

**PUBLIC**

**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  
REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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## **RESPONDENTS' PROPOSED FINDINGS OF FACT**

### **I. BACKGROUND ON E-VAPOR INDUSTRY**

1. Electronic cigarettes, also known as “e-cigarette” or “e-vapor” products, are “electronic device[s] that heat[] a liquid that contains flavoring and nicotine (called an e-liquid), resulting in a vapor that is inhaled by the user.” (PX8011 Eldridge (ITG Brands) Decl. at 004 ¶ 18; *see also* PX9027 (FDA) at 009 (defining “e-cigarette” as “an electronic device that delivers e-liquid in aerosol form into the mouth and lungs when inhaled”); Huckabee (Reynolds) Tr. 382 (explaining that an e-vapor product consists of “tobacco fluid and . . . a battery device that with various technology vaporizes the nicotine solution and produces an aerosol that consumers inhale”)).

#### **Response to Finding No. 1**

Complaint Counsel does not disagree with the proposed finding, except with respect to the proposed finding’s definition of e-liquids. E-liquids do not require flavoring nor nicotine to be considered an e-liquid. (*See* PX9027 (FDA) at 009 (“e-liquids include liquid nicotine, nicotine-containing liquids (i.e., liquid nicotine combined with colorings, flavorings, and/or other ingredients), and liquids that do not contain nicotine or other material made or derived from tobacco, but that are intended or reasonably expected to be used with or for the human consumption of a tobacco product”)).

#### **A. Early History Of E-Vapor**

2. E-cigarettes generally work as follows: When a consumer puffs on the device, the air flow passes over a puff sensor, “which tells the sensor to communicate with the battery to release a charge. Upon releasing that charge, that charge goes through the coil, heats the coil, the coil is saturated in e-liquid, and it vaporizes, atomizes the e-liquid, and the adult consumer proceeds to inhale.” (Schwartz (Altria) Tr. 1852-53).

#### **Response to Finding No. 2**

Complaint Counsel does not disagree.

3. Following the introduction of e-vapor products in the United States in the late 2000s, (Schwartz (Altria) Tr. 1859; PX2531 (JLI) at 034), “[t]he category grew rapidly starting in 2011 as more convenience stores and tobacco shops began carrying the products,” (PX8003 Wexler (Turning Point Brands) Decl. at 002 ¶ 6).

#### **Response to Finding No. 3**

Complaint Counsel does not disagree.

4. In 2013, before JUUL was on the market, large tobacco companies, such as R.J. Reynolds Tobacco Company (“Reynolds”) and Altria Group, Inc. (“Altria”), began acquiring and scaling up e-cigarette brands, fueling further growth. (PX2531 (JLI) at 013, 034; *see also* Jupe (Altria) Tr. 2226; PX7010 Gifford (Altria) IHT at 145).

#### **Response to Finding No. 4**

Complaint Counsel has no specific response.

5. In the years since, the evolution of e-vapor product development has, according to market researchers, “been dominated by two interwoven themes, 1) the shortcomings of [early] vape products as a replacement for smoking, as evidenced by low retention among triers and high rate of dual use among vap[e]rs, and 2) the evolution of the category in response.” (RX1990 (JLI) at 003).

#### **Response to Finding No. 5**

Complaint Counsel has no specific response.

#### **B. Different Types Of E-Vapor Products**

6. There are different types of e-cigarettes, including cig-a-likes, open-systems, and pods (sometimes referred to as hybrids), that reflect the evolution of e-cigarettes towards a design that balanced nicotine satisfaction, convenience, and mitigation of social friction for adult smokers. (RX1990 (JLI) at 003; PX8003 Wexler (Turning Point Brands) Decl. at 002-03 ¶¶ 6-11; Begley (Altria) Tr. 1079).

#### **Response to Finding No. 6**

The proposed finding is vague, misleading, and contrary to the weight of the evidence. The proposed finding is misleading because it implies that there are three types of e-cigarettes: cigalikes, open systems, and pods. The weight of the evidence, however, shows that there are two main types of e-cigarettes—closed-system and open-system—and that cigalikes and pods are both closed-system products with far more similarities than differences. (CCFF ¶¶ 75-91, 210-37, 268-350).

The proposed finding is also incomplete and misleading because it ignores evidence demonstrating that there is no clear-cut way of classifying a closed-system e-cigarette product as



either a cigalike or a pod-based product. The distinction between cigalikes and pod-based products is minimal at best and centers on the shape of the products. (CCFF ¶ 83). Indeed, Altria's internal classifications for some products are contradicted by third-party witnesses and Respondents' own economic expert. (RX0865 (Altria) at 032 (classifying the Vuse Vibe under "Closed Tanks" as opposed to "Cig-a-like"); RX1290 (Altria) at 009 (depicting the "Evolving E-Vapor Category" and classifying the Vuse Vibe as a "Closed Tank" instead of a "Cig-a-like" or "Hybrid"); *but see* Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike); (RX1217 at 026 (¶ 38), 091-92 (¶ 129), 112 (¶ 171) (Murphy Report) (Murphy classifies Vuse Vibe as a cigalike)). Furthermore, there is a "hybrid" category between cigalikes and pod-based products, and the lines of distinction between these categories are unclear. (Crozier (Sheetz) Tr. 1489-90 (identifying Logic Pro as a hybrid and identifying the hybrid category) ("Q. Is that product you mentioned right now, is it Logic Pro? A. Yes. Q. And do you consider that product a cigalike or a pod system? A. I kind of consider that a hybrid, if you will, because it's kind of a -- it doesn't exactly -- it's too big, I think, to consider it a true cigalike, a longer, wider, heavier type product. Q. So you used the term hybrid, so hybrid between cigalike and pod system products, that's what you mean? A. Yes."); *but see* RX1217 at 026 (¶ 37), (Murphy Report) (Murphy classifies Logic Pro as a "pod-based vaporizer"); RX0865 (Altria) at 032 (classifying Logic Pro under "Closed Tanks" as opposed to "Cig-a-like"); *see also* RX1290 (Altria) at 009 (depicting the "Evolving E-Vapor Category" and classifying Logic Pro as a "Closed Tank" instead of a "Cig-a-like" or "Hybrid"))).

