Altria Group, Inc.’s (“Altria”) partial acquisition of JUUL Labs, Inc. (“JLI”), Altria would be independently competing aggressively in the closed-system e-cigarette market today. That competition, on price, shelf-space, and innovation, should be benefitting consumers today and into the future. Instead, Altria agreed to exit the e-cigarette market in exchange for a cut of market-leader JLI’s profits. Altria’s partial acquisition of JLI (the “Transaction”), which provides Altria a 35 percent equity stake in JLI and prohibits Altria from competing in the e-cigarette market now and in the future, violates the Sherman, Clayton, and FTC Acts.

Agreements not to compete among horizontal competitors are the “*bête noir*” of antitrust law. *Impax Labs., Inc. v. FTC*, 994 F.3d 484, 493 (5th Cir. 2021). While even price-fixing schemes leave some forms of competition remaining, market allocation agreements, like the agreement at issue here, are particularly hard to justify because they remove *all* forms of competition, present and future. *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995). Because the anticompetitive effects are so apparent, market allocation agreements are typically *per se* violations of the antitrust laws. *See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). But even under the more thorough “rule of reason” framework, which asks the court to weigh anticompetitive effects against procompetitive benefits, the Transaction is clearly anticompetitive. *See NCAA v. Alston*, - U.S. --, 141 S. Ct. 2141, 2160 (2021). The testimony, documents, and economic analysis presented in the case confirm that the Transaction and its associated agreements have, and will continue to, harm competition in the U.S. market for closed-system e-cigarettes.

Prior to the Transaction, Altria was committed to the U.S. e-cigarette market. CCF ¶¶ 93-108. Recognizing that e-cigarettes were a growing category, and that the category was

accelerating the decline of traditional cigarettes, Altria sought to lead the market. CCF ¶ 96. Altria competed in the e-cigarette market through its Nu Mark group and the MarkTen brand. CCF ¶ 129. Altria was an aggressive competitor, especially after JLI entered the field and rapidly began to claim market share. CCF ¶¶ 1418-92. To compete with JLI, Altria discounted its e-cigarette products and invested in product improvements. Altria invested heavily in e-cigarettes with the goal of creating a next-generation product more attractive to consumers than anything on the market, including JLI's JUUL device. CCF ¶¶ 1553-64. Consumers lost the benefit of that competition, now and in the future, when Altria exited the market. Further, the market for the sale of closed-system e-cigarettes in the United States has significant entry barriers, limiting the number of current and potential competitors, and with Altria's exit, leaving the market with less competition. CCF ¶¶ 1767-822.

Throughout the negotiations leading to the Transaction, JLI was clear with Altria that as a "precept" of any deal, Altria would need to stop competing in the U.S. e-cigarette market. CCF ¶ 869. JLI was not concerned about *how* Altria ceased to compete, just that it did. CCF ¶ 898. In advance of an August 2018 meeting between the principal deal negotiators, JLI sent Altria a proposed term-sheet offering Altria three doors through which to exit the e-cigarette market: Altria could "divest . . . contribute [or] **cease to operate**, [its e-cigarette] assets . . . ." CCF ¶ 894 (emphasis added). When Altria initially struck the provision, JLI delivered a blunt message: "This is not acceptable to us." CCF ¶ 918. Altria ultimately agreed to JLI's demand by removing its pod-based e-cigarettes in October 2018 and shutting down its e-cigarette division entirely in December that year. CCF ¶¶ 987, 989. In addition, as part of the Transaction, Respondents signed a written non-compete agreement (the "Non-Compete") barring Altria from selling e-cigarettes or conducting any research and development ("R&D") on its own

or with third-party partners for a period of at least six years. CCF ¶ 998. The two agreements— (1) Respondents’ agreement for Altria to exit the e-cigarette market, and (2) the written Non-Compete—are each, standing alone, sufficiently anticompetitive to violate the antitrust laws.

Respondents argue that Altria exited the U.S. e-cigarette market for various reasons unrelated to the Transaction, but the evidence belies their claims. First, Altria claims that its e-cigarette products were not commercially viable, however, the record shows that Altria was the #2 e-cigarette producer in the U.S. market prior to JLI’s entry, and still the #3 producer after JLI’s meteoric rise. CCF ¶¶ 1738, 1740. It is not a defense to an antitrust claim to point out that the company would have preferred to be more successful. The evidence shows that Altria and all other e-cigarette competitors were well aware that they would need to lose money before they made money in this rapidly growing market. CCF ¶¶ 1132-43. Finally, while Altria publicly claimed that it pulled its MarkTen Elite and Apex products in October 2018 due to concerns about youth usage of e-cigarettes, behind closed doors, Altria was narrowing in on a final deal with JLI, the public face of the youth vaping epidemic. CCF ¶¶ 811-15.

Despite communications suggesting otherwise, JLI argues that it was unaware of Altria’s decision to pull its products from the market. But the record suggests that Altria faced obstacles to divesting or contributing its e-cigarette business in light of an intellectual property agreement between Altria and its international affiliate Phillip Morris International (“PMI”). CCF ¶ 925. In fact, the record further suggests that JLI, through its counsel, was aware of these obstacles. CCF ¶¶ 847, 931-32. But even if it were true that JLI had just assumed Altria would divest its e-cigarette assets following an antitrust investigation by the FTC, it does not change the antitrust analysis. JLI offered Altria three doors through which to exit the market and Altria chose the third door, electing to shut down its e-cigarette business rather than contribute it to JLI or divest

it to a third party. CCFE ¶¶ 987, 989. Regardless of how Altria accomplished its exit, the effect of Respondents' agreement is the same: the complete elimination of current and future price, innovation, and shelf-space competition from Altria in the U.S. closed-system e-cigarette market. CCFE ¶¶ 1408-1730.

Against this clear evidence of anticompetitive harm, the only procompetitive benefit Respondents point to is speculation about Altria's ability to enhance and accelerate JLI's efforts to obtain approval from the FDA. CCFE ¶¶ 1731-34, 1871-72. These claims are unverifiable and they are not merger-specific. CCFE ¶¶ 1891-1995. In any event, these speculative "benefits" are incapable of counteracting the consumer harm caused by the Transaction. CCFE ¶¶ 1766, 1888. Indeed, even a finding a minimal competitive harm is sufficient to find liability in a case like this, where there is so little to weigh on the other side of the ledger.<sup>1</sup>

The evidence presented in the record and at the evidentiary hearing clearly establishes that Respondents have violated both Section 5 of the FTC Act, applying Sherman Act Section 1 principles, and Section 7 of the Clayton Act. The appropriate remedy is the complete divestiture of Altria's equity stake in JLI and the immediate termination of the Non-Compete agreement.

## ARGUMENT

### I. Background

#### A. The Rise of E-Cigarettes

##### 1. E-Cigarettes Are a Fast Growing Tobacco Segment

Electronic cigarettes ("e-cigarettes")<sup>2</sup> are critically important to the future of tobacco companies because they represent a fast-growing category, whereas traditional combustible cigarette volumes have declined steadily for decades. CCFE ¶ 59. Prior to 2017, demand for

<sup>1</sup> Respondents also claim the FTC's administrative proceedings are unconstitutional. This claim should be rejected. See *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173, 1177 (9th Cir. 2021) (upholding dismissal of Respondents' motion to disqualify the Administrative Law Judge).

<sup>2</sup> The terms e-cigarettes and e-vapor products are used interchangeably.

traditional cigarettes had decreased at a fairly consistent rate of around two to four percent annually. CCFF ¶ 60. To offset this volume decline, cigarette manufacturers have relied on regular price increases. CCFF ¶ 61. In late 2017, however, the e-cigarette category began to experience rapid growth. CCFF ¶ 62. This rapid growth was driven almost entirely by JLI’s e-cigarette product, JUUL. CCFF ¶ 64. As JUUL’s sales increased, the rate of decline in traditional cigarette volumes accelerated significantly. CCFF ¶ 70. This accelerated decline threatened the ability of traditional tobacco companies, such as Altria, to maintain their profit levels. CCFF ¶¶ 72-73.

Given the long-term decline in combustible cigarettes—and the acceleration of that decline with the rise of JUUL—{ [REDACTED]

[REDACTED] }. CCFF ¶ 74. Altria acknowledged the critical importance of its participation in the e-cigarette category, with its then-CEO remarking in the *Wall Street Journal* that, “[a]t a time when e-vapor is going to grow rapidly and likely cannibalize the consumers we have in our core business, if you don’t invest in the new areas you potentially put your ability to deliver that financial result at risk.” CCFF ¶ 108. Other major tobacco manufacturers also acknowledged the critical importance of the e-cigarette category to their futures. CCFF ¶¶ 109-117.

## 2. Closed-System E-Cigarettes Differ From Open-Tank E-Cigarettes

There are two main types of e-cigarettes: closed-system e-cigarettes and open-tank e-cigarettes. CCFF ¶ 75. A closed-system e-cigarette only works with the sealed, pre-filled pods or cartridges specifically designed for the device, and consumers cannot fill or refill those pods and cartridges with nicotine-containing e-liquid themselves. CCFF ¶ 76. In contrast, open-tank e-cigarettes have refillable tanks that users manually fill with e-liquid, which allows them to select

from and mix a wide assortment of (often-flavored) e-liquids. CCFE ¶ 215. Open-tank e-cigarettes tend to be larger than closed-system e-cigarettes and allow users to customize many aspects of the device, such as the mouthpiece or coil. CCFE ¶¶ 219-20.

### **3. Closed-System E-Cigarettes Include Cigalikes and Pod-Based Products**

Closed-system e-cigarettes consist of cigalikes and pod-based products, which offer similar user experiences. While cigalikes and pod-based products have a different size and shape, there are numerous similarities between the two products. CCFE ¶¶ 278-89. Cigalikes and pod-based products both use sealed e-liquid pods or cartridges. CCFE ¶ 286. Both cigalikes and pod-based products may, or may not, contain nicotine salts. CCFE ¶ 288. Both forms can be rechargeable devices into which new pre-filled pods or cartridges can be inserted. CCFE ¶¶ 285-86. Both cigalikes and pod-based products are sold primarily through the multi-outlet and convenience store (“MOC”) channel. CCFE ¶¶ 157, 374.

### **4. FDA Regulations Restrict the Number of Firms That Can Compete in the E-Cigarette Market**

FDA regulations limit participation in the U.S. e-cigarette industry. In 2016, the FDA issued regulations requiring that manufacturers of new e-cigarette products submit a Premarket Tobacco Application (“PMTA”) and obtain a marketing authorization before they can sell their products. ¶ 198. Existing e-cigarettes that were on the market prior to the effective date of the “Deeming Rule” (August 8, 2016) could remain on the market, but the manufacturers of those products were required to file a PMTA by a certain deadline. CCFE ¶ 203. That deadline changed several times but was ultimately set at September 9, 2020. CCFE ¶ 199. Manufacturers can submit PMTAs for new e-cigarette products after the deadline, but they cannot sell those products until receiving PMTA approval. CCFE ¶ 200. Preparing a PMTA requires a significant amount of resources—time, personnel, and money—which can range from { [REDACTED]



[REDACTED] }. CCFE ¶ 202.

**B. The Market for Closed-System E-Cigarettes in the United States Is Dominated by a Very Small Group of Competitors**

Prior to December 2018, closed-system U.S. industry participants viewed the major competitors as JLI, Reynolds, Altria, JTI, NJOY, and ITG. CCFE ¶ 118. [REDACTED]

[REDACTED] } CCFE ¶ 1754.

**1. Altria**

Altria is the long-standing market leader for tobacco products in the U.S. CCFE ¶ 119. Altria established an e-cigarette-focused subsidiary called Nu Mark around 2012. CCFE ¶ 125. Nu Mark introduced MarkTen cigalikes in 2013. CCFE ¶ 134. Prior to October 25, 2018, Altria sold a broad portfolio of e-cigarette products including cigalike products MarkTen, MarkTen Bold with nicotine salts, and MarkTen XL, and pod-based products MarkTen Elite and Apex. CCFE ¶ 129. Altria acquired the rights to MarkTen Elite in late 2017 from a Chinese contract manufacturer, Smoore, and Altria introduced MarkTen Elite in the U.S. in February 2018. CCFE ¶ 138.

Altria licensed Apex from the global tobacco giant PMI, pursuant to a strategic partnership focused on next-generation nicotine products. CCFE ¶¶ 143-45. That strategic partnership (internally called Project Vulcan) included a Joint Research, Development and Technology Sharing Agreement (“JRDTA”) pursuant to which Altria and PMI would “collaborate to develop the next generation of e-vapor products for commercialization in the United States by Altria and in markets outside the United States by PMI.” CCFE ¶ 145. Altria introduced Apex into e-commerce around August 2018. CCFE ¶ 144.

[REDACTED]

[REDACTED] } CCFF ¶ 133.

**2. JLI**

JLI, then operating under the name Pax Labs, introduced its signature “JUUL” product, a closed-system pod-based e-cigarette, in 2015. CCFF ¶ 154. The JUUL product emerged as the leading closed-system e-cigarette with over \$1 billion in sales in 2018. CCFF ¶ 160. Sales of JUUL began growing rapidly towards the end of 2017 and JUUL soon overtook Altria’s MarkTen and Reynold’s Vuse to become the top selling closed-system e-cigarette. CCFF ¶ 159. Prior to Altria’s exit, JLI was the clear market leader in the closed-system e-cigarette market, with a share of 51 percent. CCFF ¶ 162.

**3. Reynolds**

Reynolds American, Inc. (“Reynolds”) is the second-largest tobacco company in the U.S. after Altria. CCFF ¶ 164. [REDACTED]

[REDACTED] } CCFF ¶ 166. In August 2018, Reynolds introduced the Vuse Alto, a pod-based product. CCFF ¶ 165. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶ 170. [REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶ 1031. Prior to Altria’s exit,

Reynolds’ share of the closed-system e-cigarette market was approximately 22.7 percent. CCFF ¶ 171.

**4. ITG**

ITG Brands (“ITG”) is the third-largest tobacco company in the U.S. CCF ¶ 173. ITG sells e-cigarettes under the brand name blu. CCF ¶ 176. [REDACTED] [REDACTED] [REDACTED] } CCF ¶ 114. Prior to Altria’s exit, ITG had approximately 6.6 percent of the closed-system e-cigarette market. CCF ¶ 181.

**5. JTI**

JTI is a tobacco company that sells the Logic e-cigarette brand in the U.S. CCF ¶ 183. Prior to Altria’s exit, Logic’s share of the closed-system e-cigarette market was approximately 3.7 percent. CCF ¶ 187.

**6. NJOY**

[REDACTED] } CCF ¶ 189. Like Altria and Reynolds, NJOY’s pod-based device, NJOY Ace, was licensed from Smoore. CCF ¶ 193. Prior to Altria’s exit, NJOY’s share of the closed-system e-cigarette market was around 1.8 percent. CCF ¶ 195.

**C. Altria Was a Meaningful and Well-Positioned Competitor That Was Committed to the E-Cigarette Category over the Long Term**

**1. Altria Was a Major Competitor in Closed-System E-Cigarettes**

Through its Nu Mark subsidiary, Altria was a significant competitor in closed-system e-cigarettes. [REDACTED] [REDACTED]. CCF ¶ 1091. Prior to its exit, both Nu Mark’s pod-based MarkTen Elite and its MarkTen cigalikes were growing in sales volume. CCF ¶¶ 1097, 1099. [REDACTED]



## 2. Altria Was Committed to Competing in E-Cigarettes Long Term, and Was Well Positioned to Do So

Through its public investor statements and its actions, including investing hundreds of millions of dollars in acquiring, developing, marketing, and selling e-cigarettes, Altria consistently demonstrated its long-term commitment to competing in the U.S. market for e-cigarettes. CCFF ¶¶ 409-26. As a large, well-capitalized company with market-leading tobacco products, and extensive distribution, sales, shelf space, marketing, R&D, and regulatory infrastructure, Altria was well positioned to be a significant long-term competitor in e-cigarettes. CCFF ¶¶ 493-531.

Indeed, just as Altria's Marlboro brand dominates the combustible cigarette market, Altria's oft-stated goal was to "be the U.S. Leader in authorized, non-combustible, reduced risk products." CCFF ¶ 533. Altria's CEO, Howard Willard, recognized that "long-term leadership won't be achieved overnight" but stated that Nu Mark had "a diverse product portfolio and a pipeline of promising products in development" and was "well positioned to achieve long-term leadership in the category, bolstered by [Altria's] world-class marketing, sales and distribution[,] and regulatory capabilities." CCFF ¶ 103. Altria's senior executives repeatedly acknowledged that e-cigarettes were critical to the company's future. CCFF ¶¶ 92-108, 409-504.

Altria backed up its stated aspirations with serious capital investments. Altria's annual spend on e-cigarette product development grew more than tenfold over a five-year period: from a mere \$7 million in 2012 to a projected \$90 million in 2017. CCFF ¶ 413. Altria CEO Willard testified that Altria "spent well over half a billion dollars, maybe up to a billion dollars, investing in the e-vapor category." CCFF ¶ 428. The company spent \$350 million dollars on its Center for Research and Technology, which housed "more than 400 scientists, physicians, product developers, engineers, regulatory experts and others who are developing innovative products,"

including e-cigarettes. CCFE ¶ 452. In November 2017, Altria’s former Chairman and CEO proudly boasted to investors that the company’s “extraordinary financial engine” confers advantages for competing in innovative, reduced-risk products like e-cigarettes. CCFE ¶ 454. With massive resources and a demonstrated willingness to use them, Altria left no doubt as to its intent to compete in the e-cigarette market over the long term.

Altria’s long-term commitment to the e-cigarette market is also apparent from its willingness to engage in R&D efforts to create innovative e-cigarette products, even when some of those efforts might not succeed. Richard Jupe, Altria’s VP of Product Development, explained: “[with] innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success. [. . .] So innovation is like that. You’ve got to have a lot of different bets.” CCFE ¶ 1559. Moreover, even failed product development efforts still provided valuable learning for Altria’s ongoing R&D efforts. CCFE ¶ 1563.

Altria’s rapid rollout of MarkTen Elite in 2018 illustrates the advantages Altria has in the e-cigarette market. Relying on Altria’s extensive relationships with retailers, its established distribution network and sales force, and its ability to fund promotions, Nu Mark was able to take Elite from zero retail stores to 25,000 retail stores between February and September of 2018. CCFE ¶ 1124. Altria believed it would have Elite in 40,000 stores by the end of 2018. CCFE ¶ 1126. Indeed, Altria’s ownership of the leading tobacco brands in other categories, such as Marlboro cigarettes, gives it leverage to get retailers to carry new products—and to give those products critical shelf placement. CCFE ¶ 501. In 2018, Altria launched a \$100 million campaign to obtain additional shelf-space for its innovative tobacco products, focused on its e-cigarette products. CCFE ¶ 431. As part this initiative, Altria invested in e-cigarette shelf space, or

“fixtures,” to be installed at retail locations and enticed retailers to participate by offering payments. CCFE ¶¶ 1461, 1815, 1907.

Market participants agree that, given its resources, Altria was a long-term threat in the e-cigarette market. For instance, a JLI board member described Altria as “definitely well-equipped to do well in the space.” CCFE ¶ 497. And an ITG executive testified that he expected the MarkTen Elite brand to grow “[g]iven Altria’s resources as the largest tobacco company in the U.S.” CCFE ¶ 498.

#### **D. JLI’s Growth Threatened Altria**

The JUUL product took off dramatically in 2017, quickly eclipsing Altria’s MarkTen and {REDACTED} to become the leader in e-cigarettes. CCFE ¶¶ 156, 158, 546. JLI’s rise posed a dangerous new threat to Altria on two fronts: it stood in the way of Altria’s goal of leading the e-cigarette category and threatened to disrupt Altria’s lucrative traditional cigarette business. CCFE ¶¶ 59-74, 96-105. Altria quickly realized the gravity of the situation and tried to develop strategic options on how to respond, including pursuing a strategic transaction with JLI. CCFE ¶ 68. Indeed, Altria executives identified acquiring all or part of JLI as “Plan A,” and identified focusing on Altria’s own e-cigarette business as “Plan B.” CCFE ¶ 1718. Both plans clearly involved Altria participating in the closed-system e-cigarette market, either through JLI or on its own.

#### **E. As Part of Its Agreement to Acquire an Interest in JLI, Altria Agreed to—and Did—Exit the E-Cigarette Business**

During negotiations with Altria, JLI made clear that it would only be willing to do a transaction if Altria agreed to stop competing in e-cigarettes, now and in the future. CCFE ¶¶ 880-924; *see infra* § III.A.1.a. Altria conveyed to JLI that it was willing to meet this demand, and ultimately did so by withdrawing its e-cigarette products from the market prior to executing its

Transaction with JLI. CCF 944-94; *see infra* § III.A.1.a. Key points in the sequence of events include:

- On July 27, 2018, JLI’s deal adviser at Goldman Sachs, who had recently spoken directly to Altria CEO Howard Willard, wrote that he was under the impression that Altria would “shut down” its e-cigarette business. CCF 673, 675, 969-71.
- On July 30, 2018, JLI sent an initial term sheet reflecting Altria’s commitment to stop competing. CCF 684-86. The term sheet required Altria to divest, contribute, or “cease to operate” its existing e-cigarette business, and to commit to a forward-looking non-compete. CCF 684-86.
- Willard’s talking points for an August 6, 2018 call with JLI stated that “Altria has come a long way to accommodate [JLI] in this process,” including by “demonstrating flexibility with our existing vapor business, if necessary, in order to form the partnership.” CCF 695-99.
- In its August 9, 2018 term sheet, Altria tried to walk back its commitment to exit e-cigarettes, striking the language requiring it to divest, contribute, or “cease to operate” its existing e-cigarette business, and reserving the right to compete with its existing e-cigarette products and products under development. CCF 704-707.
- On August 15, 2018, JLI responded by telling Altria in writing that it was “not acceptable” for Altria to retain any right to compete through its existing e-cigarette products, products under development, or future products. CCF 722. JLI required that Altria confirm it was aligned on this issue prior to going forward with a planned meeting in San Francisco on August 18, 2018. CCF 720-24.
- At the August 18, 2018 meeting, Altria assured JLI that it had no substantive disagreement with JLI’s requirement that it exit e-cigarettes and enter a non-compete. CCF 730.
- On October 5, 2018, Altria sent JLI a letter confirming its commitment not to compete in e-cigarettes, “in a manner consistent with previous discussions.” CCF 782.
- On October 15, 2018, Altria sent JLI a term sheet that included a reference to Altria “otherwise exiting” the e-cigarette business. CCF 800-01.
- On October 25, 2018, Altria withdrew its pod-based e-cigarettes MarkTen Elite and Apex from the market, due to a purported concern that “pod-based products significantly contribute to the rise in youth use of e-vapor products.” CCF 812, 987.



- Four days later, on October 29, 2018, Altria and JLI reached agreement on terms. CCFE ¶¶ 820-25.
- On December 7, 2018, Altria announced the discontinuation of its remaining e-cigarette products. CCFE ¶ 848.

Less than two weeks later, on December 20, 2018, Altria and JLI executed and closed the Transaction. CCFE ¶¶ 33-34.