The proposed finding is further misleading because it suggests that cigalikes are an outdated product that eventually evolved into pods. Although sales of pod-based products have grown more quickly than cigalikes due to the commercial success of JUUL, (*see* CCFF ¶¶ 546-

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48), cigalikes continue to be sold and preferred by some e-cigarette customers. (PX1234 (Altria) at 005 (“Nu Mark Business Update” dated April 24, 2018) (stating that “MarkTen volume sales increasing, primarily driven by Bold expansion”); PX2079 (JLI) at 014 (“Product Roadmap” dated January 2018) (slide entitled “Competition from big companies” and listing MarkTen Bold as one of JUUL’s competitors); CCF ¶¶ 1173-76). The proposed finding is also vague because the term “social friction” is vague, undefined, and not referred to in the cited evidence.

### 1. Cig-A-Likes

7. The early e-cigarettes were the size and shape of a cigarette and thus dubbed “cig-a-likes.” (Jupe (Altria) Tr. 2136 (“[Cig-a-likes are] supposed to emulate the look of the cigarette.”); *see also* Willard (Altria) Tr. 1352 (discussing MarkTen cig-a-like specifically); PX7004 Willard (Altria) IHT at 104 (discussing cig-a-likes more broadly)).

#### **Response to Finding No. 7**

The proposed finding is misleading to the extent that it implies that cigalikes are neither sold nor preferred by some e-vapor customers. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76). Moreover, the evidence shows that some e-vapor customers prefer cigalikes. (PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the U.S. behind only JUUL); PX4015 (Altria) at 009 (Jody Begley’s Nov. 2017 Investor Day presentation and speaker notes) (describing how the cigalike “generally appeal[s] to adult smokers looking for an experience that closely resembles cigarette smoking”)).

Complaint Counsel does not disagree that the early e-cigarettes were cigalikes.

8. These “first generation” vapor products “once made up the majority of the U.S. vaping market.” (RX1990 (JLI) at 003).

**Response to Finding No. 8**

The proposed finding is vague because it does not define the term “U.S. vaping market” nor does it provide a relevant time frame. But Complaint Counsel does not disagree that, prior to the dramatic growth of JUUL in 2017 and 2018, (*see* CCF ¶¶ 62, 64, 546-48), the majority of closed-system e-cigarette products sold in the U.S. were cigalikes.

9. Cig-a-likes are “closed-system” e-vapor devices, meaning that they have “an e-liquid reservoir that is not refillable.” (PX9027 (FDA) at 009; *see also* Huckabee (Reynolds) Tr. 384 (“The closed-system terminology refers specifically to the cartridge or pod or tank which is not meant to be refillable.”); Begley (Altria) Tr. 1091 (explaining that cig-a-like is a type of “closed-system product”)).

**Response to Finding No. 9**

Complaint Counsel does not disagree.

10. Cig-a-likes often have two elements: (1) a disposable “cartridge” that contains the e-liquid and also serves as the mouthpiece; and (2) a “device” or “battery” that consists of a battery and a heating element. (PX7002 Schwartz (Altria) IHT at 24-25 (discussing cig-a-like components); Farrell (NJOY) Tr. 212-13 (same); Willard (Altria) Tr. 1353 (explaining that the cartridge serves as the mouthpiece)). The cartridge is designed to “work[] as one” with the device. (PX7002 Schwartz (Altria) IHT at 24-25).

**Response to Finding No. 10**

Complaint Counsel does not disagree, but adds that all closed-system e-cigarette devices, including pod-based products, are comprised of a battery as well as a container that comes pre-filled with e-liquid. (CCFF ¶¶ 76-77).

11. “[F]or many smokers and vapers, [cig-a-likes] were underpowered and did not provide enough satisfaction.” (RX1990 (JLI) at 003; *see also* PX7030 Wexler (Turning Point Brands) Dep. at 35-36 (explaining that cig-a-likes are ineffective at “deliver[ing] the nicotine to the consumer”); *see also* [REDACTED]).

**Response to Finding No. 11**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence. The proposed finding is vague because it refers to “many smokers and vapers” without



*see also* { [REDACTED] }.

### **Response to Finding No. 12**

The proposed finding is incomplete and misleading because the evidence cited is referring to cigalike products prior to 2013 when “the next generation of vapor products “emerge[d].” (PX8003 at 002 (¶ 7) (Wexler (Turning Point Brands), Decl.)). In February 2018, Altria’s CEO told investors that its cigalike products had nicotine satisfaction approaching that of cigarettes. (PX2079 (JLI) at 014 (January 2018 Product Roadmap presentation); PX2176 (JLI) at 110 (February 2018 CAGNY Summary)). And, as of August in 2018, Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL. (PX1008 (Altria) at 001 (Email from Nu Mark President & CEO, Brian Quigley, accusing Altria’s senior executives involved in the JLI transaction of providing Altria’s Board of Directors with “only the bad news version” of Nu Mark’s e-vapor products)).

The proposed finding is further incomplete and misleading to the extent that it suggests that all cigalikes contain smaller and inferior batteries, because it ignores evidence demonstrating that Vuse Vibe, a cigalike, “has the largest capacity cartridge and the longest-lasting battery of the VUSE product line.” (PX8008 at 009 (¶ 18(c)) (Huckabee (Reynolds), Decl.) (“The VIBE has the largest capacity cartridge and the longest-lasting battery of the VUSE product line.”); Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike)).