#### **F. The Transaction Includes a Non-Compete Provision Prohibiting Altria from Competing in E-Cigarettes**

On December 20, 2018, Altria and JLI announced Altria's \$12.8 billion investment in JLI, with Altria taking a 35 percent non-voting equity interest in JLI. CCFE ¶¶ 33-34, 861. As part of the Transaction, Altria and JLI entered into a number of agreements, including a Services Agreement,<sup>4</sup> a Relationship Agreement, and an Intellectual Property License Agreement. CCFE ¶ 37.

The Relationship Agreement includes the Non-Compete barring Altria from participating in all aspects of the e-cigarette business, including R&D, for an initial term of six years, which is indefinitely extendable by three-year increments if not terminated by either party. CCFE ¶ 38. In effect, Altria "commit[ted] to conduct e-vapor operations exclusively through [JLI]." CCFE ¶ 40. The Non-Compete is comprehensive in that it prohibits Altria from engaging in the following activities directly or indirectly:

- (1) own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor Business; (2) take actions with the purpose of preparing to engage in the e-Vapor Business, including through engaging in or sponsoring research and development activities; or (3) Beneficially Own any equity interest in any Person, other than an aggregate of not more than four and nine-tenths percent (4.9%) of the equity interests of any Person which is publicly listed on a national stock exchange, that engages directly or indirectly in the e-Vapor

---

<sup>4</sup> Under the original Services Agreement, Altria agreed to provide some shelf space and a variety of services to JLI. CCFE ¶ 44. However, on January 28, 2020, Respondents executed an Amended Services Agreement that eliminated all services except for regulatory support services relating to JLI's PMTA submissions. CCFE ¶¶ 46, 50-52.

Business . . . (all such actions set forth in clauses (1) through (3), to “**Compete**” or “**Competition**”). CCFE ¶ 1001.

The Non-Compete contains a provision allowing Altria to “engage in the business relating to (I) its Green Smoke, MarkTen . . . and MarkTen Elite brands, in each case, *as such business is presently conducted.*” CCFE ¶ 1002 (emphasis added). But as discussed *infra* in Sections III.A.1.a. and III.C.2., this provision has no impact on the scope of the Non-Compete because Altria announced “the discontinuation of production and distribution of all *MarkTen* and *Green Smoke* e-vapor products” on December 7, 2018, almost immediately prior to the signing of the Non-Compete, and halted its sales of MarkTen Elite products in October 2018. CCFE ¶¶ 987, 989-90, 1003-04.

## II. The Relevant Market Is Sales of Closed-System E-Cigarettes in the United States

A relevant market has two components, reflecting the different dimensions of where competition occurs: (1) the relevant product market and (2) the relevant geographic market.<sup>5</sup> “The ‘relevant product market’ identifies the product and services with which the defendants’ products compete,” while “the ‘relevant geographic market’ identifies the geographic area in which the defendants compete in marketing their products or services.” *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 37 (D.D.C. 2009). The parties have stipulated that the United States is the relevant geographic market. CCFE ¶ 408.

The relevant product market “identifies the product and services with which the defendants’ products compete.” *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 24 (D.D.C. 2015)

---

<sup>5</sup> The market definition discussion included in this section is primarily relevant to Count II, an illegal acquisition under Section 7 of the Clayton Act, 15 U.S.C. § 18. For Count I, an illegal agreement under Section 1 of the Sherman Act, 15 U.S.C. § 1, “[w]hen ‘horizontal restraints involve agreements between competitors not to compete in some way, [the Supreme Court] concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive.’” *In re Benco Dental Supply Co.*, Docket No. 9379, 2019 WL 5419393, at \*70 (F.T.C. Oct. 15, 2019) (quoting *Ohio v. Am. Express Co.*, -- U.S. -- 138 S. Ct. 2274, 2285 n.7 (2018)); see also *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460 (1986) (explaining that “the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition”).

(quoting *FTC v. Arch Coal*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004)). “A market’s ‘outer boundaries’ are determined by the ‘reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.’” *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 198 (D.D.C. 2018) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). “A relevant product market need not be defined around a *single* product.” *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 884 (E.D. Mo. 2020) (emphasis in original); *see also United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966) (“We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities.”). “Defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other.” *Polypore Int’l, Inc. v. FTC*, 686 F.3d 1208, 1217 (11th Cir. 2012) (quoting *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995 (11th Cir. 1993)).

In defining a relevant product market, courts consider “‘practical indicia’ of market definition such as industry or public recognition of the market as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” *In re Otto Bock HealthCare N. America, Inc.*, Docket No. 9378, 2019 WL 5957363, at \*13 (F.T.C. Nov. 1, 2019) (citing *Brown Shoe*, 370 U.S. at 325); *see also In re Polypore Int’l, Inc.*, Docket No. 9237, 2010 WL 9549988, at \*11 (F.T.C. Nov. 5, 2010).

Courts and the Commission also rely on the approach prescribed by the *Horizontal Merger Guidelines* (“*Merger Guidelines*”) in defining relevant product markets.<sup>6</sup> See, e.g., *FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 47, 57–58 (D.D.C. 2018); *Sysco*, 113 F. Supp. 3d at 33–34; *Otto Bock*, 2019 WL 5957363, at \*13; *Polypore*, 2010 WL 9549988, at \*11. The *Merger Guidelines* define a relevant product market in economic terms, by asking whether a hypothetical monopolist of a particular group of substitute products could profitably impose a “small but significant non-transitory increase in price” (“SSNIP”) over those products, or whether customers switching to alternative products would make such a price increase unprofitable. *Merger Guidelines* § 4.1.1; see also *Peabody Energy*, 492 F. Supp. 3d at 886; *Otto Bock*, 2019 WL 5957363, at \*13.

Here, the evidence for both the “practical indicia” identified by the Supreme Court in *Brown Shoe*, CCFF ¶¶ 218-394, and the hypothetical monopolist test outlined in the *Merger Guidelines*, CCFF ¶¶ 395-407, support the conclusion that the sale of closed-system e-cigarettes is an appropriate relevant product market.

#### **A. Closed-System E-Cigarettes Are a Relevant Product Market Based on the *Brown Shoe* Factors**

The relevant product market in which Respondents competed vigorously before Altria’s agreed-to exit in 2018 is the sale of closed-system e-cigarettes. The evidence shows that closed-system e-cigarettes constitutes a relevant product market when considering the *Brown Shoe* “practical indicia” factors. In particular, closed-system e-cigarettes (1) have distinct product features, consisting of a relatively small battery (often rechargeable) and a small, factory-sealed e-liquid container (called cartridges or pods), CCFF ¶¶ 218-25; (2) provide unique user

---

<sup>6</sup> “Although they are not binding, the [*Merger Guidelines*] ‘have [] been repeatedly relied on by the courts’ in evaluating merger challenges.” *Peabody Energy*, 492 F. Supp. 3d at 883 n.9 (quoting *Tronox*, 332 F. Supp. 3d at 206).

experiences such as convenience, discreetness, portability, and simplicity, CCFF ¶¶ 227-34; and (3) are sold predominantly through the multi-outlet and convenience (“MOC”) channel, which largely consists of convenience stores. CCFF ¶¶ 235-37. These attributes separate closed-system e-cigarettes as a distinct group of products within a broader tobacco/nicotine space, and the evidence further shows that market participants accordingly view the closed-system e-cigarette space as a distinct competitive marketplace. CCFF ¶¶ 238-67.

Respondents’ contemporaneous business documents and testimony show that Altria and JLI considered their respective MarkTen and JUUL e-cigarette product lines to be competing in a market consisting of closed-system e-cigarettes. First, before the company shut down its e-cigarette business, Altria regularly tracked the performance (e.g., market share and volume growth) of its MarkTen cigalikes and MarkTen Elite pod-based products (both closed-system e-cigarettes) in the MOC channel, which effectively reflected their performances in the closed-system e-cigarette market. CCFF ¶¶ 239-44. In numerous internal documents, for example, Altria listed JUUL, VUSE, blu, and Logic—all of which are closed-system e-cigarette brands—as competitors of its MarkTen-branded products. CCFF ¶¶ 242, 244-48. As one Altria executive testified, “all of the vapor products in **closed systems** sold in MOC were part of the competitive set for Nu Mark.” CCFF ¶ 249 (emphasis added). In fact, the same Altria executive testified that Altria focused on closed-system e-cigarettes because “everything [Altria] sold was **closed**, and everything [Altria was] working on developing was **closed**.” CCFF ¶ 238 (emphasis added). Thus, in an August 2018 presentation, Altria tracked promotion and launch activities of other closed-system e-cigarette competitors, including both cigalike and pod-based products. CCFF ¶ 245. Altria also developed market reports (entitled “Weekly Share Reports”) for closed-system e-cigarettes that tracked the weekly market shares, sales volumes, and prices of other closed-

system e-cigarettes. CCFE ¶ 246. {

} CCFE ¶ 251 (emphasis added).

Likewise, JLI's ordinary course of business documents included other closed-system e-cigarettes—including Altria's MarkTen cigalikes and MarkTen Elite pod-based products—in the set of products competing against JUUL. CCFE ¶¶ 252-59. JLI also monitored product development and marketing efforts by Altria and other closed-system e-cigarette producers. CCFE ¶ 253. Like Altria, JLI listed MarkTen, VUSE, blu, Logic, and NJOY as competitors to JUUL. CCFE ¶¶ 256-59. In addition to Respondents, documents and testimony from other closed-system e-cigarette competitors such as Reynolds, ITG, and NJOY show that they also considered other closed-system e-cigarette producers as their closest competitors, which reflected the same commercial realities they were facing. CCFE ¶¶ 260-67.

### **1. It Is Appropriate to Include Both Cigalikes and Pod-Based Products in the Same Closed-System E-Cigarette Market**

The closed-system e-cigarettes market include both cigalikes and pod-based products because they share the same, distinct product features, provide similar user experiences, and are sold through the same retail channel. CCFE ¶¶ 278-98. Cigalikes and pod-based products both use factory-sealed e-liquid containers (called pods or cartridges), CCFE ¶¶ 286-87, and both use e-liquids that have similar chemical characteristics and may, or may not, contain nicotine salts. CCFE ¶ 288. The only clearly distinguishable product feature between cigalikes and pod-based products is shape—cigalikes are typically round (or cylindrical), whereas pod-based products are more rectangular, like a USB drive. CCFE ¶¶ 278-79, 285. Moreover, both cigalikes and pod-based products offer similar ease of use and convenience, CCFE ¶ 291, and are sold side-by-side in convenience stores. CCFE ¶¶ 292, 295-96.

In fact, the most widely-used industry datasets, such as Nielsen and IRI, that Respondents use in their ordinary course of business do not distinguish between cigalikes and pod-based products sold in the retail channel they cover. CCFE ¶ 275. Further, the functional similarities between cigalikes and pod-based products are confirmed by the e-cigarette flavor ban imposed by the FDA, which was announced in January 2020 and went into effect in February 2020. CCFE ¶ 294. The flavor ban that removed non-tobacco, non-menthol flavors from the e-cigarette marketplace applies to both cigalikes and pod-based products (the FDA used the term “cartridge-based e-cigarettes” for these closed-system e-cigarettes), whereas the ban does not apply to open-tank e-cigarettes. CCFE ¶ 294.

Consistent with these attributes, when closed-system e-cigarette producers—including Altria and JLI—assessed their competitive landscape, they focused on *all* competitive closed-system e-cigarette products that included both cigalikes and pod-based products. CCFE ¶¶ 299-350. Numerous JLI documents show that even before Altria launched MarkTen Elite, its first pod-based product, in early 2018, JLI closely tracked Altria’s e-cigarette business, which consisted solely of cigalikes at that time, including market shares, prices, and product characteristics, and considered MarkTen to be a significant competitor. CCFE ¶¶ 299-310. For example, in the second half of 2017, JLI executives noted that JUUL’s main competitors included MarkTen cigalikes. CCFE ¶¶ 303-05. After Altria launched MarkTen Elite in February 2018, JLI continued to track MarkTen cigalike products and often did not distinguish between the two products. CCFE ¶¶ 311-22. For example, in several 2018 documents shared with investors, JLI compared its JUUL product with both MarkTen cigalike and MarkTen Elite products. CCFE ¶¶ 312-13.

Furthermore, JLI has consistently viewed as its primary competitors all other major closed-system e-cigarettes—not only competitive pod-based products, but also cigalikes. CCFF ¶¶ 301, 306, 308, 314, 316-23. For example, a 2018 JLI investor presentation included a slide tracking “competitive [product] launches,” which listed both cigalikes (e.g., MarkTen Bold, Vuse Ciro, and Blu Plus) and pod-based products. CCFF ¶ 320. In a December 2018 email, a JLI executive attached a JLI quarterly investor update identifying major closed-system e-cigarette brands offering both cigalikes and pod-based products (e.g., Vuse, MarkTen, blu, and Logic) as competitors. CCFF ¶ 258. In addition, one of JLI’s board members, Riaz Valani, testified that both cigalikes and pod-based products competed with JLI. CCFF ¶ 323. Similarly, Altria, which before 2018 did not have any pod-based products, viewed cigalikes and pod-based products as competing in the same market. CCFF ¶¶ 327- 40. For example, a January 2018 update to the Altria Board of Directors included a slide forecasting a potential combined Altria-Juul market share that includes both cigalikes and pod-based products. CCFF ¶ 335. A three-year strategic plan draft that was sent to Altria’s CEO in February 2018 also compared the pricing for MarkTen Elite pod-based product against both Juul (another pod-based product) and two cigalikes in a single chart. CCFF ¶ 337. Moreover, ordinary-course business documents from other closed-system e-cigarette producers also show that they consider a market for closed-system e-cigarettes that encompasses both cigalikes and pod-based products. CCFF ¶¶ 341-50. For example, { [REDACTED] } CCFF ¶ 348.

Finally, the very nature of Respondents’ Non-Compete further confirms that JLI focused on eliminating the possibility of competition from *all* of Altria’s closed-system e-cigarette



products, including both cigalikes and pod-based products.<sup>7</sup> CCFE ¶ 324. The Non-Compete expressly prohibits Altria from directly engaging in or indirectly participating (or even preparing to engage) in the “e-Vapor Business,” which is defined as “business activities and operations relating to *vapor-based electronic nicotine delivery systems (including vaporizers and e-cigarettes that create an aerosol, vapor or other gaseous form that the user inhales)* other than Heat-not-Burn Nicotine Delivery Systems . . . .” CCFE ¶ 324 (emphasis added). This encompasses cigalikes and pod-based products. CCFE ¶¶ 323-24, 1007-08.

Facing the weight of the real-world evidence and *Merger Guidelines* analysis offered by Complaint Counsel, Respondents try to argue that Complaint Counsel’s relevant product market is not “the narrowest market” possible. Resps.’ Pretrial Br. at 55. But this critique ignores fundamental principles of antitrust market definition and utterly fails to show that the closed-system e-cigarette market is not an appropriate relevant product market.

First, as the *Merger Guidelines* clearly state, the hypothetical monopolist test, which was used by Complaint Counsel’s economic expert, Dr. Dov Rothman, to define the market, “does not lead to a single relevant market” and courts and agencies may evaluate a transaction in “any relevant market satisfying the test” with the overarching goal of defining the market “to illuminate the evaluation of competitive effects.” *Merger Guidelines* § 4.1.1. Here, because the primary competitive effects of the Transaction arise out of Altria’s discontinuation of *all* of its closed-system e-cigarettes, it is logical to see whether a candidate market that includes *all* of the affected Altria products can constitute a relevant product market to illuminate the evaluation of competitive effects.<sup>8</sup> Thus, Dr. Rothman began his analysis to implement the hypothetical monopolist test by defining a candidate market that encompasses those e-cigarette products that

---

<sup>7</sup> See *supra* § I.F.

<sup>8</sup> See *infra* §§ III.B.1, IV.C.

Altria marketed before shutting them all down in 2018. CCFE ¶ 400. These products of course included both cigalikes (MarkTen and GreenSmoke) and pod-based products (MarkTen Elite and Apex). CCFE ¶ 21. Then Dr. Rothman concluded that a hypothetical monopolist of this candidate market consisting of both cigalikes and pod-based products (i.e., closed-system e-cigarettes) would likely impose at least a SSNIP and thus this market passes the hypothetical monopolist test.<sup>9</sup> CCFE ¶¶ 400-07.

Second, if there was a pod-only market in 2018 and earlier, that hypothetical market would have included JUUL with a 90-plus percent market share and just a handful of other products with each having a low single-digit market share. However, the evidence is indisputably clear that no market participants looked at the marketplace in such a distorted way and Respondents indeed have failed to identify any contemporaneous ordinary course documents that validate this distorted view. In fact, the ordinary course documents from Respondents point to the opposite conclusion: the market shares of cigalikes and pod-based products were lumped together in a broader closed-system e-cigarette market.<sup>10</sup> This market reality further supports defining a relevant product market that includes both cigalikes and pod-based products in the same closed-system e-cigarette market.

## **2. It Is Appropriate to Exclude Open-Tank E-Cigarettes from the Relevant Product Market**

While the evidence shows that it is appropriate to include both cigalikes and pod-based products in the relevant product market (i.e., the closed-system e-cigarette market), it shows that open-tank products should be excluded from the relevant product market because they are not close substitutes to closed-system e-cigarettes. Closed-system e-cigarettes and open-tank

---

<sup>9</sup> It is also worth noting that Respondents provided no alternative market definition that could be used to evaluate competitive effects of the Transaction. *See* Resps.' Pretrial Br. at 54-56 (no alternative product market definition); *see also* CCFE ¶ 2088 (citing RX1217 (Murphy Expert Report) (same)).

<sup>10</sup> CCFE ¶¶ 240-43, 246, 248, 252, 256-59, 302, 304-05, 309, 315, 319, 331, 334-36, 339.

products have: (1) distinct product attributes; (2) dissimilar user experiences; and (3) are sold in different retail channels. CCFE ¶¶ 352-78. Due to these differences, market participants—producers, distributors, and retailers—do not view closed-system e-cigarettes and open-tank products as close substitutes. CCFE ¶¶ 379-83.

First, closed-system e-cigarettes and open-tank e-cigarettes have different product characteristics that appeal to different users. A closed-system e-cigarette only works with the factory-sealed, pre-filled pods or cartridges specifically designed for the device, and consumers cannot fill or refill those pods and cartridges with e-liquids themselves. CCFE ¶¶ 218-25, 359. In contrast, open-tank e-cigarettes have refillable tanks that users manually fill with e-liquids, which allows them to select from and mix a wide assortment of (often flavored) e-liquids. CCFE ¶¶ 352-53, 355-56. Open-tank e-cigarettes tend to be larger than closed-system e-cigarettes and also allow users to customize many aspects of the device, such as batteries, coils, and power levels. CCFE ¶¶ 354, 357-58. Open-tank e-cigarettes allow for a much more customizable experience whereby users can experiment with different e-liquids, creating customized flavors or nicotine strength. CCFE ¶¶ 355-56. This was true prior to the FDA flavor ban, but is even more true now, because the FDA flavor ban applies only to pods and cartridges for closed-system e-cigarettes, not to e-liquids for open-tank products. CCFE ¶ 294.

Second, with their distinct product attributes, closed-system e-cigarettes and open-tank e-cigarettes provide vastly different user experiences. CCFE ¶¶ 363-67. For example, open-tank users have the ability to customize and experiment with both e-liquids and various components of their devices, which is not something the users of closed-system e-cigarettes have. CCFE ¶¶ 354-56, 363. As one industry executive testified, open-tank e-cigarette are used by “hobbyists or

vapor enthusiasts.” CCFF ¶ 363. Similarly, Sheetz’s Paul Crozier testified that open-tank users are a “completely different type of customer segment.” CCFF ¶ 365.

Third, closed-system e-cigarettes and open-tank products are sold in different retail channels. Open-tank e-cigarettes are sold almost exclusively at dedicated vape shops or online, CCFF ¶¶ 368-72, whereas closed-system e-cigarettes are sold through the MOC channel, which consists primarily of convenience stores. CCFF ¶¶ 373-77.

Consistent with these stark differences, market participants, including Respondents, do not consider closed-system e-cigarettes and open-tank e-cigarettes as close competitive products. For example, closed-system e-cigarette producers’ documents show that they track sales volumes and market shares for closed-system e-cigarette products. CCFF ¶¶ 241, 252, 266. Consistent with this, Wade Huckabee of Reynolds testified at the hearing that open-tank and closed systems are not substitutes. CCFF ¶ 383. Likewise, ordinary course documents show that closed-system competitors analyze and compare the features, prices, brand awareness, and consumer satisfaction for the closed-system e-cigarettes on the market, without including any such analysis of open-tank e-cigarettes. CCFF ¶¶ 266, 312. Moreover, closed-system e-cigarette producers and retailers do not consider open-tank products when making sales and marketing decisions for closed-system e-cigarettes. CCFF ¶¶ 380-82.

**B. The Hypothetical Monopolist Test Confirms That Closed-System E-Cigarettes Are a Relevant Product Market**

Consistent with the “practical indicia” described above, the empirical analysis conducted by Complaint Counsel’s economic expert, Dr. Dov Rothman, supports a relevant product market consisting of all closed-system e-cigarettes. CCFF ¶ 395. As described more fully in his expert report and testimony, Dr. Rothman found that a hypothetical monopolist of closed-system e-cigarettes would be able to profitably impose a SSNIP, thus showing that closed-system e-

cigarettes is a relevant product market under the *Merger Guidelines* analysis—the methodology that has been accepted by many courts.<sup>11</sup> CCF ¶¶ 397-407.

To implement the hypothetical monopolist test, Dr. Rothman used a “critical elasticity test” (sometimes called a “critical loss” analysis) and showed that the elasticity of demand for closed-system e-cigarettes is “less (in absolute value) than” the critical elasticity, which was calculated from the margin information for producers. CCF ¶¶ 401-07. This means that not enough consumers of closed-system e-cigarettes would substitute to alternative products to make a SSNIP by a hypothetical monopolist unprofitable. Thus, the sale of closed-system e-cigarettes is a properly defined relevant product market under the hypothetical monopolist test. CCF ¶ 407.

In marked contrast to Dr. Rothman, who conducted the *Merger Guidelines* analysis faithfully and showed that the closed-system e-cigarette market passes the hypothetical monopolist test, Dr. Kevin Murphy, Respondents’ economic expert, utterly failed to apply that test and to rebut Dr. Rothman’s analysis generally. CCF ¶¶ 2086-93. Dr. Murphy did not: (1) express any opinion on what the appropriate relevant product market is in this case, CCF ¶ 2086; (2) reach an opinion on whether there are separate relevant markets for cigalikes and pod-based products, CCF ¶ 2087; (3) test whether a market consisting of only cigalikes or only pod-based products passed the hypothetical monopolist test, CCF ¶¶ 2089-90; (4) offer an opinion that a market consisting of all closed-system e-cigarettes fails the hypothetical monopolist test, CCF ¶ 2091; and (5) conduct any critical elasticity or critical loss analysis. CCF ¶¶ 2092-93. As Dr. Rothman’s unrebutted analysis shows, the relevant product market in which to assess the competitive effects in this case is the sale of closed-system e-cigarettes.

---

<sup>11</sup> See *supra* n.6.

### **III. Respondents' Agreement for Altria to Exit the E-Cigarette Market Violates Section 1 of the Sherman Act**

Section 5 of the FTC Act, 15 U.S.C. § 45, prohibits unfair methods of competition, including conduct that violates Section 1 of the Sherman Act, 15 U.S.C. § 1. A Section 1 violation requires proof of (1) a contract, combination, or conspiracy that (2) unreasonably restrains trade. *See Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011); *In re Benco Dental Supply Co.*, Docket No. 9379, 2019 WL 5419393, at \*68 (F.T.C. Oct. 15, 2019). A plaintiff need only establish that a defendant violated Section 1 by a preponderance of the evidence. *See, e.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56, 663 (7th Cir. 2002).

The evidence shows that Altria and JLI entered into an agreement not to compete in e-cigarettes consisting of (a) an agreement that Altria would exit its current e-cigarette business; and (b) a written agreement—the Non-Compete—that Altria would not participate in the e-cigarette business going forward. Respondents' agreement, encompassing both the removal of existing products and a forward-looking non-compete, resulted in the complete elimination of all price, innovation, and shelf-space competition from Altria in the U.S. closed-system e-cigarette market. *See infra* § III.B-C. Respondents' agreement is unlawful under Section 1 of the Sherman Act, and therefore is unlawful under Section 5 of the FTC Act. *See infra* § III.B-C. Even setting aside the agreement for Altria to exit its existing e-cigarette business, the written Non-Compete—which prohibits Altria from competing in e-cigarettes (including conducting R&D) for a minimum of six years—is by itself unlawful. *See infra* § III.C.

#### **A. Altria and JLI Agreed that Altria Would Exit the U.S. E-Cigarette Market In Exchange for a Stake in JLI**

As discussed below in Section III.A.1, the totality of the evidence shows that Altria and JLI agreed that Altria would exit the market for closed-system e-cigarettes. As discussed below

in Section III.A.2, the various explanations Altria has put forward to explain its exit from e-cigarettes are pretextual and inconsistent with the evidence.

**1. The Totality of the Evidence Shows that Respondents Agreed that Altria Would Exit the U.S. E-Cigarette Market in Exchange for a Stake in JLI**

The evidence shows that Altria and JLI agreed not to compete in e-cigarettes in the U.S. “The existence of an agreement is the very essence of a section 1 claim.” *Benco*, 2019 WL 5419393, at \*7 (quoting *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004)). An anticompetitive agreement may be established through either direct or circumstantial evidence, or a combination of the two. *See W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010); *Benco*, 2019 WL 5419393, at \*9. Indeed, because it is rare for parties to an illegal agreement to commit the entirety of their anticompetitive agreement to writing, plaintiffs commonly prove the existence of an anticompetitive agreement through inferences drawn from circumstantial evidence. *See City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998); *Benco*, 2019 WL 5419393, at \*9; *see also In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d 728, 734 (8th Cir. 2014). A plaintiff must present evidence that is sufficient to allow the fact-finder “to infer that the conspiratorial explanation is more likely than not.” *In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (quoting Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* (hereinafter “Areeda & Hovenkamp”) ¶ 14.03(b) (4th ed. 2011)) Circumstantial evidence often takes the form of so-called “plus factors,” which are “economic actions and outcomes . . . that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action.” William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 393 (2011). Circumstantial evidence is no less persuasive than direct evidence. *E.g., United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff’d*, 791 F.3d 290 (2d Cir. 2015). Here,

part of the illegal agreement—the written Non-Compete—is in writing in the executed Transaction documents. But the anticompetitive agreement in this case goes beyond the written Non-Compete, and also includes the agreement between the parties that led to Altria exiting its existing e-cigarette business.

When evaluating the existence of an anticompetitive agreement, courts must consider the “totality of the evidence.” *Apple*, 952 F. Supp. 2d at 689 (quoting *Publ’n Paper Antitrust Litig.*, 690 F.3d at 64); *see also Benco*, 2019 WL 5419393, at \*9. When viewing the evidence, “[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.” *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). An agreement exists “if a course of conduct . . . once suggested or outlined by a competitor . . . is followed by all — generally and customarily— and continuously for all practical purposes, even though there are slight variations. . . . An exchange of words is not required. Thus not only action, but even a lack of action, may be enough from which to infer a combination or conspiracy.” *Esco Corp. v. United States*, 340 F.2d 1000, 1008 (9th Cir. 1965) (citation omitted); *see also In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 978 (N.D. Ohio 2015) (“No formal agreement is necessary to constitute an unlawful conspiracy. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words.”) (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946)).

Here, the totality of the evidence makes clear that Altria and JLI entered into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI.



**a. The Evidence Shows That Altria and JLI Agreed that Altria Would Exit E-cigarettes**

JLI made clear to Altria—and Altria understood—that a requirement of the Transaction was that Altria must exit the closed-system e-cigarette market and agree to compete in e-cigarettes only through JLI. CCFF ¶¶ 867-924. Altria and JLI discussed several paths by which Altria could exit e-cigarettes, including that Altria could simply “cease to operate” its e-cigarette business. CCFF ¶¶ 968-86. What mattered to JLI was not how Altria exited, but that it ultimately did exit. CCFF ¶¶ 898-905. As discussed below, the evidence is clear that Altria did in fact agree to JLI’s demand that it exit e-cigarettes. CCFF ¶¶ 944-1015. And Altria followed through on that agreement by ceasing to operate its e-cigarette business prior to entering the Transaction. CCFF ¶¶ 987-94.

For JLI, a foundational prerequisite for the Transaction was that Altria agree to exit e-cigarettes and to be bound by a non-compete. JLI’s Riaz Valani testified that a “general precept for [] what it would take for Altria to ever have any involvement with JUUL would be that they couldn’t have a directly competitive offering of their own.” CCFF ¶ 869. JLI’s Nicholas Pritzker testified that “[i]t would not have been acceptable” for Altria to have continued to participate in the e-cigarette business following its investment in JLI “if they continued to insist, as they had, that they have a very significant ownership position and that they have board seats—and therefore potential access to Juul information.” CCFF ¶ 876.

During negotiations, JLI expressly told Altria—and Altria understood—that in order for JLI to agree to the Transaction, Altria would have to agree not to compete in e-cigarettes with its own products, but instead would have to participate in e-cigarettes exclusively through JLI. CCFF ¶¶ 880-924. As Valani testified, however, “there was a question as to how [Altria] would fulfill [the] obligation” not to compete in e-cigarettes. CCFF ¶ 899. As discussed *infra*, Altria

believed that its Joint Research, Development, and Technology Sharing Agreement (“JRDTA”) with PMI potentially prohibited it from contributing or divesting its e-cigarette assets to a third party before July 2020. CCFE ¶ 927. The evidence indicates that in the summer of 2018, Altria informed JLI that there was uncertainty regarding its ability to divest or contribute its e-cigarette products, and that the source of that uncertainty was the PMI JRDTA. CCFE ¶¶ 899, 928-31.

In the summer of 2018, Altria and JLI discussed several ideas for how Altria could exit its existing e-cigarette business. It did not matter to JLI how Altria exited e-cigarettes; JLI only cared that Altria found a way to no longer compete in e-cigarettes. CCFE ¶ 898-905. Pritzker testified that the “goal was for [Altria] not to be competing against Juul if they had a significant interest in Juul, and I didn’t care how that would come about.” CCFE ¶ 898. JLI’s Valani explained that how Altria went about exiting e-cigarettes was “really their problem, not ours;” JLI was “more concerned about an end state” in which Altria was no longer a competitor. CCFE ¶ 900.

One idea that JLI and Altria discussed was that Altria could divest its e-cigarette products to a third party. CCFE ¶¶ 903, 973. In fact, the parties contemplated that a divestiture might be necessary to obtain antitrust clearance for the Transaction, and JLI viewed such a divestiture as a solution to how Altria could exit the e-cigarette business. CCFE ¶¶ 905, 973. Pritzker testified that he thought divestiture was the most likely outcome. CCFE ¶ 906. Another idea Respondents considered was that Altria could contribute its e-cigarette assets to JLI. CCFE ¶¶ 906-07. And another idea that Altria and JLI discussed was that Altria could simply cease to operate its e-cigarette business. CCFE ¶¶ 968-82. In fact, shortly after speaking directly to Altria CEO Willard, JLI adviser Peter Gross wrote to Pritzker that he was under the impression that Altria would just “shut down” MarkTen. CCFE ¶¶ 673, 675, 969-71.

Just three days after Gross's email to Pritzker, JLI sent an initial term sheet to Altria suggesting that one path Altria could take to exit e-cigarettes would be to "cease to operate" its e-cigarette business. Specifically, JLI's July 30, 2018 term sheet included the following term requiring Altria to get rid of its e-cigarette products:

Promptly and in no event later than nine months following the Purchase, subject to the license referenced above, Richard [Altria] will divest (or if divestiture is not reasonably practicable, contribute at no cost to Jack [JLI] and if such a contribution is not reasonably practicable, **then cease to operate**), all Richard [Altria] assets relating to the Field in the U.S., including all electronic nicotine delivery systems and products it acquired, developed, or has under development. CCFF ¶¶ 684, 894 (emphasis added).

Under any of the three options set forth in this term—divest, contribute, or cease to operate—Altria would no longer be competing in e-cigarettes by, at most, nine months post-transaction, thus accomplishing the "end state" that JLI wanted. CCFF ¶¶ 895, 900-01. Indeed, JLI included "cease to operate" as a failsafe to ensure that Altria had no outs in its commitment to exit e-cigarettes. CCFF ¶¶ 907-09. The July 30, 2018 term sheet also included a non-compete provision completely prohibiting Altria from competing in e-cigarettes, except for the period prior to disposing of its existing products, so long as it owned at least a 5% interest in JLI. CCFF ¶¶ 910-12.

JLI's inclusion of "cease to operate" in the July 30, 2018 term sheet was no accident. Less than week later, on August 4, 2018—after JLI's Pritzker, Valani, and Burns met with Altria's Willard and Billy Gifford at the Park Hyatt hotel in Washington, D.C.—JLI sent a revised term sheet. CCFF ¶¶ 689-94, 913. Among the revisions was the addition of the word "shutdown" to the non-compete term. CCFF ¶¶ 694, 913, 976. And Willard's talking points for a call with JLI later that same week stated that "Altria has come a long way to accommodate [JLI] in this process," including by "demonstrating flexibility with our existing vapor business, if necessary, in order to form the partnership." CCFF ¶¶ 695-99, 980.

The one time Altria appeared to renege on the requirement to exit e-cigarettes, JLI pushed back forcefully, unequivocally stating that it was “not acceptable” for Altria to retain any right to compete with either existing or future products. CCFE ¶¶ 704-07, 722; 914-22. On August 9, 2018, Altria sent JLI an edited term sheet in which Altria struck entirely the commitment to divest, contribute, or cease to operate its existing e-cigarette products. CCFE ¶¶ 704-706, 915. In the same draft, Altria also edited the non-compete to permit itself to continue competing in perpetuity through its existing e-cigarettes and e-cigarettes under development. CCFE ¶ 707.

JLI responded to Altria’s August 9 term sheet with a set of bullet points setting forth “foundational concepts” that Altria would need to agree it was clear on prior to JLI committing to attend an in-person meeting planned for August 18 in San Francisco. CCFE ¶¶ 709-28, 914-24, 949-52. Valani provided the bullet points to Altria board member Dinyar Devitre while the two of them met privately in Devitre’s office in New York on August 15, 2018. CCFE ¶¶ 719-20, 914-24, 951. The purpose of the private meeting between Valani and Devitre was to “bake the cake before the weekend meeting” in San Francisco. CCFE ¶¶ 710-11. During their private meeting, Valani and Devitre discussed the bullet points in order for JLI to get “some verification from the Altria team that [] they were aligned with this prior to us sitting down” for the planned August 18, 2018 meeting. CCFE ¶¶ 724, 952. While he was still meeting with Valani, Devitre sent the list of bullet points to Willard, who circulated them to the other Altria executives involved in negotiations. CCFE ¶¶ 719-728. The second bullet point made crystal clear that it was unacceptable for Altria to retain any right to compete in e-cigarettes with current or future products:

We understood that you (and your successors and current and future affiliates) would not compete against us in vapor in the US and that JUUL would be the

vehicle for all vapor assets. **You have retained the right under certain circumstances to compete not only with existing Mark Ten products, but also with products under development and future products. The commitment to divest Mark Ten has been stricken. This is not acceptable to us.** CCFE ¶¶ 722, 918 (emphasis added).

Upon receiving JLI's list, Altria's Willard and Gifford understood this bullet point to be in response Altria's strike through of the divest/contribute/cease to operate commitment in the August 9, 2018 term sheet, and to Altria's retention of the right to compete with existing and future e-cigarette products in the same term sheet. CCFE ¶¶ 921-22. After receiving JLI's list, Altria's investment banker James Wappler remarked that it looked like JLI "wants us to concede some key points prior to the [Saturday, August 18] meeting." CCFE ¶ 727.

Satisfied that Altria was "aligned" with the "foundational concepts" in the August 15 list, JLI went forward with August 18 meeting with Altria in San Francisco. CCFE ¶¶ 728, 951-53. Indeed, Altria's outline for the August 18 meeting indicates that at that meeting, Altria told JLI that it agreed in substance to JLI's demand that it exit e-cigarettes and enter a non-compete, but that its removal of the specific language used by JLI was "driven by antitrust and for the protection of both companies." CCFE ¶¶ 730, 956. Altria's outline for the August 18 meeting notes, "[w]e can't agree to these terms under antitrust laws prior to receiving HSR approval." CCFE ¶¶ 730, 956. In other words, in an attempt to evade antitrust liability Altria refused to include the exact language written by JLI, but reassured JLI that it agreed to exit e-cigarettes and be bound by a non-compete. CCFE ¶¶ 730, 956. Then, several months later, Altria went ahead and did exactly the thing it said it could not agree to in writing—exit the e-cigarette market prior to HSR approval. CCFE ¶¶ 33-35, 47, 987-94, 1003-05.

At the August 18 meeting, Altria made clear that although it would not approve the exact language JLI proposed, it was perfectly willing to agree to what JLI wanted—exit e-cigarettes and enter a non-compete. CCFE ¶¶ 729-31, 956-57. This agreement was reflected in the term

sheet resulting from the meeting, which required Altria to exit e-cigarettes either by contributing its e-cigarette assets to JLI upon antitrust clearance, and if antitrust clearance was not obtained by nine months after the purchase, to divest its e-cigarette assets within six months thereafter. CCF 732-33, 957.

In fact, every single term sheet from August 18, 2018 forward committed Altria to exit e-cigarettes, providing that Altria must contribute its existing e-cigarette assets to JLI or divest them if necessary to achieve antitrust clearance. CCF 733, 798, 826. No term sheet after August 18 permitted Altria to continue to compete with its existing e-cigarette products; every term sheet required Altria to exit and commit to a non-compete. CCF 733, 798, 826. While other terms remained the subject of negotiation, there was never further substantive dispute on this issue. It was settled and agreed to that Altria would exit the closed-system e-cigarette market if it wanted a deal with JLI.

Altria CEO Willard’s October 5, 2018 letter to JLI’s Pritzker, Valani, and Burns confirms as much. In that letter, Willard wrote that “Altria would agree that it . . . will not compete, in a manner consistent with our previous discussions, in the U.S. e-vapor market . . . .” CCF 779, 782, 961. Pritzker understood this language to be referring to “all of the discussions that [JLI and Altria] had” and to him, it suggested “was there was an agreement on that, on these points.” CCF 785. Pritzker did not see this as a game changer, but saw it as Altria simply saying, “we’ll do the thing with the noncompete we already exchanged views on.” CCF 785.<sup>12</sup> Willard testified that what he wrote on this point in the October 5 letter was referring to a topic “which it sounds like we had come to prior agreement on . . . .” CCF 962.

---

<sup>12</sup> In contrast, Pritzker viewed other terms in the October 5 letter as more noteworthy because they set forth something different than what was previously discussed—for instance, Altria proposing to acquire a 35% interest (instead of 45%) and investing in the entire JLI (not just the U.S. business). CCF 780.

The fact that Altria might comply with JLI's demand to exit by shutting down its e-cigarette business was not hidden. In addition to prior discussions between Altria and JLI about this very option, Altria added language to its October 15, 2018 revised term sheet referring to it "otherwise exiting the marketing and sale of [e-cigarette products]." CCF ¶¶ 800, 983. This was 10 days before Altria pulled Elite off the market. CCF ¶ 986.

Not every detail needs to be worked out in order to prove that an agreement exists for purposes of antitrust liability. See *Cont'l Ore Co.*, 370 U.S. at 699; *Esco Corp.*, 340 F.2d at 1008. Therefore, the fact that JLI may not have known exactly how and when Altria would comply with its demand to exit e-cigarettes does not save Respondents from liability. JLI's witnesses testified that they told Altria that it had to exit e-cigarettes, that what they cared about was the end state of Altria no longer competing, and that they left it up to Altria how to achieve that end state. CCF ¶¶ 880-904. JLI did not care whether Altria divested its existing e-cigarette products, shut them down, or contributed them to JLI. CCF ¶¶ 898-904. The path that Altria choose to comply with JLI's demand that it exit e-cigarettes was, of course, ceasing to operate its e-cigarette business. CCF ¶¶ 987-94. On October 25, 2018, Altria pulled Elite and Apex from the market, and on December 7, just weeks before the JLI Transaction closed, Altria announced the discontinuation of all of its e-cigarettes products. CCF ¶¶ 987-94.

The only term sheet or draft purchase agreement that did not include a provision requiring Altria to get rid of its e-cigarettes products was the final December 20, 2018 purchase agreement. CCF ¶¶ 842, 862. By that point, such a provision was unnecessary, because Altria had already satisfied the agreement and had discontinued all of its e-cigarette products. CCF ¶¶ 862, 1003-04. The terms of the final Non-Compete did ensure, however, that the only business Altria could engage in with its existing products was the ongoing wind-down. Specifically, the

non-compete provided that Altria may “engage in the business relating to (I) its Green Smoke, MarkTen [] and MarkTen Elite brands, in each case, **as such business is presently conducted.**” CCFE ¶ 1002 (emphasis added). But given that Altria had already stopped selling MarkTen Elite, and that the only business “presently conducted” with respect to MarkTen and Green Smoke was for retailers to sell through remaining inventory, the Non-Compete only served to guarantee that Altria could not compete in e-cigarettes with these existing products, or sell or develop new products, going forward. CCFE ¶¶ 1001-05.

Any suggestion by Respondents that their agreement must be legal because attorneys drafted term sheets and deal documents is spurious. The principal Altria and JLI negotiators met in person and spoke by phone on numerous occasions without an attorney present. CCFE ¶¶ 614-24. Based on their negotiations with each other, the JLI and Altria negotiators instructed their attorneys regarding what terms to put in the term sheets, and each party’s primary negotiators would review and approve the term sheets prior to sending them to the other side’s negotiators. CCFE ¶¶ 588, 893. In any event, there is no record evidence regarding what Altria or JLI’s attorneys advised their clients regarding any potential antitrust liability that might arise from their actions.<sup>13</sup>

**b. The Timeline of Events Supports an Inference that Altria Exited Pursuant to an Agreement with JLI**

The timeline of the deal negotiations, juxtaposed with the timeline of Altria’s actions to discontinue its e-cigarette products, supports an inference that Altria exited e-cigarettes pursuant to its agreement with JLI. The same Altria executives who were on the deal negotiating team were simultaneously making decisions relating to Altria’s plans for its own e-cigarette division.

---

<sup>13</sup> When Altria’s Murray Garnick was asked at trial if Altria’s outside counsel ever advised whether Altria’s actions might give rise to antitrust liability, Altria’s counsel objected on privilege grounds and directed Garnick not to answer. CCFE ¶ 994.



CCFF ¶¶ 578, 1359-78. Every major development in the negotiations with JLI influenced the view of Altria's executives towards continuing to invest in Nu Mark and its existing e-cigarette brands. Indeed, when compared to Altria's prior commitment to being a long-term, strategic competitor in the e-cigarette market, the timeline of its actions starting after July 30, 2018 strongly suggests that JLI's non-compete demand drove key decisions made by Altria's senior leadership. *See In re Urethane Antitrust Litig.*, 913 F. Supp. 2d 1145, 1154-55 (D. Kan. 2012) (timeline of events can support inference of conspiracy).

On August 3, 2018, just four days after JLI sent the initial July 30, 2018 term sheet with the provision requiring Altria to divest, contribute, or "cease to operate" its e-cigarette products, Altria's Willard, Gifford, Garnick, and Crosthwaite met with Nu Mark President Brian Quigley and suggested for the first time the possibility of withdrawing MarkTen Elite from the market. CCFF ¶¶ 1359, 1361. Quigley was surprised by this suggestion, given that Altria "had just launched [Elite]." CCFF ¶ 1362. Quigley testified that it was unusual to launch a product, have it grow, and then pull it several months later. CCFF ¶ 1511.

On August 10, 2018, Altria's Willard, Gifford, Garnick, and Crosthwaite met again with Quigley and some of his Nu Mark team. CCFF ¶ 1364. The outcome of that meeting was that Nu Mark would move forward with implementing the new gasket for Elite in order to fix the issue with leaking pods. CCFF ¶ 1364. At the August 10 meeting, the same group also decided to continue moving forward with the PMTA for the MarkTen cigalike products. CCFF ¶ 1365.

That Altria's Willard, Gifford, Garnick, and Crosthwaite decided on August 10 to move forward with a fix for Elite and with the MarkTen cigalike PMTAs is not surprising, given that the day before, Altria sent JLI a term sheet that removed Altria's obligation to divest, contribute, or cease to operate its e-cigarette products, and explicitly reserved the right to continue to

compete with existing products and products under development. CCFF ¶¶ 704-07, 947-48.

These August 10 decisions regarding Elite and MarkTen cigalikes would make little sense if Willard, Gifford, Garnick and Crosthwaite were simultaneously committing Altria to get rid of these products. On August 11, 2018, Willard spoke to Quigley by phone and reaffirmed that he understood and agreed with Quigley's position that Altria should have an e-vapor platform on the market to grow from. CCFF ¶ 1366.

But shortly thereafter, on August 15, 2018, JLI provided its list of "foundational concepts" to Altria, in response to Altria's August 9 term sheet. CCFF ¶¶ 720-24, 949-51. JLI's list made clear that it was "not acceptable" for Altria to retain any ability to compete with its current products, and that in order to move forward with negotiations, Altria must commit to rid itself of its existing products. CCFF ¶¶ 720-24, 949-52. As discussed above, at the August 18 meeting, Altria clarified that it would commit to exit e-vapor. CCFF ¶¶ 729-31, 956. This commitment is reflected in the August 18 term sheet and in all term sheets thereafter. CCFF ¶¶ 733, 798, 826.

Only a few days after the August 18 meeting with JLI, Altria's Willard, Gifford, Garnick, and Crosthwaite conducted meetings with Altria's board at Altria's ranch in Montana. CCFF ¶ 1372. Other Altria executives, including Quigley, flew out to the ranch for the meetings as well, but only Willard, Gifford, Garnick, and Crosthwaite were allowed into the meetings with the board, which was unusual. CCFF ¶ 1372. Prior to the meetings in Montana, Quigley had expressed concern to Crosthwaite that a presentation for the board concerning Altria's e-cigarette portfolio was "clearly only the bad news version of the story" and that some of the points in the presentation were "flat out incorrect." CCFF ¶¶ 1036, 1367. As an example, Quigley observed that the presentation said that the MarkTen cigalike platform was declining, when MarkTen

cigalike was actually the second fastest growing brand behind JUUL. CCF ¶¶ 1036, 1368. But Quigley was not permitted in the room during the meeting where Altria’s e-cigarette portfolio was discussed. CCF ¶ 1372. Instead, the Altria executives in charge of negotiating the deal with JLI (Willard, Gifford, Garnick, and Crosthwaite) presented the e-cigarette slides to the board. CCF ¶ 1372. At the same board meetings, the same group of Altria executives { [REDACTED] [REDACTED] [REDACTED] } CCF ¶¶ 739, 741. During the August 2018 meetings at the Altria ranch, Willard, Gifford, Garnick, Crosthwaite, and board member Devitre communicated by text and spoke on the phone with JLI’s negotiators. CCF ¶¶ 740, 743-44.