13. Beyond the limitations of the device, “the e-liquid found in cig-a-likes was relatively low in nicotine concentration and did not offer varied flavors; most of these devices ranged from about 1.8% to 2.4% nicotine strength.” (PX8003 Wexler (Turning Point Brands) Decl. at 002 ¶ 7; *see also* [REDACTED] }.

### **Response to Finding No. 13**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence. The proposed finding is vague as to the timeframe. The proposed finding is incomplete and misleading because the evidence cited in PX8003 was referring to early cigalikes on the market prior to the emergence of open systems in 2013. (PX8003 at 002 (¶ 8) (Wexler (Turning Point Brands), Decl.)).

The proposed finding is also contrary to the weight of the evidence, as cigalikes come in varying nicotine strengths and, prior to the FDA's flavor ban, also came in a variety of flavors. (See PX2176 (JLI) at 110 (February 2018 CAGNY Summary) (noting that MarkTen Bold was 4% nicotine by weight and approached the nicotine satisfaction of cigarettes); *see also* PX4015 (Altria) at 012 (Jody Begley's Nov. 2017 Investor Day presentation and speaker notes) (highlighting MarkTen Bold's 4% nicotine strength)). MarkTen cigalike products alone came in several nicotine strengths, including 3.5 percent and 4 percent, and in over ten flavor such as Caribbean Oasis, Summer Fusion, Vineyard Blend, and Bourbon Blend. (PX4357 (Altria) at 001 ("MarkTen® Actual Use Study" dated Oct. 3, 2018); PX1298 (Altria) at 045 (draft version of Nu Mark's 2018 Three Year Strategic Plan); *see also* CCF 1179).

14. This nicotine concentration, "combined with the battery and the amount of vape[,] produced . . . a lower level of satisfaction than the options you get from open systems and the options you get from some pod systems and disposable systems." (PX7030 Wexler (Turning Point Brands) Dep. at 35-36). In other words, cig-a-likes were not very effective at "deliver[ing] the nicotine to the consumer." They "didn't have as much impact." (PX7030 Wexler (Turning Point Brands) Dep. at 35-36).

#### **Response to Finding No. 14**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence. The proposed finding is vague as to the timeframe. The proposed finding is also incomplete and misleading for the reasons stated in response to RPF 13, and because the evidence cited specifically refers to cigalikes with "1.8 to 2.4 [percent nicotine concentration],"

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thus ignoring cigalikes with a higher nicotine concentration, such as MarkTen Bold. (*See* Response to RPF ¶ 13; *see also* PX2176 (JLI) at 110 (February 2018 CAGNY Summary) (noting that MarkTen Bold was 4% nicotine by weight and approached the nicotine satisfaction of cigarettes)).

15. And, because cig-a-likes “look[] like a cigarette,” that product format “unfortunately still carried some of the stigmas of smoking.” (Begley (Altria) Tr. 1099-100).

### **Response to Finding No. 15**

The proposed finding is vague and misleading because it does not define the “stigmas of smoking,” nor does it compare the purported “stigma” of cigalikes with other form factors. In addition, the proposed finding is unreliable because it relies solely on the self-serving statement of one Altria executive.

16. Along with the lack of nicotine satisfaction, this stigma arising from cig-a-like’s design impaired the ability of cig-a-likes to convert adult smokers to e-cigarettes: “[S]mokers who wanted to convert to non-combustible tobacco products did not want to appear to be smoking a cigarette, and so the form of the product was just wrong for conversion.” (PX7036 Garnick (Altria) Dep. at 135; *see also* Willard (Altria) Tr. 1347 (“It turned out, people that are quitting cigarettes to pick up vapor don’t want a vapor product that looks like a cigarette.”); Jupe (Altria) Tr. 2228 (explaining that “gimmicky” looking cig-a-likes were the “wrong” format); Gardner (Altria) Tr. 2604 (“[A]dult smokers no longer wanted . . . to look like they were smoking a cigarette and the stigma associated with that.”)).

### **Response to Finding No. 16**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence. The proposed finding is unreliable, incomplete and misleading in that it relies solely upon the self-serving testimony of Altria executives. The evidence shows that, in February 2018, Altria’s CEO told investors that its cigalike products had nicotine satisfaction approaching that of cigarettes. (PX2079 (JLI) at 014 (January 2018 Product Roadmap presentation); PX2176 (JLI) at 110 (February 2018 CAGNY Summary)). And, as of August in 2018, Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL. (PX1008 (Altria) at 001 (Email from Nu Mark President & CEO, Brian Quigley, accusing Altria’s senior

executives involved in the JLI transaction of providing Altria’s Board of Directors with “only the bad news version” of Nu Mark’s e-vapor products)). Moreover, the evidence also shows that, as of September 2018, Altria had never measured the conversion potential of any of its products, including its MarkTen cigalikes. (See CCF ¶ 1304 (citing RX1175 (Altria) at 010 (“We can’t/haven’t measured conversion potential of any of our products to effectively know what is working, what isn’t and why.”))). Indeed, Dr. Gardner testified that he did not think “[Altria] understood what drove conversion potential” and that the FDA itself has been unable to determine what needs to be demonstrated to show conversion potential. (Gardner (Altria) Tr. 2649, 2651, 2660; PX7026 (Gardner (Altria), Dep. at 59)).

17. As a result of these limitations in satisfaction and form, studies show that “retention rates for cig-a-likes [were] low.” (RX1990 (JLI) at 003; *see also* [REDACTED]).

### **Response to Finding No. 17**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. The proposed finding is misleading because it suggests that there are multiple studies concluding that the retention rates for cigalikes were low, but cites only a single study JUUL completed approximately six years ago—well before MarkTen Bold and other successful cigalike products were introduced to the market. (See RX1990 (JLI) at 001; PX2176 (JLI) at 110 (February 2018 CAGNY Summary)). Moreover, the evidence shows that there was no industry consensus on what drove e-vapor conversion. (CCFF ¶ 1302). In fact, the evidence shows that, as of September 2018, Altria had never measured the conversion potential of any of its products, including its MarkTen cigalikes. (See Response to RPF ¶ 16; *see* CCF ¶ 1304 (citing RX1175 (Altria) at 010 (“We can’t/haven’t measured conversion potential of any of our products to effectively know what is



working, what isn't and why.”)). Furthermore, cigalikes are still on the market today. (CCFF ¶¶ 1173-76).

## 2. Open-System E-Cigarettes

18. Beginning in 2013, larger, more powerful vapor devices known as “open systems” emerged on the market, offering customizable components and liquid nicotine solutions. (PX8003 Wexler (Turning Point Brands) Decl. at 002 ¶¶ 8-9; Farrell (NJOY) Tr. 207-08).

### **Response to Finding No. 18**

Complaint Counsel has no specific response.

19. Open system devices include “a reservoir that a user can refill with an e-liquid of their choosing.” (PX9027 (FDA) at 009).

### **Response to Finding No. 19**

Complaint Counsel does not disagree.

20. These refillable devices “consist of a battery, [e-liquid] tank, [heating] coil, and atomizer.” (PX8003 Wexler (Turning Point Brands) Decl. at 002 ¶ 8; *see also* Farrell (NJOY) Tr. 207-09 (discussing components)).

### **Response to Finding No. 20**

Complaint Counsel does not disagree.

21. Open system e-cigarettes have the largest batteries of the various e-vapor product types, allowing them to generate more power, which produces larger “plumes of vapor.” (PX8003 Wexler (Turning Point Brands) Decl. at 002 ¶ 8).

### **Response to Finding No. 21**

Complaint Counsel has no specific response.

22. In addition, many open-system devices allow users to adjust the energy from the device, and with it, the volume of the vapor plume. (PX7030 Wexler (Turning Point Brands) Dep. at 33; PX7002 Schwartz (Altria) IHT at 25; *see also* {REDACTED}).

### **Response to Finding No. 22**

Complaint Counsel has no specific response.

23. “As their industry name implies, open systems allow users to customize their experience by choosing variations of the liquid nicotine solutions for use in the tank. E-liquids

typically consist of liquid nicotine, flavoring, and solvents. As a result, open system users can experiment with a wide variety of potential flavor combinations and nicotine strengths.” (PX8003 Wexler (Turning Point Brands) Decl. at 002 ¶ 9; *see also* Begley (Altria) Tr. 969-70 (explaining that open systems allow users to adjust the device settings and e-liquids)).

### **Response to Finding No. 23**

Complaint Counsel has no specific response.

24. These combinations can be created with e-liquids made by any manufacturer. (Farrell (NJOY) Tr. 208 (explaining that open-system devices “can be refilled by a variety of different e-liquids that customers have access to and are manufactured by a variety of entities”); King (PMI) Tr. 2342 (“It’s called open because generally consumers source the liquid separately from the device . . .”)).

### **Response to Finding No. 24**

Complaint Counsel has no specific response.

25. In addition, “users can customize the individual components of an open system, such as the battery, coil, and atomizer.” (PX8003 Wexler (Turning Point Brands) Decl. at 002 ¶ 9). As a result, “there’s almost infinite variety in open systems.” (PX7030 Wexler (Turning Point Brands) Dep. at 100; *see also* Farrell (NJOY) Tr. 208 (explaining that users can swap out the various parts)).

### **Response to Finding No. 25**

Complaint Counsel has no specific response.

26. “Many open system users view customizing these products as a hobby.” (PX8003 Wexler (Turning Point Brands) Decl. at 002 ¶ 9; *see also* Huckabee (Reynolds) Tr. 387 (similar)). That is because the products are more “complex” and generally require maintenance and cleaning. (Farrell (NJOY) Tr. 207-09).

### **Response to Finding No. 26**

Complaint Counsel has no specific response.

## **3. Pod-Based Devices**

27. “[I]nadequate nicotine delivery and deficient product design/form-factor ultimately limited broad-based acceptance” of cig-a-likes and open systems. (PX2531 (JLI) at 034). By the summer of 2015, nearly two-thirds of the 44 million adult smokers and vapers in the United States had tried e-vapor products, but less than five percent were using e-vapor devices exclusively. (PX1135 (Altria) at 035). And the “first-generation products . . . plateau[ed]

at ~3% of the total cigarette market despite heavy marketing and promotional spend.” (PX2531 (JLI) at 034).

### **Response to Finding No. 27**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. The proposed finding is misleading because, while PX2531 does state that cigalikes lacked broad-based acceptance, Figure 39 in the same exhibit shows that cigalikes had 19.8% growth between 2013 and 2018, and had more retail value compared to any other e-vapor category, including 25% more retail value than new closed-system products such as JUUL in 2018. (PX2531 (JLI) at 079).

The proposed finding is further misleading because Respondents rely on outdated statistics while ignoring the fact that (1) cigalike products continued to evolve and that Altria itself offered a cigalike product (MarkTen Bold) that boasted nicotine satisfaction similar to cigarettes; (2) aside from JUUL, the fastest growing e-cigarette brand in the United States in 2018 was Altria’s own MarkTen, and (3) cigalike products continue to be sold in the market today. (PX2176 (JLI) at 110 (February 2018 CAGNY Summary); CCFF ¶¶ 1173-76; *see also* Begley (Altria) Tr. 980-81; CCFF ¶¶ 281-82; PX1008 (Altria) at 001).