After the August 2018 Altria board meeting, Altria continued to pursue the Transaction with JLI. In late August, an issue arose regarding whether Altria would pay JLI at signing for non-voting shares, or wait to pay until receiving HSR approval, at which point Altria could convert its shares to voting shares. CCF ¶¶ 747-48, 780. JLI wanted Altria to pay up-front at signing, but the Altria board wanted to wait until antitrust approval before paying JLI. CCF ¶¶ 747-48. Nevertheless, Altria continued to speak to JLI in September 2018, and internally continued to strategize about how to move forward with the JLI deal. CCF ¶¶ 751-772. On September 11, there was an Altria board meeting regarding the JLI deal. CCF ¶¶ 759-62. Altria’s executives told the board that negotiations were on hold due to the unavailability of one of JLI’s negotiators, and that the “[p]arties were discussing time frames for continuing negotiations.” CCF ¶ 760. By that point, Altria had already decided to agree to pay JLI at signing and had internally revised the proposed term sheet. CCF ¶¶ 759, 763-64, 768.

On September 12, 2018, the FDA issued letters to the five top-selling e-cigarette manufacturers (Altria, JLI, Reynolds, ITG, and JTI), requesting that each company submit to the

FDA within 60 days its plan to address the issue of youth e-cigarette use. CCF ¶ 766. Altria and its advisers saw the FDA letter as having “a profound impact” on negotiations with JLI, thinking it would increase JLI’s incentive to do a deal with Altria. CCF ¶¶ 767, 770. As September 2018 progressed, Altria continued to conduct analysis pertaining to a JLI transaction. CCF ¶¶ 769-72.

Altria argues that it decided to remove MarkTen Elite in response to the FDA’s September 12 letter. *See* Respondents’ Pre-Trial Br. at 74-75. But, as explained below, Altria did not make any announcement (internal or external) about removing Elite from the market until after it was clear that the JLI negotiations were on track and progressing well.

In the first few days of October 2018, several discussions occurred between Altria and JLI negotiators. CCF ¶¶ 773-76. In one of these discussions, Altria’s Willard proposed revised deal terms to JLI’s Pritzker to see if he thought it would be constructive for Altria to send a letter setting out those terms. CCF ¶ 775. Pritzker confirmed that the terms were sufficiently responsive to JLI’s concerns that the parties could move forward. CCF ¶ 775. In October 4, 2018 notes for an Altria board call, Garnick wrote that { [REDACTED]

[REDACTED]

[REDACTED] } CCF ¶ 777. { [REDACTED]

[REDACTED] } CCF ¶ 777. Garnick

wrote that { [REDACTED]

[REDACTED]

[REDACTED] } CCF ¶ 777.

On October 5, 2018, Willard sent a letter to JLI’s Pritzker, Valani, and Burns setting forth the terms he had discussed with Pritzker. CCF ¶ 779-82. Consistent with Garnick’s suggestion, Willard’s letter requested a response from JLI as to whether they were willing to more forward

by no later than October 12, 2018 (*i.e.*, prior to Altria’s scheduled FDA meeting). CCFE ¶ 779. Willard did receive a response from JLI prior to October 12, confirming that JLI wanted to move forward with the Transaction. CCFE ¶¶ 791-93. On October 11, 2018, JLI’s Pritzker informed Willard that the JLI board had given approval to move forward on the terms set forth in the October 5 letter. CCFE ¶ 792. In an October 12, 2018 text message, Willard reported to Altria board member Devitre: “Spoke to Nick [Pritzker] last night | Tentative agreed to a call on Monday to agree on terms | Agreed on term in the letter.” CCFE ¶ 793. On October 15, 2018, Willard sent a revised term sheet. CCFE ¶¶ 797. On Saturday October 20, 2018, Valani and Devitre had a breakfast meeting in New York, and Valani indicated that JLI was “ready to do a deal.” CCFE ¶ 805. The key negotiators planned to have dinner and a meeting in late October in New York. CCFE ¶¶ 806-07.

It was only at this point, on October 25, 2018, that Altria announced it was pulling its pod-based e-cigarettes from the market, due to a purported concern that “pod-based products significantly contribute to the rise in youth use of e-vapor products.” CCFE ¶¶ 812, 987 (quoting Altria’s October 25, 2018 letter to FDA). On the same day that Altria announced it was pulling its pod-based e-cigarettes, Altria’s Willard and Gifford assured JLI’s Pritzker, Valani, and Burns that Altria still wanted to move forward with acquiring an interest in JLI—the market leading e-cigarette company whose only product (JUUL) was pod-based. CCFE ¶ 814. This, of course, belies Altria’s claim that it pulled Elite because of concern about pod-based products driving youth vaping.

On October 29, 2018, only four days after Altria announced the removal of Elite, Altria and JLI met in New York and agreed on terms. CCFE ¶¶ 820-25. Due diligence and the drafting and finalization of corporate deal documents began shortly thereafter. CCFE ¶¶ 832-34. By

December 4, 2018, the parties were already working on a joint press release announcing their Transaction. CCFE ¶ 841. And on December 5, 2018, Altria board member Devitre told JLI’s Valani that Altria was “all systems go” on proceeding with the Transaction. CCFE ¶ 844.

On December 7, 2018, *less than two weeks before closing on the JLI Transaction*, Altria announced the “discontinuation of production and distribution of all MarkTen and Greensmoke e-vapor products.” CCFE ¶¶ 848, 989-90. The evidence indicates that Altria took this course of action *because* of the JLI Transaction. Altria executives explicitly linked the discontinuation of MarkTen and the impending JLI Transaction. In a mid-November 2018 email, Altria’s Garnick wrote to Willard, Gifford, and Crosthwaite that if the JLI transaction went forward, “we need to consider canceling Mark Ten now . . . .” CCFE ¶ 1396. In a December 1, 2018 email, Garnick wrote that the larger Altria leadership team “still does not understand that we are recasting the company as a core products [traditional cigarette] company after [T]ree.” CCFE ¶ 1399. When Maria Gogova, Altria’s Vice President of Regulatory Sciences, was asked when she heard that MarkTen would be discontinued, she responded that “it was when we finalized the deal with JUUL because we had to remove our own activity in the e-vapor category.” CCFE ¶ 1402.

On December 13, 2018, Altria sent an email to MarkTen customers stating that pursuant to the December 7 discontinuation announcement, MarkTen products would only be available online until 11:59pm December 18, 2018, and at retailers as long as supplies lasted. CCFE ¶ 858.

{ [REDACTED] }

CCFE ¶ 859. { [REDACTED] }

[REDACTED] } CCFE ¶

860.

As Altria's VP of Product Development Richard Jupe testified, the terms of the JLI transaction required Altria to immediately stop doing work in e-cigarettes. CCFF ¶ 1007. Therefore, upon signing the deal on December 20, 2018, Altria embarked on a "rapid and comprehensive closure to product development work associated with e-vapor," ending any future closed-system e-cigarette price, innovation and shelf-space competition. CCFF ¶ 1008.

**c. Altria Ceasing to Operate Its E-cigarette Business Benefited Altria and JLI**

As discussed above, Altria exited e-cigarettes by simply shutting down its e-cigarette business. Due to Altria's entanglements with PMI, Altria ceasing to operate its e-cigarette business (instead of contributing it to JLI or divesting it to a third party) provided benefits to both Altria and JLI. *See United States v. Apple, Inc.*, 791 F.3d 290, 315 (2nd Cir. 2015) ("Circumstances that may raise an inference of conspiracy include a common motive to conspire . . . .") (internal quotations and citation omitted). Altria was concerned that, under its JRDTA with PMI, it did not have the right to divest or contribute its e-cigarette products to a third party until July 2020, when the JRDTA expired. CCFF ¶ 927. To address this concern, Altria and JLI agreed that Altria could have until July 2020 to make its HSR filing. CCFF ¶¶ 932-35. But this presented several problems. First, Altria was eager to convert its non-voting shares into voting shares and to take seats on JLI's board—which it could not do until receiving antitrust approval. CCFF ¶¶ 936-37. If Altria had to wait until July 2020 to make its HSR filing due to the PMI agreement, then Altria's ability to take board seats and convert its shares would be delayed by a year and a half. Simply discontinuing its products immediately solved this problem, as Altria and JLI both recognized. Indeed, the December 5, 2018 draft purchase agreement—dated just two days prior to Altria's e-cigarette discontinuation announcement—stated that Altria had until July 2020 make its HSR filing. CCFF ¶ 941. After Altria's December 7, 2018 announcement that it

was exiting e-cigarettes, Altria and JLI edited the draft purchase agreement to *require* both parties to make HSR filings within 90 days, thereby significantly accelerating the timeline for seeking antitrust approval. CCF ¶ 943.

In addition, Altria’s discontinuation of its e-cigarette products provided important benefits to JLI as well. Altria and JLI had determined that Altria could not provide certain enhanced services while Altria was still competing in e-cigarettes. CCF ¶¶ 802-03. Therefore, the final two term sheets (dated October 15 and October 30, 2018) specified that enhanced services could start only after Altria contributed or divested its e-cigarette business, or “otherwise exited the business.” CCF ¶¶ 800-03, 828-29. These enhanced services included direct marketing programs such as including JUUL coupons on (onserts) or in (inserts) Altria cigarette packs. CCF ¶¶ 800-03. [REDACTED] [REDACTED] } CCF ¶ 984. Prior to Altria discontinuing its e-cigarette products, JLI had expressed concern to Altria that the full support services and non-compete “effectively may last only 3 ½ years due to antitrust delay” in making HSR filings and then waiting for antitrust review. CCF ¶ 809.

Because Altria exited the business, however, it was able to start providing enhanced services to JLI immediately after closing, as opposed to waiting until after making its delayed (possibly as late as July 2020) HSR filing and receiving antitrust approval (upon which time Altria would contribute its e-cigarette assets to JLI or divest the assets if required to receive such approval). On December 9, 2018, just days after Altria’s discontinuation announcement, Altria’s Garnick stated to JLI’s Masoudi that Altria could “start enhanced services right away” since it was no longer in the e-cigarette market. CCF ¶ 851. Garnick also assured Gerad Masoudi that although the non-compete “cannot start simply with closing for antitrust reasons – section 1



issue,” the non-compete could “start running based on when providing enhanced services begins and tied to that.” CCF § 851. In other words, Garnick was assuring Masoudi that since Altria had exited the market, the Non-Compete would start right away as well.

[REDACTED]

CCFF § 985. [REDACTED]

[REDACTED] } CCF § 985. Shortly after closing, Altria began providing JLI with enhanced services such as product inserts, which it would not have been able to do at that time if it had not already discontinued its own e-cigarette products. CCF § 985.

In addition to the foregoing, Altria’s discontinuation of its e-cigarette business prior to the Transaction had one additional potential benefit for both Altria and JLI. Altria and JLI may have perceived that Altria’s exit enhanced the chances of the Transaction receiving antitrust approval, as the parties could argue to the FTC that they no longer were competitors and that the Transaction therefore raised no competitive concerns. This is exactly the position that Altria and JLI took in front of the FTC’s Bureau of Competition during the Bureau’s pre-complaint investigation.

**d. Exiting E-Cigarettes Was Against Altria’s Economic Interest Absent the JLI Transaction**

Altria’s discontinuation of its e-cigarette business was against its economic interest—indeed, the evidence is clear that Altria would have competed in the e-cigarette segment but for the Transaction. Actions against unilateral economic self-interest is plus-factor evidence that supports a finding of conspiracy. *Apple*, 952 F. Supp. 2d at 690. “Actions against interest by a

participant in a conspiracy are actions that would have been economically irrational for a firm acting in a competitive market.” *In re McWane, Inc.*, Docket No. 9351, 2012 WL 4101793, at \*9 (F.T.C. Sept. 14, 2012). A company depriving itself of a promising market opportunity is an action against self-interest that points towards an agreement. *Toys “R” Us v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000) (finding an agreement after it was “suspicious for a manufacturer to deprive itself of a profitable sales outlet”); *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 988 F. Supp. 2d 696, 713 (E.D. La. 2013) (acts that “risk a loss of market share to the other manufacturers” are acts against economic self-interest supporting claim of conspiracy).

Altria would never have exited e-cigarettes in the absence of the JLI transaction because Altria viewed market leadership in e-cigarettes as critically important to its long-term success. CCFF ¶¶ 93-108, 411-26; *see supra* §§ I.A.1. and I.C.2. Altria had already spent over half a billion dollars developing and marketing e-cigarette products, and had hundreds of people working on e-cigarette product development and marketing. CCFF ¶¶ 97, 409-10, 428, 452. The company repeatedly touted the importance of the e-cigarette market to its investors given the steady decline of the combustible cigarette category. CCFF ¶¶ 96, 98, 100, 103, 105, 108. Altria could not afford to stand on the sidelines as e-cigarette products displaced traditional cigarettes. CCFF ¶¶ 59-74; *see supra* § I.A.1. { [REDACTED] } Altria was willing to forego short-term profits to succeed in the e-vapor market. CCFF ¶¶ 95, 109-117. { [REDACTED] } [REDACTED] [REDACTED] [REDACTED] } CCFF ¶¶ 95, 1067.

Altria frequently made public statements to investors, which must be truthful and accurate under SEC regulations, on the importance of the e-cigarette market to Altria. At Altria’s

2017 Investor Day, then-Chairman and CEO Marty Barrington said: “[W]e’ll be clear: We aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products.” CCF ¶ 420. In an interview with the *Wall Street Journal*, Howard Willard acknowledged the critical importance of Altria’s participation in e-cigarettes in view of changing market dynamics: “At a time when e-vapor is going to grow rapidly and likely cannibalize the consumers we have in our core business, if you don’t invest in the new areas you potentially put your ability to deliver that financial result at risk.” CCF ¶ 108.

Given the importance of e-cigarettes, industry participants were surprised that Altria discontinued its e-cigarette products. CCF ¶¶ 1016-27. ITG executive Jeff Eldridge thought that given Altria’s resources, they would have been able to grow MarkTen Elite if they had kept it on the market, and he was surprised when Altria pulled Elite because it had not been on the market very long. CCF ¶¶ 498, 1019, 1160. PMI’s Martin King testified that “investors and others were adamant that companies like PMI and Altria address the e-cigarette space, and have some way to compete and make sure that they’re not being disrupted, and it would have been [] unusual for a major tobacco company at the time not to have some initiative or way to deal with the growth of e-cigarettes.” CCF ¶ 1017. Paul Crozier of Sheetz was surprised upon learning that Altria was exiting the e-cigarette category, because Altria has a leadership position in the other tobacco categories, and Altria’s e-cigarettes were the number two product in that category at Sheetz. CCF ¶ 1027.

Moreover, as soon as Altria discontinued MarkTen, observers in the investment community quickly linked the discontinuation to an impending Altria/JLI transaction. Wells Fargo called Altria’s December 7, 2018 discontinuation announcement a “surprise move,” and

immediately suspected a JLI deal was imminent. CCF ¶ 1021. Morgan Stanley also expressed surprise at Altria's discontinuation of its e-cigarettes:

[W]e are surprised to see the company forgo this business altogether, given the amount of investment it has already put into the category, shifting consumer preferences towards RRP [reduced risk products] over the long-term, and a regulatory backdrop that aims to encourage a shift down 'the continuum of risk'. [Altria]'s decision to exit e-cigs suggests that it sees better growth prospects elsewhere [. . .] and we question if it is related to a potential JUUL investment (note that JUUL has ~75% market share of e-cigs and a potential investment by [Altria] could raise anti-trust issues). CCF ¶ 1020.

Centos Securities described the discontinuation as a "clearing of the decks of the old attempts at e-vapour" which "seem[ed] to be a fairly clear pointer" towards Altria buying a stake in JLI. CCF ¶ 1024.

In view of Altria's statements to investors as well as the general understanding in the investment community, it is highly implausible that Altria would exit the e-cigarette market in the absence of an agreement with JLI. Indeed, the evidence suggests that Respondents "would not have acted as they did had they not been conspiring." *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 989 (N.D. Ohio 2015) (quoting *City of Tuscaloosa*, 158 F.3d at 572).

**e. The January 2020 Amendment to the Non-Compete Shows that but for the JLI Transaction, Altria would have Continued Competing in E-cigarettes**

The January 2020 amendments to the Transaction make clear that Altria would have continued to compete in e-cigarettes but for the agreement with JLI. In January 2020, at Altria's behest, Altria and JLI executed certain amendments to the Transaction. CCF ¶¶ 50-54. Those amendments included a revised term allowing Altria to be released from its non-compete obligation if (1) JLI is prohibited by federal law from selling e-cigarettes in the U.S. for at least a year, or (2) if Altria's valuation of its JLI investment is 10% or less of its initial valuation of \$12.8 billion. CCF ¶ 53. In other words, if Altria can no longer participate in e-cigarettes

through JLI (because JUUL is not allowed to be sold in the U.S.), or if Altria determines JLI is no longer as valuable as expected, Altria wants the right to compete on its own. This supports an inference that Altria would never have exited this important market in the first place if not for its Transaction with JLI.

## **2. Altria’s Proffered Explanations For Its Decision to Exit the E-Cigarette Market Are Pretextual And Inconsistent with the Evidence**

Throughout this case, Respondents have proffered various alternative explanations for Altria’s decision to exit the e-cigarette market, citing concerns about youth vaping, the inability to convert smokers, and Nu Mark’s purportedly dire financial position. The record evidence supports none of these explanations; rather Respondents have conjured these convenient narratives in an attempt to save what is clearly an anticompetitive transaction.<sup>14</sup> “Pretextual excuses are circumstantial evidence that can disprove the likelihood of independent action.” *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 478 (3d. Cir. 1998); *see also Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d. Cir. 1985) (“evidence of pretext, if believed by the [fact finder], would disprove the likelihood of independent action on the part of [Respondent].”). Indeed, evidence of pretext can “strengthen an inference of joint action that is otherwise in evidence.” *White v. RM Packer Co., Inc.*, 635 F.3d 571, 585 (1st Cir. 2011). Therefore, Respondents’ inconsistent and unsupported alternative justifications for Altria’s market exit lend further support for finding Respondents entered an illegal agreement.

### **a. Altria’s Purported Commercial Challenges Are Pretextual and Inconsistent with the Evidence**

When Altria shut down its e-cigarette division in December 2018, Altria claimed in a press release that its decision was based on “the current and expected financial performance of

---

<sup>14</sup> As discussed above, *see supra* § III.A.1.d, sophisticated market analysts, including Morgan Stanley and Cenkos Securities, immediately linked Altria’s exit to a potential deal with JLI. CCF 1020, 1024.

these products . . . .” CCFF ¶ 1034. But ordinary course documents, the observations and experiences of market participants, and the testimony of Altria’s own executives indicate that this justification is implausible. CCFF ¶ 1035. Altria recognized that e-cigarettes were a critical category and, like every major tobacco company, was willing to sacrifice short-term profits in the category in order to gain long-term success. CCFF ¶¶ 1064-87, 1132-43. From the start, Willard told investors that in the e-cigarette category, “long-term leadership won’t be achieved overnight.” CCFF ¶ 103. As Craig Schwartz explained, “when you are in the heavy up period, you are going to have depressed profits. The objective is that the investment will pay off.” CCFF ¶ 1066. And Altria had reason to believe those objectives would ultimately be successful: In November 2017, Begley told investors that he “fully expect[s] Nu Mark to achieve our long-term goal, which is to lead the U.S. e-vapor category through a portfolio of superior reduced risk products . . . that generate cigarette like margins at scale.” CCFF ¶ 1083.

Further, contrary to Respondents’ assertions, Nu Mark’s financial performance was actually improving and Altria was meeting the strategic benchmarks it had set for itself. For one, Nu Mark held the #2 position in the U.S. closed-system e-cigarette market as late as 2017. CCFF ¶ 137. As for MarkTen Elite, Altria pulled the product before it even had the chance to establish its footing in the market. CCFF ¶¶ 987, 1433. Inspired by the success of JLI’s pod product, Altria acquired and rapidly started distributing Elite in February 2018. CCFF ¶¶ 138-39, 141. But Elite was in the market less than nine months when Altria pulled it, having lasted a mere fraction of the more than 75 years Altria has taken developing its Marlboro brand. CCFF ¶ 1162. Even Brian Quigley, Nu Mark’s President and CEO, was confused about Altria upper management’s decision to pull Elite, testifying that he “did not feel it made sense to walk away from the pod business.” CCFF ¶ 1155.

By exiting the e-cigarette market, Altria took a dramatically different path than its big-tobacco peers. While other competitors in the e-cigarette market faced similar initial financial setbacks, Altria is the only one that exited this critical, growing market. CCFF ¶¶ 1132-1143. As documents from 2017 and 2018 reflect, “all the large tobacco companies say their e-vapor businesses are loss-making” and “[m]ajor manufacturers are still operating at sizeable losses.”

CCFF ¶ 1030. { [REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶ 1031. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶ 1032.

There is no doubt that JLI disrupted the e-cigarette market, but even after JLI’s entry, Altria still held the #3 position. CCFF ¶ 1738. All firms lost share to the rapidly growing JLI, but only Altria exited the market. Respondents essentially ask the Court to conclude that while Reynolds and ITG were able to continue to compete in the critical and growing e-cigarette category, even when they were losing money and share to JLI, Altria, the largest tobacco firm of them all, could not.

When Altria exited the e-cigarette business in December 2018, Nu Mark was hardly failing. Altria was still the third largest seller of closed system e-cigarettes in the U.S., behind Reynolds and JLI. CCFF ¶ 1414. Even with an imperfect portfolio of e-vapor products, Nu Mark gave Altria a valuable toehold in this critical category. While Altria claims its products were deeply flawed as compared to JUUL, not every customer seeks the same experience, and Altria’s

products appealed to a subset of consumers, particularly those who were seeking lower nicotine strength. CCFF ¶ 1177, 1316-19, 1493. Furthermore, while certain Altria executives saw product flaws as early as June 2018, Altria did not take any steps to discontinue any of its products until October 2018, suspiciously close to the time when Altria and JLI agreed to final terms. CCFF ¶¶ 811-25. Altria's uniquely defeatist attitude toward success in the e-cigarette market can only be explained by its strategic investment in JLI.<sup>15</sup>

**b. Altria's Purported Concerns About Youth E-Cigarette Use are Pretextual and Inconsistent with the Evidence**

Initially, when Altria removed Elite and Apex from the market in October 2018, Altria cited concerns about the rise in youth e-cigarette use. CCFF ¶ 1239. In its letter to the FDA, Altria stated that it believed that pod-based products significantly contributed to the rise of youth vaping. CCFF ¶ 1239. But behind closed doors, Altria was closing in on a deal with JLI, the U.S. market leader in e-cigarettes and the public face of the youth vaping epidemic. CCFF ¶¶ 812-19. And privately, immediately after the FDA letter was sent, Altria called JLI to reassure them of their continued interest in a strategic partnership despite its letter to the FDA linking pod products to youth vaping concerns. CCFF ¶ 814.

Those familiar with the e-cigarette industry quickly spotted the logical inconsistency between Altria's letter to the FDA and its decision to press forward with an investment in JLI. JLI's former CEO Kevin Burns testified that "it seemed in conflict" that Altria would write its letter to the FDA and "still want to have discussions about investing in a company whose

---

<sup>15</sup> Respondents' arguments suggest a weak version of the "failing firm" defense recognized under Section 7. *See Merger Guidelines* § 11. Notably, Respondents do not raise a formal failing firm defense, and indeed are unable to satisfy its demanding requirements. *See United States v. Energy Sols.*, 265 F. Supp. 3d 415, 44 (D. Del. 2017) (Respondents "have the burden of showing (1) that the resources of [one firm] were so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure and (2) that there was no other prospective purchaser for it.") (citing *United States Greater Buffalo Press, Inc.*, 402 U.S. 459, 555 (1971) (internal quotations omitted).



primary product was a pod-based e-vapor product.” CCFF ¶ 1243. Additionally, following news of the JLI deal, FDA Commissioner Gottlieb wrote to Willard requesting a meeting with Altria regarding Altria’s letter to the FDA in which it acknowledged “that Altria Group, Inc. has an obligation to take action to help address the mounting epidemic of youth addiction to tobacco products.” CCFF ¶ 1240. Gottlieb further noted that “[a]fter Altria's acquisition of a 35 percent ownership interest in JUUL Labs, Inc., [Altria’s] newly announced plans with JUUL contradict the commitments [Altria] made to the FDA.” CCFF ¶ 1241. Willard later testified that he understood Commissioner Gottlieb’s references to “commitments” to include Altria’s October 25, 2018 letter to the FDA announcing the discontinuation of MarkTen Elite and Apex by MarkTen. CCFF ¶ 1242.

Indeed, all the record evidence in this case points to the fact that Altria knew that it was JLI’s JUUL product – and *not* any Altria e-cigarette product – that was closely associated with youth usage and initiation. As Howard Willard testified, around October 25, 2018, “the evidence pointed to the fact that [JUUL] was also the number one product that was being utilized by youth.” CCFF ¶ 1251. Further, Craig Schwartz stated in an August 2018 email that JLI’s product had a “significant initiation component” with users under 21 which he anticipated would “present problems with the FDA” when seeking PMTA approval. CCFF ¶ 1249. Another Altria executive testified that, at the time of the Transaction, she was concerned “that the youth issue would be very difficult for JUUL in a PMTA context.” CCFF ¶ 1250. The record evidence does not support the notion that Altria’s e-cigarette products presented the same youth appeal as JLI’s did. In fact, Altria’s letter to the FDA noted that Altria did not believe that it had “any current issue with youth access to or use of” its pod-based products. CCFF ¶ 1348.

Moreover, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶ 1246. { [REDACTED] } strongly suggests that the FDA’s youth usage concerns were not the true reason behind Altria’s decision to pull its pod-products. Rather the FDA’s timely scrutiny of youth usage of e-cigarettes provided a convenient alternative justification for actions Altria had already planned to take in order to satisfy JLI’s terms.

In sum, the record evidence does not support Respondents’ contention that Altria removed its pod-based products due to concerns about youth e-cigarette usage.

**c. Altria’s Purported Regulatory Challenges Are Pretextual and Inconsistent with the Evidence**

Respondents argue that Altria exited the market because its products were incapable of obtaining a PMTA, but once again, the facts do not support Respondents’ claim. CCFF ¶ 1254-1352. At the time of the Transaction, Altria’s PMTA process was well underway, and the deadline for submissions still four years in the future. CCFF ¶¶ 1257, 1264-65. { [REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶ 1259. Altria planned to file PMTAs for both the MarkTen cigalike and the MarkTen Elite. CCFF ¶¶ 1261-62, 1267-68. Altria documents reveal that the PMTAs for the MarkTen cigalike were as much as 75 percent complete. CCFF ¶¶ 1264. As for the Elite, Altria planned to submit a final application by the then-2022 deadline. CCFF ¶ 1268. While MarkTen Elite was not without its issues, Altria had plans to address these

issues in the Elite 2.0, a new and improved product for which it would also seek a PMTA. CCFE ¶¶ 1282-1300.

Respondents have claimed throughout this case that the FDA's deeming rule prevented Altria from implementing any new product improvements. But the record shows that Altria did in fact, make improvements to its products including a gasket replacement for MarkTen Elite to prevent leaking. CCFE ¶ 1149.<sup>16</sup>

Furthermore, Respondents' argument that Altria would be unable to obtain a PMTA is highly speculative given the uncertainty surrounding this new regulatory process. Respondents' myopically focus on the MarkTen products' ability to convert smokers, but the FDA looks at more than conversion potential when determining whether the product is "appropriate for the protection of public health." *See* 21 U.S.C. § 387j(c); *see also* CCFE ¶¶ 1325, 1327. In fact, the FDA is particularly concerned with whether the product initiates use among youth and non-smokers, and by all accounts, it was JLI's product, not any of Altria's, that was driving youth initiation. CCFE ¶¶ 1248-52, 1323-27. But the Court should also question Altria's underlying claims about its products' ability to convert adult smokers because Altria *never actually tested* these claims. CCFE ¶¶ 1302-07.

Finally, these regulatory hurdles were not unique to Altria. Every e-cigarette manufacturer is subject to the FDA's PMTA regime, but once again, Altria was alone among its big-tobacco peers in taking the drastic action of exiting a critical and growing market. The evidence does not support Respondents' claim that it exited the market due to regulatory

---

<sup>16</sup> Initially, multiple Altria executives testified under oath that Altria had *not* implemented a new gasket in MarkTen Elite due to regulatory concerns about implementing new features. CCFE ¶ 1225. Almost seven months later, Altria's counsel finally sent a letter to Complaint Counsel, acknowledging that the new gasket was implemented, correcting the record. CCFE ¶ 1226. The Court is "entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 147 (2000).

concerns. In fact, the implausibility of Respondents' various and shifting claims suggest these alternative justifications are pretextual and conjured for the purpose of shielding a clearly anticompetitive transaction.

### **B. Respondents' Agreement is Unlawful under the Rule of Reason**

Respondents' agreement that Altria exit the e-cigarette market, including its agreement to remove its own products and the six-year Non-Compete with JLI, violates the rule of reason because the anticompetitive effects of Altria's exit clearly outweigh any procompetitive benefits. As the Supreme Court has explained, "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978); *see also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986); *Board of Trade v. United States*, 246 U.S. 231, 238 (1918).<sup>17</sup> Under the rule of reason framework, the antitrust plaintiff "must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

In analyzing an alleged violation of Section 1 under the rule of reason, courts use a burden-shifting framework. *Impax*, 994 F.3d at 492 (citing *Ohio v. Am. Express Co.*, -- U.S. --, 138 S. Ct. 2274, 2284 (2018)). First, the "initial burden is on the FTC to show anticompetitive effects." *Id.* If the FTC succeeds, the burden shifts to Respondents to "demonstrate that the restraint produced procompetitive benefits." *Id.* If Respondents "successfully prove[]

---

<sup>17</sup> Respondents' conduct may well amount to a *per se* violation of Section 1 or be unlawful under the "inherently suspect" standard. *See Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 829-31 (3d. Cir. 2010) (describing three standards courts use to analyze alleged restraints); *see also* Complaint, *In re Juul Labs, Inc., Antitrust Litig.*, Docket No. 3:20-cv-02345-WHO (N.D. Cal. Apr. 7, 2020) (private litigation challenging the instant Transaction as *per se* unlawful). Indeed, market allocation agreements among actual or potential competitors are typically *per se* antitrust violations. *See, e.g., Leegin*, 551 U.S. at 886; *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (*per curiam*). However, as Respondents' agreement to exit the market clearly violates the more "thorough" rule of reason standard, Complaint Counsel's case will proceed under that standard. *California Dental Ass'n v. FTC*, 526 U.S. 756, 759 (1999).

procompetitive benefits, then the FTC can demonstrate that any procompetitive effects could be achieved through less anticompetitive means.” *Id.* Finally, if the FTC “fails to demonstrate a less restrictive alternative way to achieve the procompetitive benefits, the court must balance the anticompetitive and procompetitive effects of the restraint.” *Impax*, 994 F.3d at 492 (citing *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.2d 620, 627 (5th Cir. 2002)). “If the anticompetitive harm outweighs the procompetitive benefits, then the agreement is illegal.” *Id.* This framework “do[es] not represent a rote checklist, nor may [it] be employed as an inflexible substitute for careful analysis.” *NCAA*, -- U.S. --, 141 S. Ct. at 2160.

Here, Respondents’ agreement resulted in the complete elimination of *all* price, shelf-space, and innovation competition from Altria in the relevant market. Agreements among horizontal competitors not to compete are considered the “*bête noir*” of antitrust law. *Impax*, 994 F.3d at 493 (citing Joshua P. Davis & Ryan J. McEwan, *Deactivating Actavis: The Clash Between the Supreme Court and (Some) Lower Courts*, 67 RUTGERS U.L. REV. 557, 559 (2015)). Indeed, market allocation agreements are more pernicious than price-fixing schemes because the former eliminates *all* forms of competition on every dimension. *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (Posner, C.J.). As the *Impax* court noted, market allocation agreements replace “the possibility of competition with the certainty of none.” 994 F.3d at 495. Against these clear competitive concerns, Respondents have offered mere speculation about Altria’s ability to assist and accelerate JLI’s PMTA efforts. *See* Resps.’s Br. at 86. Upon a weighing of these factors, it is clear that Respondents’ agreement violates the rule of reason.

**1. The Agreement Has Harmed and Will Continue to Harm Consumers**

By removing Altria from the market, Respondents agreement harmed, and will continue to harm, consumers in the U.S. closed-system e-cigarette market. Under the rule of reason, plaintiffs may meet their initial burden by showing either: (1) direct evidence of anticompetitive effects, or (2) Respondents’ market power along with the likely effect of the challenged conduct. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011). Where the plaintiff can show actual anticompetitive effects, a “full blown market analysis is not necessary.” *Intel Corp. v. Fortress Invest. Group LLC*, 511 F. Supp. 3d 1006, 1014 (N.D. Cal. 2021) (quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)). Here the direct evidence of actual anticompetitive effects is clear: Altria’s exit eliminated beneficial present and future competition across price, shelf-space, and innovation dimensions. Altria had every incentive and ability to compete and, without the Transaction, Altria would have continued to be a significant competitive constraint in the closed-system e-cigarette market.

Prior to its exit, Altria competed directly with JLI and other e-cigarette manufacturers on price. CCFE ¶¶ 1418-40. Altria closely tracked pricing and promotions by JLI. CCFE ¶ 1420. Altria executives testified that JLI “certainly influenced how [Altria] priced MarkTen in the marketplace,” and that Altria purposely priced MarkTen Elite at a discount to JUUL. CCFE ¶¶ 1421-24. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } CCFE ¶ 1429. Altria continued promoting its e-cigarette products right up until they were discontinued. CCFE ¶ 1431. On October 15, 2018, an Altria sales representative received approval to distribute additional coupons for \$8 off a pod pack as part of an “aggressive plan to connect . . . two big accounts . . . with MarkTen Elite.” CCFE ¶ 1431.

JLI, for its part, tracked Altria’s prices and promotions. CCFE ¶¶ 1432-40. In February 2018, when Altria first launched MarkTen Elite, JLI’s Bob Robbins wrote that MarkTen Elite was “priced pretty aggressively” and “set for share-gain mode,” and Joseph O’Hara noted that Elite was “shockingly cheap.” CCFE ¶ 1443. Furthermore, Altria’s Craig Schwartz testified that JLI responded to the launch of MarkTen Elite by dropping its JUUL bundle price by \$20. CCFE ¶ 1434.

But competition between Altria and JLI was about far more than just price. Altria and JLI also competed for shelf space at retail and convenience stores. CCFE ¶¶ 1441-62. Altria spent \$100 million during 2018 on its Innovative Tobacco Products (“ITP”) program to obtain premier shelf space at retailers for its e-cigarettes for a three-year period lasting until 2021. CCFE ¶ 1448. JLI considered Altria’s efforts to secure e-cigarette shelf space via the ITP program to be an “urgent” threat. CCFE ¶ 1450. In an email to JLI’s CEO and CFO titled “Altria shelf set competitive response,” Bob Robbins expressed “urgent” concern regarding Altria’s 3-year ITP shelf-space contracts. CCFE ¶ 1450. According to Mr. Robbins, “[i]f [JLI] can’t find a strategy around this, [JLI] will be severely restricted on shelf in a considerable part of the c-store universe for the next 3 years.” CCFE ¶ 1450. { [REDACTED]

[REDACTED]

[REDACTED] } CCFE ¶ 1454. { [REDACTED]

[REDACTED]

[REDACTED] }. CCFE ¶ 1454. Altria had signed, or was in the process of signing, additional ITP contracts with additional retailers across 19,000 locations. CCFE ¶ 1453. These new ITP contracts were set to go into effect between September 2018 and January 2019. CCFE ¶ 1453.

Altria and JLI also competed head-to-head on product innovations. CCFF ¶¶ 1463-81. After JLI's early success with a pod-based system, Altria introduced MarkTen Elite, one of the first pod-based systems in the U.S. market. CCFF ¶ 1464. And after seeing JLI's success with nicotine salts, Altria introduced the MarkTen Bold cigalike product containing nicotine salts, and planned to add nicotine salts to future versions of Elite. CCFF ¶¶ 138-39, 1463, 1542-48. Altria was looking to develop "JUUL fighters" and conducted "research to look at potential products to compete with JUUL and potentially hamper their momentum." CCFF ¶ 1464. After conducting a trial among adult smokers, Altria noted that "Elite was consistently preferred over . . . other devices including JUUL." CCFF ¶ 1464. Altria and JLI further competed by offering different nicotine strengths in response to consumer preferences. CCFF ¶ 1473. In 2018, Bob Robbins told JLI's CEO that "[a]ll viable competitors . . . offer variable Nicotine Strengths . . . We should too." CCFF ¶ 1474. JLI ultimately did release products in 5%, 3%, and 1.5% nicotine strengths in order to respond to consumers who wanted a lower nicotine strength or to taper down their usage. CCFF ¶ 1476. Additionally, after Altria introduced a magnetic pod insertion in its MarkTen Elite, JLI explored magnetic pods for its next generation JUUL devices. CCFF ¶¶ 1477, 1481.

Altria's exit from the closed-system e-cigarette market also eliminated all future price, innovation, and shelf-space competition between Respondents. CCFF ¶¶ 1527-87. Altria was well positioned to compete with JLI in the future: it is the largest tobacco company in the U.S. with access to tremendous resources and relationships. CCFF ¶ 6. As the leading manufacturer of tobacco products in the U.S., Altria could leverage its retail and distribution relationships, its regulatory expertise, and its vast resources to invest in innovative products. CCFF ¶ 119, 427-41, 493-514. Joseph O'Hara of JLI concluded that MarkTen Elite was one of only a few products,



including JUUL, that had long-term viability. CCFE ¶ 1129. Additionally, a 2017 Altria Investor Day presentation notes that Altria had “a promising pipeline of future e-vapor products in development.” CCFE ¶ 1531. The evidence also indicates that Altria intended to continue to discount its e-cigarette products, to implement product improvements, and to develop new products. CCFE ¶ 1532-37, 1538-87. As of September 2018, Altria was still continuing to invest in R&D to find the best mix of salts, flavors, and nicotine strength to satisfy consumers. CCFE ¶ 1544. One Altria project, entitled Project Panama, intended to create a superior e-cigarette product to “leapfrog everything that was already in the marketplace.” CCFE ¶ 1569. Altria was also pursuing a number of research and development projects for the next-generation of e-cigarettes, ranging from Smart-Pod technology to flavor sensates. CCFE ¶¶ 1570-74. With Altria out of the market, consumers have lost all the benefits of Altria’s future competitive significance.

The Transaction also foreclosed other avenues through which Altria would have continued competing with JLI in the future. In particular, the Transaction foreclosed Altria from introducing new and promising e-cigarette products developed by PMI known as APEX and VEEV. CCFE ¶¶ 1620-43. Under the JRDTA, Altria and PMI pooled resources, technology, and IP for Altria to use within the U.S. and for PMI to use outside the U.S. CCFE ¶ 516. In its 2016 three-year plan, Nu Mark wrote that it was “leveraging [the] PMI agreement to accelerate product development” and that Altria and PMI were “collaboratively focused” on cigalike platform enhancements, pod-based system developments, e-liquid portfolio expansion, and other initiatives. CCFE ¶ 1603. PMI and Altria regularly shared intelligence and discussed how best to compete with JLI. CCFE ¶ 1611. When preparing for a November 2017 meeting, Altria’s Richard Jupe wrote to PMI, “[w]e will be ready to discuss what we know about Juul when we visit at the end of November, and our plans to compete against it in the USA.” CCFE ¶ 1611. [REDACTED]

[REDACTED]

[REDACTED] } CCFE ¶ 1615.

Of particular importance, the JRDTA granted Altria the right to commercialize PMI's APEX pod-based e-cigarette product in the U.S. CCFE ¶ 1622. APEX was a promising product for Altria. In November 2017 Investor Day remarks, Begley stated that "[w]e've received positive results from our initial consumer research, and as a result, we plan to further test this product – called APEX in the US – as a line extension under MarkTen." CCFE ¶ 1626. One consumer study conducted by Altria found that APEX was well received due to its "ease of inhale/exhale experience and good tasting flavors." CCFE ¶ 1628. A July 2018 Nu Mark analysis noted that APEX has a "[p]otentially favorable device design from an FDA perspective," and has "strong IP," and an "[e]ffortless inhale/exhale experience." CCFE ¶ 1627. Altria sold APEX in e-commerce and had "the opportunity to introduce APEX in BP on the West Coast." CCFE ¶ 1629. Rather than continuing to compete with this promising product, Altria discontinued APEX, along with MarkTen Elite, in October 2018, mere days before Altria and JLI reached agreement on a final term sheet. CCFE ¶ 811.

Altria and PMI's product collaborations under the JRDTA did not end with APEX. PMI took what it learned from APEX and incorporated those lessons into product improvements for an updated product called VEEV. CCFE ¶ 1640. PMI improved the form factor in VEEV compared to APEX by making the product smaller to better fit the consumer's hand. CCFE ¶ 1641. PMI successfully released VEEV in international markets in 2020 and plans to have the product in 20 countries by the end of 2021. CCFE ¶¶ 1647, 1650. VEEV has a number of promising product features including a longer battery life, a more palatable aerosol, dry-puff prevention, and the ability to have a smaller or larger plume when vaping. CCFE ¶¶ 1652, 1660,

1668. VEEV uses nicotine salts in its e-liquid and “performs well” in terms of nicotine satisfaction and smoker conversion. CCF ¶¶ 1654, 1659. Even JLI recognized VEEV’s potential for success. Joseph O’Hara acknowledged that VEEV was a high-quality e-cigarette product and noted that a third-party consultant had referred to VEEV as the “Rolls Royce” of the e-cigarette category. CCF ¶ 1686.

Per the terms of the JRDTA, Altria had the U.S. rights to sell VEEV in the U.S., and prior to the Transaction, PMI fully intended and expected Altria to commercialize VEEV in the U.S..

CCFF ¶ 1690. However, { [REDACTED]  
[REDACTED]  
[REDACTED] } [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Finally, Altria’s exit also eliminated the possibility of Altria collaborating with or acquiring other e-cigarette companies. CCF ¶¶ 1717-30. JLI perceived a threat of competition from large tobacco companies like Altria buying smaller competitors and scaling them up quickly. CCF ¶ 1717. That threat was eliminated with the signing of the Transaction.

In short, not only did the Transaction eliminate all existing price, innovation, and shelf-space competition from Altria, it also eliminated all future competition from Altria on those dimensions, including a promising continued collaboration with PMI.

**2. Respondents Cannot Show Procompetitive Justifications for Their Agreement**

Respondents have failed to demonstrate procompetitive justifications for their agreement. Respondents point to services that Altria has provided to JLI under the Services Agreement, but

Respondents terminated most of those services when they amended the Transaction in January 2020. CCFF ¶ 1732. While under the initial agreement, Altria supplied JLI with some distribution, sales, marketing, and fixture support services for parts of 2019 and early 2020, none of those services lasted past March 2020. CCFF ¶¶ 44, 46. The one service to survive the Amended Services Agreement was Altria’s provision of “regulatory support services” in furtherance of JLI’s PMTA efforts. CCFF ¶ 46. But any procompetitive benefits stemming from these regulatory services are highly speculative given the substantial uncertainty surrounding the FDA’s PMTA process and requirements. CCFF ¶ 1898-1911. Respondents have not demonstrated how Altria’s services to JLI have benefited consumers or competition. CCFF ¶ 1733. Accordingly, the Court should not credit the Transaction any procompetitive benefits.<sup>18</sup>

### **3. Even if Respondents Could Show Procompetitive Justifications for Their Agreement, The Agreement is Not Necessary to Achieve Them**

Respondents’ Transaction also fails under the rule of reason because the agreement is not necessary to achieve the Transaction’s purported procompetitive benefits. A restraint is unreasonable when “any procompetitive benefits it produces ‘could have been achieved through less anticompetitive means.’” *Impax*, 994 F.3d at 497 (quoting *Am. Express*, 138 S. Ct. at 2284. “Less restrictive alternatives are ‘those that would be less prejudicial to competition as a whole.’” *N. Am. Soccer League, LLC v. U.S. Soccer Fed’n Inc.*, 883 F.3d 32, 45 (2d Cir. 2018) (quoting *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993). “The idea is that it is unreasonable to justify a restraint of trade based on a purported benefit to competition if that same benefit could be achieved with less damage to competition. Focusing on the existence of less restrictive alternatives may allow courts to avoid difficult balancing of anticompetitive and procompetitive effects and to ‘smoke out’ anticompetitive

---

<sup>18</sup> See also *infra* § IV.D.2.

effects or pretextual justifications for the restraint.” *Impax*, 994 F.3d at 497-98 (quoting C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM L. REV. 927, 947-63 (2016)). While Respondents are likely to argue that Altria possessed certain indispensable scientific and regulatory expertise that would benefit JLI, it is clear from the record that JLI could have achieved these benefits on its own. JLI could have hired scientific and regulatory experts directly, and indeed, JLI did *in fact* hire a number of individuals from Altria to fill these roles, such as Joe Murillo was the Senior Vice President of Regulatory Affairs at Altria. CCF ¶¶ 2015-16. Further, some of the regulatory work Altria performed for JLI was performed by third party contractors with whom JLI could have contracted directly. CCF ¶¶ 1951-55. JLI admits it “did not formally analyze alternatives to using Altria’s [regulatory] services.” CCF ¶ 1918. Because JLI could have received PMTA support through less anticompetitive means, the Transaction, resulting in Altria’s complete exit from the market, is unreasonable.