Complaint Counsel does not disagree that form factor and other aspects of open system e-cigarettes limited their broad-based acceptance.

28. Beginning in 2015, a new product format hybridized “the ease of a cigalike with the experience of an enthusiast [i.e., open-system] device,” filling “a gap between low performance easy to use cigalikes and high performance complex open system devices.” (PX2289 (JLI) at 121; *see also* PX8003 Wexler (Turning Point Brands) Decl. at 002-03 ¶¶ 10-11 (similar)). The result was a “small,” “discrete” device capable of “provid[ing] a relatively high nicotine hit without producing as much vapor” as an open system. (PX8003 Wexler (Turning Point Brands) Decl. at 002 ¶ 10; *see also* Begley (Altria) Tr. 1055, 1108 (highlighting the importance of form and satisfaction)).

### **Response to Finding No. 28**

The proposed finding is incomplete and misleading for the reasons stated in response to RPF ¶¶ 12, 13, 16, and 27, and because “hybridized” products may have had “relatively high

nicotine” at the time, it ignores the fact that cigalikes continued to evolve after 2015 to include nicotine salts and higher nicotine content, and that, according to a JLI study the Respondents cite repeatedly in their proposed findings, cigalike products had more retail value than any other type of e-vapor product in 2018. (*See* Responses to RPF ¶¶ 12, 13, 16, 27; PX9000 (Altria) at 017; PX2531 (JLI) at 079).

The proposed finding is also incomplete and misleading to the extent that it suggests that all e-vapor customers are looking for a similar experience while the evidence indicates otherwise. (*See* CCF ¶ 1177 (citing the trial testimony of Dr. Gardner admitting that some consumers prefer e-vapor products with lower nicotine strength); *see also* PX7041 (Quigley (Altria), Dep at 20-22)). Indeed, Altria’s own documents emphasized that “different segments of adult smokers and vapers are looking for a range of different product formats, flavors, nicotine levels and vapor volumes. As a result, [Altria] believes a portfolio of products that address a broad spectrum of adult consumer preferences will be required to lead in the U.S. e-vapor market.” (PX4015 (Altria) at 008 (Jody Begley’s Nov. 2017 Investor Day presentation and speaker notes); *see also* CCF ¶ 276

{ [REDACTED]

[REDACTED]

█ [REDACTED]}; CCF ¶¶ 1173-76 (e-cigarette manufacturers continue to market cigalikes)). For this reason, Reynolds sells several e-vapor products and offers different nicotine strengths. (*See* Huckabee (Reynolds) Tr. 395; CCF ¶¶ 165-69, 276).

29. These “hybrid[s]” became known primarily as “pod-based” systems or “pods.” (Gifford (Altria) Tr. 2722, 2739).

### **Response to Finding No. 29**

Complaint counsel does not disagree.

30. Pod-based devices are shaped and sized differently than cig-a-likes. While cig-a-likes are consistently cylindrical, pod-based devices are larger and more varied in shape. Some are

oval, while others are longer and rectangular. (Farrell (NJOY) Tr. 210-11; *see also* Willard (Altria) Tr. 1347-48 (explaining the distinction in the context of MarkTen products and comparing MarkTen Elite’s shape to JUUL’s)).

### **Response to Finding No. 30**

Complaint Counsel has no specific response.

31. By virtue of not looking like a cigarette, pods offer “an emotional benefit to an adult smoker, because they aren’t viewed as a smoker. It really solves a problem for them. So it is far more than just an aesthetic issue.” (Begley (Altria) Tr. 1079).

### **Response to Finding No. 31**

The proposed finding is vague, confusing, and unreliable because it relies solely on self-serving testimony of an Altria executive using the undefined term “emotional benefit to an adult for smoker.” There are no contemporary business documents in the record that support this assertion.

32. Pods also have “larger,” “more effective batteries” compared to cig-a-likes. This makes them “more effective at taking the liquid and turning it into vapor and giving consumers an experience that they desire.” (PX7030 Wexler (Turning Point Brands) Dep. at 42; *see also* Huckabee (Reynolds) Tr. 379, 385 (noting that pods, such as Vuse Alto, are “larger” than cig-a-likes); Willard (Altria) Tr. 1348 (“[M]y view of a definition of a pod product is that it tended to be larger . . .”); King (PMI) Tr. 2354 (explaining that the larger the device, the higher capacity of the battery)).

### **Response to Finding No. 32**

The proposed finding is incomplete and misleading to the extent that it suggests that all e-vapor customers are looking for a similar experience while the evidence indicates otherwise. (*See* CCFF ¶ 1177 (citing the trial testimony of Dr. Gardner admitting that some consumers prefer e-vapor products with lower nicotine strength); *see also* PX7041 (Quigley (Altria), Dep at 20-22)). Indeed, Altria’s own documents emphasized that “different segments of adult smokers and vapers are looking for a range of different product formats, flavors, nicotine levels and vapor volumes. As a result, [Altria] believes a portfolio of products that address a broad spectrum of adult consumer preferences will be required to lead in the U.S. e-vapor market.” (PX4015 (Altria) at

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008 (Jody Begley’s Nov. 2017 Investor Day presentation and speaker notes); *see also* CCFE ¶ 276

[REDACTED]

[REDACTED]

[REDACTED]; CCFE ¶¶ 1173-76 (e-cigarette manufacturers continue to market cigalikes)). For this reason, Reynolds sells several e-vapor products and offers different nicotine strengths. (*See* Huckabee (Reynolds) Tr. 395; CCFE ¶¶ 165-69, 276).

33. Most pod-based products are closed systems, “meaning they’re only meant to be used with pre-filled cartridges.” (PX2289 (JLI) at 121-22; *see also* PX2289 (JLI) at 125 (stating that by January 2017, “most of the pods on the market were closed systems and provided only prefilled replacement pods”)).