#### **4. The Competitive Harm Outweighs Any Benefits**

Regardless of whether or not a less restrictive alternative exists, the agreement is illegal because the anticompetitive effects of the Transaction outweigh the procompetitive benefits. *See Impax*, 994 F.3d at 492. As discussed above, the agreement resulted in the complete elimination of Altria, a behemoth innovator in the tobacco industry, as a competitor in the U.S. closed-system e-cigarette market. This agreement denied consumers the benefits of meaningful price, shelf-space, and innovation competition and also reduced consumer choice. Respondents’ weak justifications in the form of discontinued services and uncertain regulatory benefits cannot possibly outweigh that complete loss of competition. Furthermore, Dr. Rothman’s economic modeling predicted that “substantial efficiencies would be required to offset the loss of consumer surplus from Altria’s exit,” but that ultimately “transaction-specific efficiencies . . . don’t offset

the—the loss of Altria.” CCFF ¶ 1888. Respondents’ speculative notions about JLI’s improved PMTA prospects are insufficient to counteract the clear evidence of harm to innovation, price, and shelf-space competition stemming from Altria’s exit.

**C. Standing Alone, the Written Non-Compete Also Violates Section 1 of the Sherman Act**

As part of the final executed Transaction documents, Altria and JLI entered into a written Non-Compete which barred Altria from any participation in the e-cigarette business for a minimum of six years. CCFF ¶ 863. Taken on its own, the text of the Non-Compete – which bars Altria from selling any e-cigarette products or from engaging in any R&D for a minimum of six years – is an independent violation of Section 1 under the rule of reason. Even if the Court believes Altria exited the e-cigarette market for reasons unrelated to the deal with JLI, the Non-Compete still violates Section 1 given Altria’s status as a potential competitor in e-cigarettes. *See FTC v. Actavis, Inc.*, 570 U.S. 136, 146 (2013); *Palmer v. BRG of Ga. Inc.*, 498 U.S. 46, 50 (1990).

Respondents claim the written Non-Compete is “ancillary to a legitimate business integration,” *see* Resps.’ Pretrial Br. 84, but fall far short from satisfying the strictures of the ancillary restraints doctrine. Covenants not to compete are valid where “(1) ancillary to the main business purpose of a lawful contract, and (2) necessary to protect the covenantee’s legitimate property interests which require that the covenants be as limited as is reasonable to protect the covenantee’s interest.” *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981) (citing *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-82 (6th Cir. 1898), *aff’d* 175 U.S. 211 (1899)). Respondents satisfy neither element here.

### 1. Respondents Cannot Show the Non-Compete Agreement is Ancillary to An Otherwise Lawful Transaction

Respondents cannot demonstrate that the Non-Compete is ancillary to an otherwise lawful transaction because the underlying Transaction is invalid under both the Sherman and Clayton Acts. In order to be ancillary, “an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction.” *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986). Importantly, for the ancillary restraints doctrine to apply, the underlying Transaction must itself be legitimate, and “even restraints ancillary in form are illegal if they are part of a general plan” to violate the antitrust laws. *Id.* (citing *Addyston Pipe*, 85 F. at 282-83). Accordingly, any restraint in furtherance of a Section 1 or Section 7 violation cannot properly be considered an “ancillary” restraint. *Id.* Respondents contend this argument is circular, but it is common sense: the ancillary restraints doctrine is not a means for Respondents to save an otherwise unlawful transaction.<sup>19</sup>

Furthermore, the requirements for ancillarity are demanding. Where a restraint is “so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary.” *Rothery*, 792 F.2d at 224. Moreover, “under established precedent, a restraint is only ancillary if it [is] necessary to achieve otherwise unobtainable procompetitive benefits.” *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 872 (N.D. Ill. 2010). The Non-Compete fails on these criteria as well: the written agreement is broad enough to harm

---

<sup>19</sup> Notably, neither case cited by Respondents in their appeal for application of the ancillary restraints doctrine challenged the legitimacy of the underlying merger or acquisition. *See generally Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981); *Perceptron, Inc. v. Sensor Adaptive Machines, Inc.*, 221 F.3d 913 (6th Cir. 2000). Both cases concerned alleged breaches of non-compete agreements and counterarguments that the agreements were invalid under the antitrust laws.

competition, it creates little to no efficiencies, and any procompetitive benefits could be achieved by less restrictive alternatives.<sup>20</sup>

## **2. Even if the Non-Compete Agreement Was Ancillary to An Otherwise Lawful Transaction, the Non-Compete Agreement Violates the Rule of Reason**

The Court need not determine whether or not the ancillary restraints doctrine applies in order to find that the Non-Compete violates Section 1. Written non-competes, even where ancillary to a legitimate transaction, are subject to the rule of reason. *Lektro-Vend*, 660 F.2d at 265; *Eichorn v. AT&T Corp.*, 248 F.3d 131, 138 (3d. Cir. 2001). Respondents' written Non-Compete agreement clearly violates that standard: the anticompetitive harms from the Non-Compete substantially outweigh any benefits, and further, the Non-Compete is more restrictive than necessary to achieve any legitimate and competitive business interests.

The Non-Compete clearly harms competition by excluding Altria from participation in the U.S. closed-system e-cigarette market for a minimum of six years and eliminates all the competitive constraints that Altria would provide.<sup>21</sup> Respondents attempt to minimize the anticompetitive effects of the written agreement by arguing that the Non-Compete is "subject to a carve-out for [Altria's] existing products." Resps.' Pretrial Br. at 84. Indeed, the text includes a clause providing that Altria "may engage in the business relating to (I) its GreenSmoke, MarkTen [], and MarkTen Elite brands, in each case, as such business is presently conducted." CCFF ¶ 864. But this argument ignores the factual reality that by the time Respondents inked the written agreement, Altria had *already* removed the entirety of its e-cigarette portfolio from the market. CCFF ¶ 864. While the Non-Compete's drafters may have attempted to disguise the full effect of the written agreement through the use of the "as such business is presently conducted"

---

<sup>20</sup> See *infra* § IV.C.2

<sup>21</sup> Indeed, the Commission has challenged non-competes of equal or shorter lengths. See, e.g., *DTE Energy Co.*, No. C-4691, at 3-4, 14 (F.T.C. Complaint, Dec. 13, 2019); *Oltrin Solutions, LLC*, No. C-4388 (F.T.C. Complaint, Mar. 7, 2013).



language, the fact remains that, at the time of signing, Altria was *not* presently conducting any business in e-cigarettes due to its discontinuation of its MarkTen products just two weeks prior. *See* CCFF ¶ 1002-03. Therefore, by assenting to the terms of the Non-Compete, Altria committed itself to refraining from conducting any business whatsoever in the U.S. e-cigarette market for a period of at least six years.<sup>22</sup>

Furthermore, not only does the Non-Compete prevent Altria from selling any e-cigarettes, it bars Altria from engaging in any R&D for the term of the agreement, thereby eliminating beneficial innovation competition and opportunities for product development. CCFF ¶ 1006-07. And Altria did, in fact, cease conducting any e-cigarette R&D following the Transaction. CCFF ¶ 1010. [REDACTED]

[REDACTED] } CCFF ¶ 1012. [REDACTED]

[REDACTED] } CCFF ¶

1014. The clear harm stemming from Altria’s complete elimination from the relevant market supports a finding that the written Non-Compete violates the rule of reason.

Against this harm, Respondents provide only speculative notions about Altria’s ability to accelerate JLI’s PMTA submission timeline and improve its chance of success. But even if the Court credits this abstract goal as a valid procompetitive justification, the Non-Compete still fails because it is more restrictive than necessary to achieve Respondents’ purported goals. As discussed above, JLI could have hired, and did hire, its own experts and third-party contractors to

---

<sup>22</sup> Respondents also raised this “carve-out” argument in their motions to dismiss the private class actions challenging their anticompetitive conduct. *See* Altria’s Motion to Dismiss at 13-14, *In re Juul Labs Inc., Antitrust Litig.*, Docket No. 3:20-cv-02345-WHO (N.D. Cal. Jan. 15, 2021) ECF No. 207. The district court has tentatively denied that motion. *See* Tentative Rulings on Motion to Compel and Motions to Dismiss, *In re Juul Labs, Inc., Antitrust Litig.*, Docket No. 3:20-cv-02345-WHO (N.D. Cal. Apr. 21, 2021) ECF No. 248.

assist in its PMTA submissions.<sup>23</sup> Additionally, the six-year minimum length of the Non-Compete is more restrictive than necessary to achieve Respondents' purported goals. Instead, Respondents could have limited the Non-Compete to a shorter period or set the Non-Compete to expire upon the completion of JLI's PMTA submission. Finally, Respondents could have implemented firewalls within Altria to limit the flow of competitively sensitive information rather than eliminate competition from Altria entirely, but Respondents never even considered this path. CCFF ¶ 1919. Accordingly, the Non-Compete also violates the rule of reason because it is more restrictive than necessary to achieve the claimed procompetitive benefits.

#### **IV. The Transaction Violates Section 7 of the Clayton Act**

As this case involves an acquisition of an equity stake of a horizontal competitor and a simultaneous exit by the acquiring firm, the Transaction falls within the purview of—and, as explained below, violates—Section 7 of the Clayton Act. Through Altria's complete exit from the closed-system e-cigarette market, the Transaction entirely eliminated existing and future competition from Altria's e-cigarette products and thus resulted in a significant increase in concentration in an already highly-concentrated market. Complaint Counsel's strong *prima facie* case establishes a presumption of anticompetitive effects, and then bolsters that presumption with additional evidence of competitive harm. And at a minimum, the Transaction eliminated Altria as an actual potential competitor. Therefore, the Transaction is also unlawful under Section 7 of the Clayton Act.

##### **A. Applicable Legal Standard Under Section 7**

Section 7 of the Clayton Act prohibits the acquisition of “the whole or any part of the stock or other share capital” where “the effect of such acquisition may be substantially to lessen

---

<sup>23</sup> See *supra* § III.B.3; see also *infra* § IV.B.2.b.

competition, or to tend to create a monopoly.” 15 U.S.C. § 18. The unambiguous text of Section 7 makes it clear that it applies to partial acquisitions such as the instant case.<sup>24</sup> In one of the seminal merger cases, which involved an acquisition of a 23 percent stock interest, the Supreme Court held that “any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of [Section 7 of the Clayton Act] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce.” *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957); *see also Yamaha Motor Co. v. FTC*, 657 F.2d 971, 947 (8th Cir. 1981) (involving an acquisition of a 38 percent interest).

Although the Transaction between Altria and JLI was a partial acquisition, it had the practical effect of a full acquisition as it completely eliminated one of the parties from the market.<sup>25</sup> Indeed, this is precisely the same concern outlined in the *Merger Guidelines*—a horizontal merger that “completely and permanently eliminat[es] competition between them. This elimination of competition is a basic element of merger analysis.” *Merger Guidelines* § 13. Here, Altria’s presence as a competitor was entirely eliminated because it completely exited the U.S. closed-system e-cigarette market as a result of the Transaction. CCF ¶¶ 944-1015. Indeed, shortly after the Transaction, Altria’s sales and market share went down to zero and will stay there for an indefinite period until Respondents’ Non-Compete expires. Thus, it is appropriate and necessary to treat this Transaction like any other horizontal merger.

---

<sup>24</sup> “There is no doubt . . . that [Clayton Act § 7] can apply to acquisitions of a part of the stock of another corporation. This is true . . . regardless of whether the acquisition is sufficient to control that corporation and regardless of whether it appears to be a step toward control.” Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1203 (4th Ed. 2013-2018); *see also Merger Guidelines* § 13.

<sup>25</sup> For the sake of completeness, however, Dr. Rothman also conducted a competitive effect analysis of the partial acquisition (without the non-compete for that particular analysis) and concluded that even in that situation, both Altria and JLI’s incentives would be changed and the companies would compete less vigorously by, among other things, increasing their prices. CCF ¶ 1525.

Section 7 prohibits acquisitions that create a reasonable probability of anticompetitive effects. *See, e.g., FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991). “Congress used the phrase ‘*may be substantially to lessen competition*’ to indicate that its concern was with probabilities, not certainties[.]” *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016) (quoting *Brown Shoe*, 370 U.S. at 323). An acquisition violates Section 7 if it “create[s] an appreciable danger of [anticompetitive] consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for.” *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) (Posner, J.) (citation omitted). Courts typically assess whether a merger violates Section 7 by determining the relevant product market, the relevant geographic market, and the merger’s probable effects on competition in those relevant markets. *See, e.g., Penn State Hershey*, 838 F.3d at 338–47; *Peabody Energy*, 492 F. Supp. 3d at 883–907.<sup>26</sup>

Courts traditionally analyze Section 7 under a burden-shifting framework consisting of three steps. *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982–83 (D.C. Cir. 1990); *In re Polypore Int’l, Inc.*, Docket No. 9327, 2010 WL 9434806, at \*165–66 (F.T.C. Mar. 1, 2010). Under this framework, the government can establish a presumption of anticompetitive harm by defining a relevant product and geographic market and showing that the transaction will lead to undue concentration in the market. *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 363 (1963). The typical measure for determining market concentration is the Herfindahl-Hirschman Index (“HHI”) which is calculated by summing the squares of the individual market shares of all the firms in the market. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715–16 (D.C. Cir. 2001); *Tronox*,

---

<sup>26</sup> Courts and the Commission also rely on the *Merger Guidelines* for guidance in assessing how the challenged transaction may harm competition. *See supra* n.6.

332 F. Supp. 3d at 207. The government can bolster its presumption based on market share with additional evidence showing that competitive effects are likely. *Heinz*, 246 F.3d at 717.

Respondents can then rebut the presumption of harm “by producing evidence to cast doubt on the accuracy of the government’s” evidence. *Polypore*, 2010 WL 9434806, at \*165; *Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008). The stronger the government’s *prima facie* case, however, the greater Respondents’ burden of production on rebuttal. *See Heinz*, 246 F.3d at 725. If Respondents successfully rebut the *prima facie* case, the burden of production shifts back to the government and “merges with the ultimate burden of persuasion, which remains with the government at all times.” *Baker Hughes*, 908 F.2d at 983 (citation omitted)).

**B. The Transaction Is Presumptively Unlawful in the Market for Sales of Closed-System E-Cigarettes in the U.S.**

The Transaction presumptively violates Section 7 of the Clayton Act because it significantly increased concentration in the already highly concentrated market for the sale of closed-system e-cigarettes in the United States. “Sufficiently large HHI figures establish the FTC’s *prima facie* case that a merger is anti-competitive.” *Heinz*, 246 F.3d at 716; *see also Tronox*, 332 F. Supp. 3d at 207; *FTC v. Staples, Inc. (“Staples II”)*, 190 F. Supp. 3d 100, 128 (D.D.C. 2016). An acquisition is “presumptively anticompetitive” if it increases the HHI by more than 200 points and results in a “highly concentrated market” with a post-acquisition HHI exceeding 2,500. *Tronox*, 332 F. Supp. 3d at 207; *Staples II*, 190 F. Supp. 3d at 128; *Merger Guidelines* § 5.3.

Here, the evidence presented at the hearing shows that the Transaction results in an HHI over 3,900 and an increase in HHI by over 650, well above the threshold for presumed harm. CCF ¶¶ 1754-56. Complaint Counsel’s economic expert, Dr. Dov Rothman, calculated pre-

Transaction HHIs by using shares of Altria, JLI, ITG, JTI, NJOY, and Reynolds in the 12-month period between October 2017 to September 2018, which is the latest full 12-month period before Altria’s beginning of its exit from the market in October 2018. CCFF ¶¶ 1751. Then, Dr. Rothman calculated post-Transaction HHIs by proportionally reallocating Altria’s shares to the remaining competitors. CCFF ¶ 1752. Although Dr. Rothman’s HHI calculation required “an assumption about where Altria’s sales go as a consequence of its exit,”<sup>27</sup> Dr. Rothman showed in his report that the Transaction increased concentration even if reallocation would have been different from one proportional to pre-Transaction shares. CCFF ¶ 1760.

**Table 2**  
**Change in HHI**

	Pre-Transaction	Post-Transaction
<b>Shares</b>		
Altria	10.1%	–
ITG	6.6%	7.3%
JTI	3.7%	4.1%
JLI	51.0%	56.7%
NJOY	1.8%	2.0%
Reynolds	22.7%	25.3%
<b>HHI</b>	<b>3,276</b>	<b>3,929</b>
<b>Change in HHI</b>		<b>652</b>

Note: Shares are based on units of closed-system consumables, including cartridges, pods, and disposables, and are calculated using data from October 2017 to September 2018.

Figure 1 Market Shares and HHI Table in CCFF ¶ 1754.

These statistics demonstrate the Transaction is presumptively anticompetitive. *See Tronox*, 332 F. Supp. 3d at 207; *Staples II*, 190 F. Supp. 3d at 128; *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 42-43 (D.D.C. 2017). The market shares and HHI levels here are comparable to the levels found to be unlawful by courts. In *FTC v. University Health, Inc.*, the court found

<sup>27</sup> The Commission may rely on “the closest available approximation” of market shares when calculating concentration levels. *FTC v. PPG Indus.*, 798 F. 2d 1500, 1505 (D.C. Cir. 1986). Indeed, the “FTC need not present market shares and HHI estimates with the precision of a NASA scientist.” *Sysco*, 113 F. Supp. 3d at 54 (market share estimates were reliable because they were the “closest available approximation”); *see also PPG Indus.*, 798 F.2d at 1505 (affirming finding of highly concentrated market based on comparison of market shares in a related market); *United States v. Bazaarvoice, Inc.*, No. 13-cv-133, 2014 U.S. Dist. LEXIS 3284, at \*237 (N.D. Cal. Jan. 8, 2014) (shares are imperfect but reveal the basic market structure).

that the FTC had “clearly established a *prima facie* case of anticompetitive effect” when it proved that a merger of two nonprofit hospitals would have resulted in an increase in HHI of over 630, and a post-merger HHI of approximately 3200. *Univ. Health Inc.*, 938 F.2d 1206, 1211 n.12, 1219 (11th Cir. 1991); *see also Tronox*, 332 F. Supp. 3d at 207 (an increase in HHI over 720 and a post-merger HHI over 3,000).

As Dr. Rothman explained in his trial deposition, the critiques from Respondents’ expert, Dr. Murphy, on Dr. Rothman’s concentration analysis are misguided and incorrect, CCFF ¶ 1757: (1) Dr. Murphy ignored the numerous confounding factors in his before-and-after comparison exercise, which is not the correct way to analyze a “but-for” world, CCFF ¶¶ 1758-59; (2) Dr. Murphy’s before-and-after comparisons of market concentration do not identify the effect of the Transaction on concentration because Dr. Murphy’s analysis confuses correlation with causation, CCFF ¶ 1758; and (3) Dr. Murphy’s claim that Dr. Rothman should have accounted for differences in cartridge volumes across brands is not supported by any economic rationale and in any case, an alternative calculation does not change the conclusion that the Transaction is presumptively anticompetitive based on the concentration statistics. CCFF ¶ 1761.

### **C. Evidence of Competitive Harm Bolsters the Presumption**

The evidence shows that the Transaction has harmed and will continue to harm competition in the U.S. market for the sale of closed-system e-cigarettes. CCFF ¶¶ 1408-730. This additional evidence of competitive harm further strengthens the structural presumption under the Section 7 burden-shifting framework, thus increasing the burden Respondents must shoulder on rebuttal. *Sysco*, 113 F. Supp. 3d at 23 (“The more compelling the [FTC’s] *prima facie* case, the more evidence the defendant must present to rebut [the presumption] successfully.”) (quoting *Baker Hughes*, 908 F.2d at 991).

Despite Respondents' attempt to present a revisionist account of what transpired, it is abundantly clear that *but for the Transaction* Altria would not have exited the U.S. closed-system e-cigarette market and would have continued to compete vigorously against JLI and other e-cigarette competitors. CCFE ¶¶ 1034-407. Thus, the *effect* of the Transaction was the complete elimination—immediately and for an indefinite period—of Altria as a competitive presence in the U.S. closed-system e-cigarette market. CCFE ¶¶ 944-1015. Altria's exit has harmed and will continue to harm competition by eliminating significant price, shelf-space, and innovation competition as well as totally eliminating consumers' ability to choose *any* Altria e-cigarette product.<sup>28</sup>

As discussed below, Complaint Counsel presented direct evidence of competitive harm caused by the Transaction through contemporaneous business documents and testimony. CCFE ¶¶ 1408-1730. Most importantly, the evidence clearly shows that Altria would not have exited the e-cigarette market absent the Transaction. CCFE ¶¶ 409-544. Testimony and contemporaneous documents of Altria executives also make clear that the shutdown of Nu Mark was *due to* the pending JLI deal. CCFE ¶¶ 1390-1407. In a December 1, 2018 email, for example, Altria's Murray Garnick wrote that the decision to “stop making all evapor products” was made in order to “start preparing for the post [Transaction] Altria.” CCFE ¶ 1400. Altria's Garnick also testified that the decision to discontinue commercialization of Nu Mark products was made in anticipation of the Transaction with JLI. CCFE ¶ 1397.

Before the Transaction, Altria competed vigorously against JLI (and other closed-system e-cigarette producers) on price and non-price dimensions, including heavy promotions and discounts for its cigalikes and pod-based e-cigarettes, online and direct mail campaigns, aggressive investment in retail shelf space, and continuous development and improvement in

---

<sup>28</sup> See *supra* § III.B.1.



devices and e-liquids.<sup>29</sup> CCF ¶¶ 1419-92. This evidence, together with Altria’s exit due to the Transaction, strongly supports a finding of anticompetitive effects. “[M]ergers that eliminate head-to-head competition between close competitors often result in a lessening of competition.” *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 216 (D.D.C. 2017); *Aetna*, 240 F. Supp. 3d at 43; *Staples II*, 190 F. Supp. 3d at 131.<sup>30</sup>

First, Respondents competed on all dimensions of head-to-head competition, including price, innovation, and shelf space. CCF ¶¶ 1418-92. As JUUL had become increasingly dominant in the closed-system e-cigarette market, Altria focused its efforts on competing with JLI to gain market share, including aggressive price promotions. CCF ¶¶ 1419-31. But for the Transaction, the intense rivalry between Altria and JLI would have continued directly benefitting consumers. CCF ¶¶ 1532-87. The total loss of head-to-head competition between Altria and JLI in the U.S. closed-system e-cigarette market strengthens the presumption of competitive harm.

This is further enhanced by the evidence that JLI took notice of and reacted to the aggressive competition from Altria on price and innovation. CCF ¶¶ 1432-40, 1463-81. For example, shortly after Altria launched MarkTen Elite with an aggressive price promotion in February 2018, JLI implemented its own price promotion on JUUL kits. CCF ¶¶ 1433-34. JLI also reacted to innovative features of Altria’s products, which appealed to consumers before their elimination from the market. CCF ¶¶ 1463-81, 1493-1526. For example, one of the improvements and new features that JLI was considering for its next generation devices were magnetic pods, similar to MarkTen Elite. CCF ¶¶ 1477-81.

---

<sup>29</sup> See *supra* § III.B.1.

<sup>30</sup> See also *Merger Guidelines* § 6.2. (“A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger.”).

Second, the Transaction also harmed competition by eliminating the future competition between Altria and JLI in the “but for” world. *See FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 883 (E.D. Mo. 2020) (“The Court’s objective is to determine the JV’s likely effect on competition compared to the but-for world in which the JV is not allowed.”). Again, the *effect* of the Transaction was the complete shutdown of Altria’s Nu Mark subsidiary, which deprived consumers of the future benefit of meaningful price, innovation, and shelf-space competition—as well as immediately reducing consumer options—in the U.S. closed-system e-cigarette market. And Altria would have continued to compete in the market but for the Transaction because the e-cigarette category is strategically critical to Altria.<sup>31</sup> CCF ¶¶ 409-544.

In fact, the Transaction extinguished all ongoing innovation competition that was driven by Altria’s significant investments in the e-cigarette category. CCF ¶¶ 1538-87. Before 2018, Altria’s annual spend on e-cigarette product development grew more than tenfold over a five-year period: from a mere \$7 million in 2012 to a projected \$90 million in 2017. CCF ¶ 413. Moreover, an Altria executive testified that prior to the Transaction, Altria had 40 to 50 people focused on e-cigarette product development. CCF ¶ 1774. In November 2017, Altria’s former Chairman and CEO aptly described how the Company’s enormous financial resources would confer advantages for competing in innovative, reduced-risk products like e-cigarettes and its intent to compete in the e-cigarette market over the long term:

Winning long term in this dynamic axis of competition will require the financial firepower and flexibility to invest in products, capabilities and market-building actions as may be appropriate. With the free cash flow we generate and a strong balance sheet, we have plenty of both firepower and flexibility . . . to make the necessary investments. We’ve been investing for years and now, with the FDA’s new direction on innovative products, we’re prepared to make any further investments we need to win.

CCF ¶ 535.

---

<sup>31</sup> *See supra* §§ I.C, III.A.1.d.

Altria's long-term commitment to the e-cigarette market was also apparent from its willingness to engage in R&D efforts to create innovative e-cigarette products. CCF ¶¶ 94-108, 409-10, 515-31. Right up to the time of the Transaction, Altria was actively working to develop and commercialize new products, including an improved version of MarkTen Elite with nicotine salts, and PMI's VEEV product with Mesh technology. CCF ¶¶ 1555-86. But as a result of the Transaction including the written Non-Compete between Respondents, Altria ceased and completely eliminated its entire e-cigarette-related R&D effort. CCF ¶¶ 1006-15, 1538-86. Thus, innovation competition in the closed-system e-cigarette market was significantly diminished because of Altria's exit, which further strengthens the presumption of competitive harm.

In addition, by requiring that JLI be the only vehicle through which Altria could compete in e-cigarettes, the Transaction foreclosed Altria from other avenues through which it would have competed, in particular the collaboration with PMI. CCF ¶¶ 1588-716. As discussed above, as part of its Transaction with JLI, Altria removed—and per the Non-Compete could not reintroduce—the e-cigarette products it already had on the market.<sup>32</sup> The Transaction also prevented Altria from pursuing any alternative acquisitions or development partnerships relating to e-cigarettes. CCF ¶¶ 1717-30.

Under its partnership with PMI, Altria would have the right to introduce PMI's VEEV e-cigarette in the U.S. CCF ¶¶ 1644-46. PMI's Martin King testified that, under the Joint Research, Development, and Technology Sharing Agreement ("JRDTA") regarding e-cigarettes between Altria and PMI, Altria "would have been able to launch VEEV on their own with the technology shared in that agreement" in the U.S. CCF ¶ 1646. Instead of competing with an innovative new product, however, { [REDACTED]

---

<sup>32</sup> See *supra* § I.F.

[REDACTED] } CCF ¶¶

1714-16. [REDACTED]

[REDACTED]

[REDACTED] } CCF ¶¶

1864-70. In addition to ending Altria’s collaboration with PMI, the Transaction (specifically the Non-Compete) also foreclosed all of the potential avenues for Altria to acquire additional e-cigarette products or pursue additional e-cigarette development partnerships. CCF ¶¶ 1717-30.

Finally, while Respondents try to account for the strong evidence of competitive harm by narrowly focusing on post-Transaction events, the Commission and courts have acknowledged that a showing of actual post-transaction harm is not required. Indeed, the Supreme Court in *United States v. General Dynamics Corp.* explained that the absence of “concrete anticompetitive symptoms . . . does not itself imply that competition has not already been affected.” 415 U.S. 486, 505 (1974). Accordingly, as the Commission confirmed in *Polypore*, “the ultimate issue under Section 7 is whether anticompetitive effects are reasonably probable in the future, not whether such effects have occurred as of the time of trial.” *Polypore*, 2010 WL 9549988, at \*8 (citing *General Dynamics*, 415 U.S. at 505-06). Therefore, “there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before [section 7] can be called into play. If the enforcement of [section 7] turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipency would be frustrated.” *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

Here, through the documentary evidence and testimony from both fact and expert witnesses, Complaint Counsel has shown that the Transaction has already harmed competition in

the relevant market and that future competitive harm is likely because of the Transaction, which strengthens the presumption under Section 7.<sup>33</sup> CCF § 1408-730.

**D. Respondents Cannot Rebut the Strong Presumption of Harm**

Respondents are incapable of rebutting the strong presumption of harm. Entry by new firms or expansion by existing firms will not be timely, likely, or sufficient to counteract the anticompetitive harm resulting from this Transaction. Further, Respondents’ claimed efficiencies cannot be verified and are not merger-specific.

**1. Entry and Expansion Will Not Be Timely, Likely, or Sufficient to Counteract the Anticompetitive Effects of the Transaction**

Respondents “carry the burden of showing that entry or expansion of competitors will be timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract the competitive effects of concern.” *Staples II*, 190 F. Supp. 3d at 133 (internal quotations omitted); *see also Sysco*, 113 F. Supp. 3d at 80; *FTC v. CCC Holdings*, 605 F. Supp. 2d 26, 47 (D.D.C. 2009). Respondents have failed to meet that burden here.

**a. De Novo Entry is Unlikely**

Respondents have failed to establish that *de novo* entry into the U.S. e-cigarette market will be timely, likely, or sufficient to counteract the anticompetitive effects of the Transaction. Entry by a new firm would require a significant upfront investment and would take many years to accomplish. CCF § 1768-78. For example, §

[REDACTED]

[REDACTED]

[REDACTED]

---

<sup>33</sup> See *supra* § IV.B.

[REDACTED] } CCFF ¶ 1770. Prior to its exit, Altria had spent “well over half a billion dollars, maybe up to a billion dollars, investing in the e-vapor category.” CCFF ¶ 1772.

Additionally, as courts have acknowledged, high regulatory barriers may render *de novo* entry unlikely. *United States v. First Nat’l State Bancorp.*, 499 F. Supp. 793, 815 (D. N.J. 1980) (citing *United States v. Marine Bancorp.*, 418 U.S. 602, 638-39 (1974)). The FDA’s deeming rule restricts the ability of new firms to enter the U.S. e-cigarette market. CCFF ¶¶ 197-201, 1784-88. A new entrant would need to acquire a product sold in the U.S. prior to August 8, 2016 in order to sell the product immediately, or it would need to obtain PMTA approval in order to sell a new product. CCFF ¶ 1784. The PMTA process is costly and requires regulatory expertise that few firms outside of the big tobacco companies have. CCFF ¶¶ 1780-81, 1789-804. Altria and JLI executives acknowledge that the PMTA process presents a significant barrier for new entrants. CCFF ¶¶ 1781-82. Joseph O’Hara noted that “PMTAs are costly applications, and [a] startup would need access to the resources required to put together an application like that[.]” CCFF ¶ 1781. According to one Altria executive, PMTA applications are “very involved,” “challenging,” and present “a very high bar” for new entrants. CCFF ¶ 1782. Market participants consistently report spending millions of dollars on their PMTA efforts. CCFF ¶¶ 1794-802.

[REDACTED]  
[REDACTED] } CCFF ¶¶ 1794, 1796. Before its exit, Altria anticipated spending between \$131 million to \$154 for its various PMTA applications. CCFF ¶ 1795. The PMTA process is also very time-consuming, and applications for new products can take anywhere from 18 months to three years. CCFF ¶ 1791.

In addition to the demanding PMTA requirements, a new entrant would face additional entry barriers in the form of access to shelf-space and retailers. CCFF ¶¶ 1805-17. Advertising of

tobacco products is restricted in the U.S., and therefore prominent shelf-space in convenience stores is an essential marketing tool for e-cigarette firms. CCFE ¶ 1811. [REDACTED]

[REDACTED] } CCFE ¶ 1813. [REDACTED]

[REDACTED] } CCFE ¶ 1820. In view of these facts, new entrants are at a distinct disadvantage, and it is highly unlikely a new firm will be able to make up for the competition lost due to Altria's exit.

**b. Repositioning By Existing U.S. Tobacco Companies Will Not Replace Lost Competition**

Respondents have failed to show that repositioning by existing competitors will replace the competition lost as a result of Altria's exit. "It is not sufficient to show that expansion would replace 'some of the competition' lost to the Transaction." *In re Otto Bock HealthCare N. America, Inc.*, Docket No. 9378, 2019 WL 2118886, at \*28 (F.T.C. May 6, 2019)(quoting *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 169 (D.D.C. 2000)). Instead, existing competitors must be "poised to expand in a way that is timely, likely, and sufficient in its magnitude, character, and scope to deter or counteract any potential anticompetitive effects resulting from the merger." *United States v. H&R Block*, 833 F. Supp. 2d 36, 74 (D.D.C. 2011) (internal quotations omitted). While Respondents argue that Reynolds, NJOY, and ITG continue to compete aggressively for share, this fact alone is insufficient to meet Respondents' burden. Once again, Section 7 requires an analysis of the "but-for world." See *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 883 (E.D. Mo. 2020). Respondents cannot show that this repositioning in the market is timely, likely, and sufficient to *replace* the competitive constraints Altria provided on the U.S. e-cigarette market.

E-cigarette competitors Reynolds, JTI, NJOY, and ITG all participated in the e-cigarette market before Altria's exit, and there is no evidence that Altria's exit prompted these firms to compete more effectively or aggressively. CCFE ¶¶ 1825-31. A but-for world in which Altria continued to sell e-cigarettes would have been more competitive than the world in which Altria exited the market. At the time of the Transaction, Altria's products were among the lowest priced e-cigarettes on the market. CCFE ¶ 1824. For example, when Altria launched its MarkTen Elite product, it significantly discounted that product below JUUL. CCFE ¶ 1824. After the Transaction, consumers lost the price competition that Altria offered. CCFE ¶ 1824.

Additionally, prior to the Transaction, Altria pursued significant research and development efforts to improve its existing products and to launch new products. CCFE ¶ 1844. In the absence of the Transaction, Altria would have continued these improvements and product development efforts. CCFE ¶¶ 444-54, 1463-92. The loss of this innovation competition from Altria has harmed, and will continue to harm, consumers. CCFE ¶¶ 1538-87. There is no evidence that the current competitors in the e-cigarette market have sufficiently expanded to replace this lost competition.

Finally, Dr. Rothman evaluated the incentives and abilities of Altria to continue competing in the e-cigarette market and concluded that Altria would have continued to be a significant competitor in the e-cigarette market absent the Transaction. CCFE ¶ 1845. This conclusion is consistent with the factual record in this case. CCFE ¶¶ 411-92, 1832-41.

**c. Repositioning by PMI Will Not Replace Lost Competition**

Repositioning by PMI will be insufficient to replace the competition lost as a result of Altria's exit. [REDACTED]

[REDACTED] CCFE ¶ 1847. [REDACTED] { [REDACTED]



[REDACTED] } CCFF ¶ 1847. [REDACTED] { [REDACTED]

[REDACTED] } CCFF ¶ 1847. [REDACTED] { [REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶ 1847.<sup>34</sup>

[REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶ 1848. { [REDACTED]

[REDACTED] } CCFF ¶ 1848.

[REDACTED]

[REDACTED] }

CCFF ¶ 1851. { [REDACTED]

[REDACTED] } CCFF ¶ 1849. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶ 1850. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

[REDACTED] CCFF ¶¶ 1858-63.

[REDACTED]

<sup>34</sup> [REDACTED] CCFF ¶¶ 1866, 1870.

[REDACTED] } CCFE

¶ 1863. { [REDACTED]

[REDACTED] } CCFE ¶ 1859. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } CCFE ¶ 1860. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

CCFE ¶ 1862.

Finally, PMI’s “go-it-alone” strategy is inferior to collaboration with Altria. CCFE ¶¶ 1864-70. { [REDACTED]

[REDACTED]

[REDACTED] } CCFE ¶ 1864. According to King, having Altria commercialize VEEV in the U.S.

would “speed the commercialization and make the success much more likely and faster.” CCFE

¶ 1693. While Altria has “decades of experience and a large, well-resourced sales function that

bar none, [is] the best,” PMI does not have a sales force or well-established relationships with

convenience store chains in the U.S. CCFE ¶ 1866. As a result, Altria “would have much more

ability to work with retailers and others to commercialize” VEEV in the U.S. than PMI does.

CCFE ¶ 1866. { [REDACTED]

[REDACTED] } CCFE ¶ 1869. In view of these barriers to PMI’s expansion,

Respondents have failed to demonstrate that PMI is capable of replacing Altria's competitive significance in the U.S. e-cigarette market.

In sum, Respondents have failed to demonstrate that entry or expansion is capable of offsetting the competition lost due to the Transaction.

## **2. The Claimed Efficiencies Are Insufficient to Rebut the Presumption of Harm**

Respondents cannot carry their burden to show cognizable efficiencies capable of rebutting the presumption of harm. Respondents claim Altria's provision of regulatory services to JLI are procompetitive efficiencies sufficient to counteract any anticompetitive effects,<sup>35</sup> but such bare assertions alone cannot sustain an efficiencies defense. Respondents "bear the burden of showing that . . . their claimed efficiencies are: (1) merger-specific, and (2) reasonably verifiable by an independent party." *Staples II*, 190 F. Supp. 3d at 137 n.15; *Merger Guidelines* § 10. In analyzing the defense, the court must "undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior." *H&R Block, Inc.*, 833 F. Supp. 2d at 89 (citing *Heinz Co.*, 246 F.3d at 721. Further, "[h]igh market concentration levels," like those presented by the Transaction, require "proof of extraordinary efficiencies." *FTC v. Heinz Co.*, 246 F.3d at 720-21. Finally, no court has permitted an otherwise unlawful transaction to stand as a result of claimed efficiencies. *See, e.g., Wilhelmsen*, 341 F. Supp. 3d at 72 (citing *FTC v. CCC Holdings Inc.*, 605 F. Supp. 26, 72 (D.D.C. 2009)).

Here, Respondents claim that the deal will result in efficiencies based on certain services that Altria agreed to provide to JLI pursuant to the Services Agreement. CCF ¶ 1871. However, the January 2020 amendment to the Services Agreement eliminated all services other than

---

<sup>35</sup> Resps.' Pretrial Br. at 54 n.321.

regulatory services related to JLI's PMTA submissions. CCF ¶ 1871. As a consequence, Altria has not provided any services to JLI other than PMTA assistance since March 31, 2020. CCF ¶ 1881. Even for this narrow set of claimed efficiencies, Respondents have failed to substantiate their claims, and the evidence makes clear that JLI likely could have obtained comparable benefits in the absence of the Transaction. Accordingly, the Court should reject Respondents' efficiencies defense.

**a. Respondents' Claimed Efficiencies Cannot be Verified**

Respondents' claimed efficiencies in this case are incapable of verification. Courts have consistently held that efficiencies are only cognizable where "it is possible 'to verify by independent means' the likelihood and magnitude of each efficiency." *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Merger Guidelines* § 10). Moreover, because "[e]fficiencies are inherently difficult to verify and quantify . . . it is incumbent upon the merging firms to substantiate efficiencies claims." *Id.*; see also *FTC v. Staples ("Staples I")*, 970 F. Supp. 1066, 1089 (D.D.C. 1997) (finding "defendants failed to produce the necessary documentation for verification" of efficiencies). Respondents have fallen well short of meeting that burden here.

First, Respondents have failed to quantify any cost-savings associated with Altria's provision of services to JLI. While Altria claims that "JLI is the best source" for quantifying the purported efficiencies, JLI never attempted to estimate the projected cost-savings from any of the services under the Services Agreement before entering into the Transaction. CCF ¶¶ 1884-85. As of January 2020, JLI had still failed to provide an estimate of the claimed cost-savings stemming from the Transaction, nor had it attempted to do so. CCF ¶ 1886. As Joseph O'Hara testified, any attempts at such a cost estimate "would have been super speculative." CCF ¶ 1887.

The speculative nature of Respondents' efficiencies claims is particularly apparent when considering the claimed efficiencies related to Altria's provision of regulatory services to JLI—the only service to survive the Amended Transaction. While JLI claims Altria's regulatory services would “accelerate JLI's FDA application process and advance the sophistication of JLI's science programs,” Respondents have failed to support this claim, nor quantify it, with any reliable evidence. CCFF ¶¶ 1889-97. As discussed above, there is still great uncertainty surrounding how the FDA will evaluate PMTA submissions and how it will weigh certain factors such as “adult conversion potential” and “no unintended consequences.” CCFF ¶ 1913. Indeed, no e-cigarette product has received PMTA authorization to date. CCFF ¶ 1899. Therefore, as Joe Murillo testified, it is “difficult for anybody” to predict whether a PMTA submissions will be successful. CCFF ¶ 1898. Further, according to Kevin Burns, JLI was in “unchartered territory” when it came to PMTA submissions “given, frankly, the lack of clarity” surrounding the FDA's process. CCFF ¶ 1900. Even with Altria's purported regulatory assistance, it remains unclear whether JLI will ultimately receive PMTA authorization and if so, on what timeline. Respondents' vague and unsubstantiated claims about what may or may not occur in the future cannot carry an efficiencies defense under Section 7.

Respondents have also failed to substantiate any efficiencies relating to the discontinued services under the Services Agreement. While Altria briefly provided services to JLI related to sales, marketing, shelf-space, and distribution, Respondents have not provided sufficient evidence to allow for their verifiability. Some of the documents on which Respondents rely in estimating their cost savings were withheld for privilege while others provide no basis for their estimates. CCFF ¶¶ 1956-95. Other estimates were based only on “very preliminary interviews.” CCFF ¶ 1962. Finally, some services, such as the direct marketing services, resulted in cost-

savings that were “not as meaningful as [JLI] would have hoped.” CCFF ¶ 1979. These discontinued services can provide little support for Respondents’ efficiencies defense and should not be credited by the Court.

**b. Respondents’ Claimed Efficiencies Are Not Merger-Specific**

Respondents’ efficiencies defense also fails because Respondents have failed to demonstrate that their claimed efficiencies are merger-specific. Due to the anticompetitive concern mergers raise, “efficiencies, no matter how great, should not be considered if they could be accomplished without a merger.” *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 62 (D.D.C. 1998). As courts have repeatedly explained, a cognizable efficiency must “represent a type of cost-saving that could not be achieved without the merger.” *H&R Block*, 833 F. Supp. 2d at 89; *see also Sysco*, 113 F. Supp. 3d at 82-83 (holding that, despite the “rigor and scale of the analysis,” defendants’ efficiencies claims are inadequate because they are not merger specific). Where a company can achieve the claimed same cost savings on their own, or through a less anticompetitive alternative, those efficiencies are not merger-specific. *H&R Block*, 833 F. Supp. 2d at 90; *Cardinal Health*, 12 F. Supp. 2d at 62; *Merger Guidelines* § 10 n.13.

Respondents have not demonstrated that the claimed regulatory efficiencies are merger-specific, and indeed, there is ample evidence to suggest that JLI could have achieved the same ends in the absence of the Transaction. By its own admission, JLI acknowledges that it “did not formally analyze alternatives to using Altria’s [regulatory] services.” CCFF ¶ 1918. Further, JLI took a number of aggressive actions, wholly on its own, to accelerate and improve its PMTA submission. CCFF ¶¶ 1923-24. During Kevin Burns’ tenure as CEO, JLI “[h]ired a lot of people” and expanded its scientific affairs department from three to 100 people. CCFF ¶ 1929. JLI’s new hires included professionals who had previously worked at PMI, such as Ryan Wick who worked

on the IQOS PMTA, and those who at previously worked at Altria, including Joe Murillo, Elizabeth Copeland, and Dr. Willie McKinney. CCFE ¶¶ 1933-40. Ultimately, Altria was just one of many third parties who contributed to JLI's PMTA submission process. CCFE ¶¶ 1942-55. Throughout 2019, JLI retained multiple outside consulting firms to assist with everything from testing and behavioral studies to toxicology and clinical research. CCFE ¶¶ 1942-55. In fact, many of the purported regulatory services Altria provided to JLI under the Services Agreement were actually provided by third-party contractors rather than Altria or its own employees. CCFE ¶¶ 1951-55. This evidence clearly undermines Respondents' ability to show that any regulatory success obtained by JLI were Transaction-specific. Instead, the record demonstrates that JLI was keenly invested in obtaining PMTA authorization, with or without Altria's assistance, and that JLI was capable of pursuing these goals on its own without the need for the complete shutdown of Altria's entire e-cigarette business.

The record also reflects that JLI was capable of achieving the benefits of the discontinued services in the absence of the Transaction. JLI had already invested in many of the services contemplated under the Services Agreement on a stand-alone basis. CCFE ¶¶ 1965-66, 1973-75, 1984, 1993. For example, as of early 2018, [REDACTED], and a November 2018 slide deck reflects a plan for a further investment of "\$100 million in merchandising assets & execution to support brand building [in] 2019." CCFE ¶ 1973. In 2019, even before the sales services were officially terminated, JLI started [REDACTED] [REDACTED] CCFE ¶ 1974. JLI was also able to improve its marketing and promotional efforts on its own; as Kevin Burns testified, in the fall of 2018, "every promotion across the key metrics was better." CCFE ¶ 1984. There is no evidence that the Transaction was necessary for JLI to improve its sales, marketing, or distribution capabilities.

Therefore, Respondents have failed to demonstrate that their claimed efficiencies are merger-specific.

### **E. The Transaction Also Violates Section 7 Under the Potential Competition Theory**

#### **1. It Is Most Appropriate to View the Transaction as a Merger Between Actual Competitors**

In the relevant case law, it is proper to treat both Altria and JLI as actual competitors for analyzing the competitive effects of the Transaction, despite Respondents' contorted argument claiming that Altria was not a competitor to JLI at the time of the Agreement. Resps.' Pretrial Br. at 56-58. As the district court in *United States v. Aetna Inc.* explained, "the case law does not support defendants' approach of viewing competition as an on-off switch where a merging party can simply switch it off entirely by withdrawing from a market . . . ." 240 F. Supp. 3d 1, 76 (D.D.C. 2017). As the evidence indisputably shows, this is not a case where "there is no pre-existing competition to begin with." *Id.* (citing *Int'l Shoe Co. v. FTC*, 280 U.S. 291, 298 (1930)). Further, just like the situation described in *Aetna*, Complaint Counsel in this case alleges—and the evidence clearly shows—that Altria shut down its e-cigarette business *because of* the Transaction (and did it *right before* the Transaction); therefore, it would be "especially inappropriate to apply a legal framework that would limit judicial inquiry." *Id.* at 78. "Courts appropriately guard their ability to ascertain the actual facts at issue, rather than allow a party to thwart judicial review through its own machinations." *Id.* (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). As the Supreme Court warned, any ruling that does not treat Respondents as actual competitors would run the risk of "grant[ing] defendants such a powerful weapon against public law enforcement" and thus, public policy also strongly favors analyzing



this case as a transaction between actual competitors. *W.T. Grant*, 345 U.S. at 632; *see also Aetna*, 240 F. Supp. 3d at 78.