### **Response to Finding No. 33**

Complaint Counsel does not disagree.

34. Pods also have a different cartridge design. Unlike cig-a-like cartridges, which contain gauze that absorbs the e-liquid, pod products contain no gauze, leaving the e-liquid “freely suspended.” (Schwartz (Altria) Tr. 1856).

### **Response to Finding No. 34**

Complaint Counsel has no specific response.

35. There is also what some consider to be a variant of pods, sometimes called “closed-tank” devices. The key feature of closed tank devices is that they are “larger” devices and have “a larger liquid-containing pod or cartridge.” (Begley (Altria) Tr. 1092; *see also* [REDACTED]; PX4080 (Altria) at 005, 007). The larger and more voluminous tanks were viewed as having potentially greater appeal for open-system users who were more interested in performance than convenience. (Begley (Altria) Tr. 1092-93).

### **Response to Finding No. 35**

Complaint Counsel has no specific response.

36. The “satisfaction and form or design” of pod-based devices “really mattered” to adult smokers. (Begley (Altria) Tr. 1108). In 2017, following several years of stagnant growth rates, adult smokers “started to re-engage with e-vapor and find more satisfying products, . . . primarily pod-based products.” (Begley (Altria) Tr. 1085; *see also* PX7010 Gifford (Altria) IHT at 146 (similar)).

### **Response to Finding No. 36**

The proposed finding is incomplete, misleading, and is unreliable as it relies solely on the self-serving testimony of Altria's own executives.

The proposed finding is incomplete and misleading because it suggests that "satisfaction and form or design" preferences for smokers are universal. But the evidence clearly shows that not all e-vapor customers are looking for a similar experience. (*See Responses to RPF 11, 28, 32*). Wade Huckabee of Reynolds testified that there are "a range of consumers with a range of desired product attributes" and "consumers prefer different nicotine levels as well." (Huckabee (Reynolds) Tr. 395). Likewise, Altria's Dr. Gardner conceded that some consumers prefer e-vapor products with lower levels of nicotine. (Gardner (Altria) Tr. 2673-74).

### **C. Harm Reduction Potential**

37. E-cigarettes were developed to provide cigarette smokers with a potentially less harmful alternative to cigarettes. (Begley (Altria) Tr. 1054; *see also* Schwartz (Altria) Tr. 1858-59; Willard (Altria) Tr. 1154; {REDACTED}).

#### **Response to Finding No. 37**

Complaint Counsel has no specific response.

38. Although nicotine is addictive, "nicotine itself has not been proven to directly cause disease or health problems in adults under normal consumption patterns." (PX2531 (JLI) at 009). Instead, "[t]he majority of harm from cigarettes is derived from carcinogenic combustion byproducts and carbon monoxide from incomplete burning." (PX2531 (JLI) at 009; *see also* Garnick (Altria) Tr. 1697; {REDACTED}).

#### **Response to Finding No. 38**

Complaint Counsel has no specific response.

39. Burning tobacco "create[s] thousands of chemical compounds, such that today . . . there are close to 7000 elements identified in cigarette smoke, of which we know about 70 are actually carcinogenic." (Jupe (Altria) Tr. 2207). The production of these compounds is "inherent to burning tobacco leaves." (Jupe (Altria) Tr. 2208).

#### **Response to Finding No. 39**

Complaint Counsel has no specific response.

40. As a result of the carcinogens produced by combustion, cigarettes cause a number of serious diseases, including lung cancer. (Garnick (Altria) Tr. 1696 (discussing findings by the Royal College of Physicians and U.S. Surgeon General)).

#### **Response to Finding No. 40**

Complaint Counsel does not disagree.

41. E-cigarettes “attempt to provide satisfying inhaled nicotine delivery while minimizing carcinogenic byproducts and eliminating the carbon monoxide created by cigarette combustion.” (PX2531 (JLI) at 009). The inhalation method offers an advantage over the nicotine delivery of typical cessation products, such as patches, sprays, and lozenges, which cannot match the speed or the dose of nicotine delivery offered by a cigarette. (PX2531 (JLI) at 009; *see also* PX7009 Burns (JLI) IHT at 114-15 (explaining that with nicotine gum, “it takes 30 minutes to absorb into your bloodstream,” whereas when you inhale from a cigarette, it “takes less than three minutes to get to peak nicotine satisfaction”; some e-vapor products, such as JUUL, have “almost the same rate of absorption in your bloodstream as a cigarette”)).

#### **Response to Finding No. 41**

Complaint Counsel has no specific response.

42. Recognizing these advantages, the public health community has increasingly acknowledged the harm-reduction potential of e-cigarettes:
- a. **Royal College of Physicians (April 2016):** “Large-scale substitution of e-cigarettes, or other non-tobacco nicotine products, for tobacco smoking has the potential to prevent almost all the harm from smoking in society.” (PX2158 (JLI) at 019; *see also* Garnick (Altria) Tr. 1695-96 (discussing the Royal College’s finding that e-vapor may be 95 percent safer than combustible cigarettes)).
  - b. **Mitch Zeller, Director, U.S. Center for Tobacco Products, FDA (May 2016):** “A hypothetical pack-a-day smoker who was otherwise unable or unwilling to quit cigarettes, if that person were to completely switch to e-cigarettes, there’s no question that person would be significantly reducing his or her risk.” (PX2158 (JLI) at 019).
  - c. **American Cancer Society (February 2018):** “Based on currently available evidence, using current generation e-cigarettes is less harmful than smoking cigarettes . . . .” (PX2158 (JLI) at 019). “[S]witching to the exclusive use of e-cigarettes is preferable to continuing to smoke combustible products.” (PX2158 (JLI) at 019).
  - d. **Public Health England (February 2018):** “Our new review reinforces the finding that vaping is a fraction of the risk of smoking, at least 95% less harmful and of negligible risk to bystanders.” (PX2158 (JLI) at 019).