## **2. Even Evaluating the Transaction Under the Actual Potential Competition Theory, the Transaction Is Likely to Result in Substantial Anticompetitive Effects**

As discussed above, it is appropriate and necessary to treat both Altria and JLI as *actual* competitors for analyzing the competitive effects of the Transaction. But even if one were to assume that Altria discontinued its existing closed-system e-cigarette products independently of the Transaction,<sup>36</sup> the Transaction still violates Section 7 of the Clayton Act under the actual potential competition doctrine. “Actual potential competition rests on the theory that the merger eliminated a firm that was on the verge of entering the market *de novo* or through a toehold acquisition.” *Polypore*, 2010 WL 9549988, at \*23 n.41 (citing *Marine Bancorp.*, 418 U.S. at 633; *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-78 (8th Cir. 1981); *Mercantile Tex. Corp.*, 638 F.2d at 1265-70)), *aff’d on other grounds*, 686 F.3d 1208 (11th Cir. 2012); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (“The theory of the (actual potential competition) doctrine is that competition in the market would be enhanced by the addition of the new competitor and therefore the elimination of such a potential competitor would substantially lessen competition within the meaning of [Section] 7.”) (internal quotations and citation omitted)).

“Although the Supreme Court has yet to rule specifically on the validity of the actual-potential-entrant doctrine, it has delineated two preconditions that must be present, prior to any resolution of the issue. First, it must be shown that the alleged potential entrant had ‘available feasible means’ for entering the relevant market, and second, ‘that those means offer(ed) a substantial likelihood of ultimately producing deconcentration of that market or other significant

---

<sup>36</sup> For the avoidance of doubt, it is Complaint Counsel’s position that Altria’s stated justifications for exiting the market are pretextual. *See supra* § III.A.2.

procompetitive effects.” *Yamaha Motor*, 657 F.2d at 977-78 (footnote omitted) (quoting *Marine Bancorp.*, 418 U.S. at 633).<sup>37</sup> Here, even if the Court decided to treat Respondent Altria as a potential competitor instead of an actual one, as shown above, Complaint Counsel has provided ample evidence proving each of the elements of an actual potential competition case. CCF ¶¶ 409-544, 1527-1730.

When determining whether a firm is an actual potential entrant, the appropriate question is whether the firm “probably” would have entered the relevant markets. *Yamaha*, 657 F.2d at 977. A probability standard is consistent with Section 7 of the Clayton Act. Indeed, in *Yamaha*, the Eighth Circuit “stress[ed] the word ‘probably’ . . . because the question under Section 7 is not whether competition was actually lessened, but whether it ‘may be’ lessened substantially.” *Id.* Similarly, in the Commission’s recent applications of the actual potential competition doctrine, the Commission has applied a “reasonable probability” standard. *See In re McWane, Inc.*, Docket No. 9351, 2014 WL 556261, at \*32 (F.T.C. January 30, 2014). In *McWane*, the Commission stated that the “ultimate issue” in determining whether a firm is an actual potential competitor hinges on whether the firm’s “entry was reasonably probable.” *Id.* (citations omitted). Notably, the Commission cited the Eighth Circuit’s decision in *Yamaha* as support for the “reasonably probable” standard. *Id.*<sup>38</sup>

In *Yamaha*, Brunswick, an American manufacturer of outboard motors, acquired a 38 percent interest in Sanshin, a subsidiary of Yamaha Motor, which also manufactured outboard

---

<sup>37</sup> *Cf. FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 966 (N.D. Ohio 2015) (an alternative four-prong test for the “actual potential entrant” doctrine).

<sup>38</sup> Respondents’ reliance on *FTC v. B.A.T. Industries*, in which the Commission chose to apply what it termed a “clear proof” standard, is misplaced. 104 F.T.C. 852, 926 (1986). Not only does B.A.T. predate the Commission’s more recent applications of a “reasonable probability standard,” but it was a unique “test case to see if purely objective evidence would establish liability under the actual potential entrant theory.” *Id.* at 947 (Bailey, concurring). But even assuming *arguendo* that the “clear proof” standard is the correct standard of proof, the evidence proffered by Complaint Counsel clearly meets even this more stringent standard. CCF ¶¶ 409-544, 1527-1730.

motors, and entered into a joint venture. *Yamaha*, 657 F.2d at 973-74. Unlike Altria and JLI, Yamaha and Sanshin were *not* competitors in the U.S. outboard motor market at the time of the joint venture agreement; however, Yamaha (1) was a major international seller of outboard motors, (2) had an established reputation in the U.S. from sales in other markets, and (3) had made two unsuccessful attempts to enter the U.S. market in recent years. *Id.* The agreement included provisions (1) granting Brunswick several board seats at Sanshin, (2) whereby Sanshin agreed to sell motors to Brunswick for the U.S. market, and (3) barring Yamaha from competing in the U.S. outboard motor market. *Id.* The Eighth Circuit affirmed that the agreement violated Section 7 on an actual potential competition theory and ordered the complete divestiture of Brunswick's share of Sanshin. *Id.*

In the instant case, (1) the closed-tank e-cigarette market is highly concentrated, CCF ¶¶ 1737-61; (2) Altria would have continued to compete in the relevant market absent the Transaction, CCF ¶¶ 437-40, 1390-1407; (3) Altria is extremely well-positioned to participate again in the market because there are few other companies that possess Altria's resources, experience, partnerships, and R&D capabilities,<sup>39</sup> CCF ¶¶ 507-31, 1553-1730; and (4) no other potential market participant could leverage anything close to Altria's entire tobacco/nicotine portfolio to gain distribution and retail access for its products.<sup>40</sup> CCF ¶¶ 493-506. Therefore, the evidence provides more than enough support to Complaint Counsel's case even under the actual potential competition theory.

---

<sup>39</sup> See *supra* § I.C.

<sup>40</sup> Altria's circumstances in this case stand in stark contrast to the facts of *Steris*. See *Steris*, 133 F. Supp. 3d at 977-84. Here, the evidence shows that Altria was a significant competitor in the closed-system e-cigarette market before its shutdown of Nu Mark and, but for the Transaction, it would have competed again. CCF ¶¶ 93-108, 409-92, 532-44.

## V. Requested Relief

The appropriate remedies are the complete divestiture of Altria's equity stake in JLI and the immediate termination of all agreements associated with the Transaction. An effective remedy in this case must restore the level of competition that was lost when Altria agreed with JLI to exit from the e-cigarette market and entered into the Non-Compete agreement with JLI precluding future competition. To restore competition lost because of anticompetitive acquisitions, courts favor structural remedies, including for acquisitions of a minority equity stake. *United States vs. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961) (requiring complete divestiture of the 23% stake in General Motors that DuPont had acquired, and overturning district court's remedy that would have allowed DuPont merely to divest the voting rights of the stock and commit not to enter into preferential trading relationships with General Motors); *see also Merger Guidelines* § 13. As the Supreme Court explained, "complete divestiture is particularly appropriate in cases of stock acquisitions which violate § 7. . . . Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." *Du Pont*, 366 U.S. at 328, 330-31; *accord United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 859-60 (6th Cir. 2005). The Commission also "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity." *In re PolyGram Holding, Inc.*, 136 F.T.C. 310, 379-80 (July 24, 2003) (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)). Moreover, "all doubts as to the remedy are to be resolved in [Complaint Counsel's] favor." *Du Pont*, 366 U.S. at 334.

The simplest and most effective way to remedy the anticompetitive harm arising from the Transaction is to restore Altria to the position it occupied before agreeing with JLI to halt all

competition between the two firms. Thus, Altria must have both the *ability* and *incentive* to resume competing aggressively in the closed-system e-cigarette market. Altria's full divestiture of its equity stake in JLI coupled with the immediate termination of the Transaction's agreements will achieve these objectives. Altria will be free to bring its considerable expertise, resources, and strategic partnerships to bear in a sustained effort to achieve market leadership through competition. Complaint Counsel's proposed order is attached as Attachment A.<sup>41</sup>

### CONCLUSION

For the foregoing reasons, the evidence presented at trial and admitted to the record established that the Transaction violates Section 1 of the Sherman Act, Section 5 of the Federal Trade Commission Act, and Section 7 of the Clayton Act, as alleged in the complaint, and justifies entry of an Order by the Court granting the relief sought therein.

Dated: August 23, 2021

Respectfully submitted,

*s/ Frances Anne Johnson*  
Frances Anne Johnson

Stephen Rodger  
Dominic E. Vote  
Peggy Bayer Femenella  
Jennifer Milici  
James Abell  
Erik Herron  
Joonsuk Lee

---

<sup>41</sup> Respondents argue that JLI cannot be found liable under Section 7 because it only applies to buyers not sellers. Resps.' Pretrial Br. at 90. While Section 7 "does not provide a [damages] remedy against the acquired firm . . . of course equitable relief in the form of divestiture covers both the acquiring and acquired firms." PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶¶ 1201-02 (4th and 5th Editions, 2021 Cum. Supp. 2013-2020); see also *United States v. Phillips Petroleum Co.*, 367 F. Supp. 1226, 1262 (C.D. Cal. 1973), *aff'd sub nom. Tidewater Oil Co. v. United States*, 418 U.S. 906 (1974), and *aff'd*, 418 U.S. 906 (1974) ("In order to fashion appropriate relief in accordance with its equity powers, the court deems it necessary to include [the seller] as one of the parties against whom relief may be granted, and [the seller] is therefore a proper party to this action."). In this case, Complaint Counsel seeks purely equitable relief in the form of divestiture and termination of the Non-Compete. Therefore, Respondents' arguments concerning JLI's liability for damages are inapplicable.

**PUBLIC**

Meredith Levert  
Kristian Rogers  
David Morris  
Michael Blevins  
Michael Lovinger  
Nicole Lindquist  
Jeanine Balbach

*Counsel Supporting the Complaint*

Federal Trade Commission  
Bureau of Competition  
600 Pennsylvania Ave., NW  
Washington, DC 20580  
Telephone: (202) 326-3221  
Email: [fjohnson@ftc.gov](mailto:fjohnson@ftc.gov)

# **ATTACHMENT A**

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

**In the Matter of**

**Altria Group, Inc.  
a corporation;**

**and**

**JUUL Labs, Inc.  
a corporation.**

**DOCKET NO. 9393**

**[PROPOSED] ORDER**

**I.**

**IT IS ORDERED** that, as used in the Order, the following definitions apply:

- A. “Altria” means Altria Group, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Altria Group, Inc., including, Altria Enterprises, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “JLI” means JUUL Labs, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by JUUL Labs, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Altria and JLI, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Cooperation Agreement” means the Cooperation Agreement by and among Juul Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on January 28, 2020.
- F. “E-Cigarettes” means battery-powered devices that vaporize a liquid solution containing nicotine (an “e-liquid”), including a closed system, which consists of a device housing a battery and a heating mechanism, and sealed cartridges or pods that are pre-filled with e-liquid, and an open system, which incorporates refillable tanks that customers manually fill with e-liquid.



**PUBLIC**

- G. “E-Cigarette Business Entity” means any Person that develops, manufactures, sells, or distributes E-Cigarettes.
- H. “JLI Equity Stake” means the 35% interest Altria acquired from JLI pursuant to the Purchase Agreement.
- I. “Monitor” means the Person appointed pursuant to Section VII of this Order.
- J. “Non-Public Information” means all information not in the public domain, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.
- K. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.
- L. “Purchase Agreement” means the Class C-1 Common Stock Purchase Agreement by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on December 20, 2018, and the subsequent Amendment No. 1 to Class C-1 Common Stock Purchase Agreement entered into on January 28, 2020.
- M. “Transaction Agreements” means:
1. Intellectual Property License Agreement entered into by Respondents on December 20, 2018;
  2. Ninth Amended and Restated Investors’ Rights Agreement entered into by Respondents and various JLI stockholders on December 20, 2018;
  3. Relationship Agreement by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on December 20, 2018, and the subsequent Amendment No. 1 to Relationship Agreement entered into on January 28, 2020;
  4. Ninth Amended and Restated Right of First Refusal and Co-Sale Agreement entered into by Respondents and various JLI stockholders on December 20, 2018;
  5. Services Agreement by and between Altria Group, Inc., and JUUL Labs, Inc. entered into on December 20, 2018, and the subsequent Amendment No. 1 to Services Agreement entered into on January 28, 2020;
  6. True-Up Convertible Security Agreement by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on December 20, 2018; and
  7. JUUL Labs, Inc. Eighth Amended and Restated Voting Agreement entered into by Respondents and various JLI stockholders on December 20, 2018, and the subsequent Ninth Amended and Restated Voting Agreement entered into on January 28, 2020.

**II.****IT IS FURTHER ORDERED** that:

- A. Respondents, directly or indirectly, or through any corporate or other device, in connection with the development, manufacturing, distribution, or sale of E-Cigarettes in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade

Commission Act, 15 U.S.C. § 44, cease and desist from, and are prohibited from, entering into or participating in any agreement or understanding, whether express or implied, with any Person to not compete in the development, manufacturing, distribution or sale of E-Cigarettes.<sup>42</sup>

- B. Respondents shall not, without prior approval of the Commission, enter into any agreement or business transaction with each other or any E-Cigarette Business Entity related to the development, manufacture, distribution, or sale of E-Cigarettes.<sup>43</sup>

### III.

**IT IS FURTHER ORDERED** that, within 10 days of this Order becoming final and effective (without regard to the finality of the divestiture requirements herein), Respondents rescind the Transaction Agreements and the Cooperation Agreement.<sup>44</sup>

### IV.

**IT IS FURTHER ORDERED** that:<sup>45</sup>

- A. No later than 90 days from the date this Order becomes final and effective, Respondent Altria shall divest, absolutely and in good faith, at no minimum price, to one or more buyers approved by the Commission (unless the buyer is Respondent JLI), its JLI Equity Stake, or, in the alternative,
- B. Respondents shall rescind the Purchase Agreement.

### V.

**IT IS FURTHER ORDERED** that<sup>46</sup>:

- A. Respondents shall, within 10 days of this Order becoming final and effective (without regard to the finality of the divestiture requirements herein), remove any director, observer, or other Person associated with a Respondent from the other Respondent's

---

<sup>42</sup> Section II is modeled after previous FTC Orders that require Respondents to cease and desist from and prohibit Respondents from future recurrence of the unlawful conduct at issue. *See* The North Carolina Board of Dental Examiners, Docket No. 9343, Order, at Section II, Toys R Us, Inc., Docket No. 9278, Order, at Section II.

<sup>43</sup> Prior approval is contemplated in the Altria/Juul Part 3 Complaint – “A prohibition against any transaction between Altria and JLI that combines their businesses in the relevant market, except with prior approval by the Commission.” *See* Notice of Contemplated Relief, Paragraph C.

<sup>44</sup> The purpose of Section III is to rescind the Agreements between the Respondents, and remedy the likely anticompetitive effects of the transaction. *See* Otto Bock HealthCare North America, Inc., Docket No. 9378, Order, at Section II.

<sup>45</sup> The purpose of Section IV is to undo the acquisition and remedy the likely anticompetitive effects of the transaction. *See* Otto Bock HealthCare North America, Inc., Docket No. 9378, Order, at Section II.

<sup>46</sup> The purpose of this Section is to ensure that Respondents do not violate Section 8 of the Clayton Act, 15 U.S.C., § 19.

board of directors, including prohibiting any Person associated with a Respondent from attending a board of director meeting convened by the other Respondent;

B. Respondents shall not:

1. Permit any officer or director of either Respondent to serve on the other Respondent's board of directors or attend any of its meetings.
2. Influence or attempt to influence, directly or indirectly, the management or operation of the other Respondent;
3. Receive or attempt to receive, directly or indirectly, any Non-Public Information of, from, or relating to, the other Respondent.

**VI.**

**IT IS FURTHER ORDERED THAT**, no later than ten (10) days from the date on which this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), Respondents shall provide a copy of this Order to each of Respondents' officers, employees, or agents having managerial responsibilities for any of Respondents' obligations under this Order.<sup>47</sup>

**VII.**

**IT IS FURTHER ORDERED** that<sup>48</sup>:

- A. At any time after this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), the Commission may appoint a Person ("Monitor") to monitor Respondents' compliance with their obligations under this Order, consult with Commission staff, and report to the Commission regarding Respondents' compliance with their obligations under this Order.
- B. If a Monitor is appointed pursuant to Paragraph VII.A of this Order, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
  1. The Monitor shall have the power and authority to monitor Respondents' compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor pursuant to the terms of this Order and in a manner consistent with the purposes of this Order and in consultation with the Commission or its staff.

---

<sup>47</sup> Section VI is modeled after previous FTC Orders that required distribution of the Order to educate and inform relevant individuals of their responsibilities to comply with the order. *See* The North Carolina Board of Dental Examiners, Docket No. 9343, Order, at Section III.

<sup>48</sup> This Section provides for the appointment of a Monitor to monitor Respondents' compliance with the Order, which is common in FTC Orders as well as Part 3 Orders issued by the FTC. *See* Otto Bock HealthCare North America, Inc., Docket No. 9378, Order, at Section VI.

2. Within ten 10 days after appointment of the Monitor, Respondents, separately, shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order. If requested by a Respondent, the Monitor shall sign a confidentiality agreement prohibiting the use or disclosure to anyone other than the Commission (or any Person retained by the Monitor pursuant to Paragraph VII.B.5 of this Order), of any competitively-sensitive or proprietary information gained as a result of his or her role as Monitor, for any purpose other than performance of the Monitor's duties under this Order.
3. The Monitor's power and duties under this Section VII shall terminate three 3 business days after the Monitor has completed his or her final report pursuant to Paragraph VII.B.8 of this Order or at such other time as directed by the Commission.
4. Respondents shall cooperate with any Monitor appointed by the Commission in the performance of his or her duties, and shall provide the Monitor with full and complete access to Respondents' books, records, documents, personnel, facilities, and technical information relating to compliance with this Order, or to any other relevant information, as the Monitor may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor. Respondents shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order.
5. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct. For purposes of this Paragraph VII.B.6, the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph VII.B.5 of this Order.
7. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor in the same manner as provided by this Order.

8. The Monitor shall report in writing to the Commission (i) every thirty 30 days from the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), (ii) no later than thirty 30 days from the date Respondents complete their obligations under this Order, and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.
- C. Respondents shall submit copies of all compliance reports filed with the Commission to the Monitor no later than twenty 20 days after the date the Monitor is appointed by the Commission pursuant to Paragraph VII.A of this Order.
  - D. The Commission may, on its own initiative or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

### VIII.

**IT IS FURTHER ORDERED** that<sup>49</sup>:

- A. Respondents shall:
  1. Notify Commission staff via email at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov) of the dates that the Respondents comply with the obligations under Sections III, IV, and V.A, no later than 5 days after the occurrence of each; and
  2. Submit any documentation memorializing such occurrences in Paragraph VIII.A.1 to the Commission at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov) no later than 30 days after the date they occur.
- B. Respondents shall submit verified written reports (“compliance reports”) in accordance with the following:
  1. Respondents shall submit:
    - a. Interim compliance reports 30 days after the Order is issued by this Court, and every 60 days thereafter until Respondents have fully complied with the provisions of Sections, III, IV, and V.A;
    - b. Annual compliance reports one year after the date this Order is issued by this Court, and annually for the next 9 years on the anniversary of that date; and
    - c. Additional compliance reports as the Commission or its staff may request.

---

<sup>49</sup> Section VIII is standard in FTC Part 3 Orders. *See*, The North Carolina Board of Dental Examiners, Docket No. 9343, Order, at Section IV; Toys R Us, Inc., Docket No. 9278, Order, at Section IV; Otto Bock HealthCare North America, Inc., Docket No. 9378, Order, at Section VIII.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order. Conclusory statements that Respondents have complied with their obligations under this Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented and plan to implement to comply with each paragraph of the Orders.
3. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Orders and provide copies of these documents to Commission staff upon request.
4. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at [ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov) and to the Compliance Division at [bccompliance@ftc.gov](mailto:bccompliance@ftc.gov); *provided, however*, that Respondents need only file electronic copies of the interim reports required by Paragraph VIII.B.1 (a). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

## IX.

**IT IS FURTHER ORDERED** that Respondents shall notify the Commission at least 30 days prior to<sup>50</sup>:

- A. Any proposed dissolution of Altria Group, Inc. or Juul Labs, Inc., respectively;
- B. Any proposed acquisition of, or merger or consolidation involving Altria Group, Inc. or Juul Labs, Inc., respectively; or
- C. Any other change in Respondents including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

## X.

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon 5

---

<sup>50</sup> Section IX is standard in FTC Part 3 Orders. *See*, Otto Bock HealthCare North America, Inc., Docket No. 9378, Order, at Section IX.

**PUBLIC**

days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission<sup>51</sup>:

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and
- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

**XI.**

**IT IS FURTHER ORDERED** that this Order shall terminate 10 years from the date it is issued.

ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date:

---

<sup>51</sup> Section X is standard in FTC Part 3 Orders. *See*, Otto Bock HealthCare North America, Inc., Docket No. 9378, Order, at Section X.

**CERTIFICATE OF SERVICE**

I hereby certify that on August 23, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580  
[ElectronicFilings@ftc.gov](mailto:ElectronicFilings@ftc.gov)

The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-110  
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

Debbie Feinstein  
Robert J. Katerberg  
Justin P. Hedge  
Francesca M. Pisano  
Adam Pergament  
Le-Tanya Freeman  
Arnold & Porter Kaye Scholer LLP  
601 Massachusetts Ave, NW  
Washington, DC 20001  
Tel: 202-942-5000  
debbie.feinstein@arnoldporter.com  
robert.katerberg@arnoldporter.com  
justin.hedge@arnoldporter.com  
francesca.pisano@arnoldporter.com  
Adam.Pergament@arnoldporter.com  
tanya.freeman@arnoldporter.com

David Gelfand  
Jeremy J. Calsyn  
Jessica Hollis  
Matthew Bachrack  
Cleary Gottlieb Steen & Hamilton LLP  
2112 Pennsylvania Avenue, NW  
Washington, DC 20037  
Tel: 202-974-1500  
dgelfand@cgsh.com  
jcalsyn@cgsh.com  
jhollis@cgsh.com  
mbachrack@cgsh.com

*Counsel for Respondent JUUL Labs, Inc.*

Marc Wolinsky  
Jonathan Moses  
Kevin Schwartz  
Adam Goodman  
Wachtell, Lipton, Rosen & Katz  
51 West 52nd Street  
New York, NY 10019  
Tel: 212-403-1000  
MWolinsky@wlrk.com



**PUBLIC**

JMMoses@wlrk.com  
KSchwartz@wlrk.com  
ALGoodman@wlrk.com

Beth A. Wilkinson  
James M. Rosenthal  
Hayter Whitman  
Wilkinson Stekloff LLP  
2001 M Street NW, 10th Floor  
Washington, DC 20036  
Tel: 202-847-4000  
bwilkinson@wilkinsonstekloff.com  
jrosenthal@wilkinsonstekloff.com  
hwhitman@wilkinsonstekloff.com

Moira Penza  
Wilkinson Stekloff LLP  
130 W 42nd Street, 24th Floor  
New York, NY 10036  
Tel: 929-264-7773  
mpenza@wilkinsonstekloff.com

*Counsel for Respondent Altria Group, Inc.*

By: s/ James Abell  
James Abell, Attorney

*Counsel Supporting the Complaint*