**Response to Finding No. 42**

Complaint Counsel has no specific response.

43. Over time, the reduced-risk potential of e-cigarettes has shaped tobacco prevention and control policies. For example, “[i]nternationally, agencies including Public Health U.K. have recognized [e-cigarettes] as potential smoking cessation tools.” (PX2531 (JLI) at 014).

**Response to Finding No. 43**

The proposed finding is a conclusory statement unsupported by the cited evidence. Specifically, the evidence cited does not support the assertion that “the reduced-risk potential of e-cigarettes has shaped tobacco prevention and control policies.”

**D. Regulation Of E-Vapor Products**

44. In the United States, the Food and Drug Administration (“FDA”) has endorsed the harm reduction potential of reduced-risk products, such as e-cigarettes, while simultaneously increasing regulatory oversight over e-cigarettes, particularly with an aim toward preventing youth usage. (Murillo (Altria/JLI) Tr. 2900-12, 2961-63).

**Response to Finding No. 44**

The proposed finding is vague and unsupported by the cited evidence because the sixteen pages of Murillo’s trial testimony cited by Respondents make no mention of the FDA “endorsing the harm reduction potential of reduced-risk products” nor do they provide any indication of what that might mean.

Complaint Counsel does not disagree that risk reduction—whether an e-cigarette product offers a substantial reduction in a consumer’s individual health risk versus cigarettes—is one of the factors that the FDA weighs when considering whether that e-cigarette product is appropriate for the protection of public health and thus deserving of PMTA approval. (PX4149 (Altria) at 029; Quigley (Altria) Tr. 1986-87). Likewise, Complaint Counsel does not disagree that the FDA has increased its regulatory oversight over e-cigarettes, particularly with an aim towards preventing youth usage. Indeed, one of the other factors that the FDA weighs when considering whether an

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e-cigarette product is appropriate for the protection of public health and thus deserving of PMTA approval is whether the e-cigarette product has any “unintended consequences” to the overall population, including youth initiation. (PX4149 (Altria) at 029; *see also* Quigley (Altria) Tr. 1986-87 (testifying that in determining whether an e-vapor product is appropriate for the protection of public health, the FDA considers whether the product “demonstrated initiation;” that is, whether the product led non-tobacco consumers, of any age, to begin using the product)). However, even Altria’s President of Regulatory Affairs has acknowledged that the “[PMTA process] [is] still a very young regulatory scheme and [the] FDA isn’t terribly clear about what it wants.” (PX7017 Magness (Altria), Dep. at 88).

### **1. FDA’s Authority Under The Tobacco Control Act**

45. FDA has authority to regulate tobacco products pursuant to the Family Smoking Prevention and Tobacco Control Act (hereinafter the “Tobacco Control Act”), passed in 2009, which amended the Food, Drug, and Cosmetic Act to bring tobacco products under FDA’s purview. (Pub. L. No. 111-31; 123 Stat. 1776 (2009); Murillo (Altria/JLI) Tr. 2901-02; PX8005 Graham (NJOY) Decl. at 001-02 ¶ 7).

#### **Response to Finding No. 45**

Complaint Counsel does not disagree.

46. When the Tobacco Control Act was enacted, only certain tobacco products fell within FDA’s regulatory authority: “all cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco.” (21 U.S.C. § 387a(b)).

#### **Response to Finding No. 46**

Complaint Counsel does not disagree.

47. E-cigarettes were not included in this original list of tobacco products subject to FDA regulation. Congress, however, authorized FDA to issue regulations deeming additional categories of tobacco products subject to the Act. (21 U.S.C. § 387a(b) (stating that FDA has authority over “any other tobacco products that the Secretary by regulation deems to be subject” to the Act); *see also* Murillo (Altria/JLI) Tr. 2904-05; PX8009 Garner (Reynolds) Decl. at 002 ¶ 6).

#### **Response to Finding No. 47**

Complaint Counsel does not disagree.

48. The Tobacco Control Act is a “comprehensive regulatory statute” that gives FDA authority over “everything from the more traditional areas of FDA regulation, like manufacturing, recalls, but also things that are more unique to tobacco, such as marketing, product requirements, regulatory pathways—in other words, how to get to or stay on market.” (Murillo (Altria/JLI) Tr. 2901-02).

#### **Response to Finding No. 48**

Complaint Counsel has no specific response.

49. In passing the Tobacco Control Act, Congress expressly found that “[n]either the Federal Trade Commission nor any other Federal agency except the Food and Drug Administration possesses the scientific expertise needed to implement effectively all provisions of the Family Smoking Prevention and Tobacco Control Act.” (Pub. L. No. 111-31, § 2(45), 123 Stat. 1776, 1781 (2009)).

#### **Response to Finding No. 49**

Complaint Counsel does not disagree.

50. Under the Tobacco Control Act, regulated tobacco products sold in the United States as of February 15, 2007, are “grandfathered products” and may be marketed without FDA premarket review. (Garnick (Altria) Tr. 1685-86, 1688; PX8009 Garner (Reynolds) Decl. at 002 ¶ 7; *see also* 21 U.S.C. § 387j(a)).

#### **Response to Finding No. 50**

Complaint Counsel does not disagree.

51. By contrast, “new tobacco products”—meaning those that were not marketed in the United States as of February 15, 2007, or any significant *modification* of a grandfathered product—are subject to the Food, Drug, and Cosmetic Act’s requirement of premarket review. (21 U.S.C. § 387j(a); *see also* Garnick (Altria) Tr. 1685-86; PX8009 Garner (Reynolds) Decl. at 002 ¶ 8).

#### **Response to Finding No. 51**

Complaint Counsel has no specific response, other than to note that the term “significant modification” is vague and undefined. Altria’s Dr. Gardner testified that not all product modifications to a grandfathered product constitute a “new product” that would require a new PMTA application. (PX7026 (Gardner (Altria), Dep. at 41-42) (“To introduce a new product into

the market, you needed a PMTA -- new product into the market after August of 2016, you needed a preapproval from the agency to launch that product. Product modifications that led to a product being defined as new was – was something we were looking to understand. You know, changing a supplier on a material that has no significant impact on the product or the delivery or the consumer usage, it's a change, but we did not think that was a material change to warrant it being a new product.”); *see also* King (PMI) Tr. 2548 (“[A]t the time, there was some discussion around whether small differences or small enough differences would be still considered grandfathered, and there were a number of companies that apparently were making some improvements to their devices and still having them under the grandfather piece.”); CCFE ¶ 206 (“[A]ny significant change resulted in a new tobacco product for which you needed preapproval, but exactly where the line was [. . .] unclear.” (Garnick (Altria) Tr. 1691)). In fact, Altria and JLI both modified the gasket in their respective pod products without seeking PMTA approval. (*See* CCFE ¶¶ 204, 1208-11). Likewise, { [REDACTED] }

52. For products that were subject to FDA’s original regulatory authority and were introduced or modified after February 2007, there are three regulatory pathways for manufacturers to obtain marketing authorization. (21 U.S.C. § 387j(a)(2)).

### **Response to Finding No. 52**

Complaint Counsel has no specific response.

53. *First*, a manufacturer can file a *substantial equivalence report* for a new product that is “substantially equivalent” to a tobacco product that was marketed on the grandfather date or to a product that was previously found substantially equivalent. (Garnick (Altria) Tr. 1685-86; PX8005 Graham (NJOY) Decl. at 002 ¶ 11; PX8009 Garner (Reynolds) Decl. at 002-03 ¶ 10). This requires showing that the product has the same characteristics—meaning the same materials, design, and other features—as the predicate product or that the different characteristics do not raise different questions of public health. (PX8005 Graham (NJOY) Decl. at 002 ¶ 11; PX8009 Garner (Reynolds) Decl. at 002-03 ¶ 10). That is the pathway used by most cigarettes and smokeless tobacco products. (Garnick (Altria) Tr. 1686).

**Response to Finding No. 53**

Complaint Counsel has no specific response.

54. *Second*, a manufacturer can file an *exemption request* if “the change to the tobacco product is minor and that change only involves a change to an additive in a tobacco product that can be sold under the [Food, Drug, and Cosmetic Act].” (PX8005 Graham (NJOY) Decl. at 002 ¶ 12; *see also* PX8009 Garner (Reynolds) Decl. at 002 ¶ 10). Such exemptions are “rare.” (PX8005 Graham (NJOY) Decl. at 002 ¶ 12; *see also* Murillo (Altria/JLI) Tr. 2916 (describing this as a “small pathway”). And this is generally only available to products that were on the market in 2007. (Murillo (Altria/JLI) Tr. 2916).

**Response to Finding No. 54**

Complaint Counsel has no specific response.

55. *Third*, if a product does not satisfy the requirements of the two other pathways, a manufacturer must file a *premarket tobacco product application* (“PMTA”) under 21 U.S.C. § 387j, which requires showing that the new tobacco product would be “appropriate for the protection of the public health.” (PX8005 Graham (NJOY) Decl. at 002-3 ¶¶ 10, 14; PX8009 Garner (Reynolds) Decl. at 003 ¶ 10; Garnick (Altria) Tr. 1686). This involves a “rigorous analysis” and requires extensive scientific studies, ranging from toxicological assessments to clinical studies, which “take[] a lot of money and a lot of time.” (Garnick (Altria) Tr. 1686).

**Response to Finding No. 55**

Complaint Counsel does not disagree.

**2. The Deeming Rule Extended FDA’s Regulatory Authority To E-Vapor Products**

56. Around 2009, FDA attempted to regulate e-vapor products under the drug/devices provisions of the Food, Drug, and Cosmetics Act. In 2010, the D.C. Circuit rejected this attempt, ruling that e-cigarettes could not be regulated as drug devices. Instead, to regulate e-vapor products, FDA would have to deem those products subject to regulation as tobacco products under the Tobacco Control Act of 2009. (*Sottera v. FDA*, 627 F.3d 891, 893, 898 (D.C. Cir. 2010); Murillo (Altria/JLI) Tr. 2903-04).

**Response to Finding No. 56**

Complaint Counsel has no specific response.

57. In April 2014, FDA announced its intention to regulate additional products such as e-cigarettes through rulemaking that would deem such products subject to its regulatory authority under the Tobacco Control Act. (79 Fed. Reg. 23,142, 23,143 (Apr. 25, 2014); Murillo (Altria/JLI) Tr. 2904).

**Response to Finding No. 57**

Complaint Counsel does not disagree.

58. In May 2016, following extensive public comments, FDA issued a final rule. (81 Fed. Reg. 28,973 (May 10, 2016); Murillo (Altria/JLI) Tr. 2904-05). That regulation, which has become known as the “Deeming Rule,” deemed all products (other than accessories) that met the Tobacco Control Act’s definition of a “tobacco product” subject to FDA’s authority under the Act, effective August 2016. (81 Fed. Reg. at 29,102; PX8005 Graham (NJOY) Decl. at 002 ¶ 8, 003 ¶ 17; PX8009 Garner (Reynolds) Decl. at 003-04 ¶¶ 13-14). Today, essentially all tobacco products that can be regulated by FDA are regulated, including e-cigarettes. (PX8005 Graham (NJOY) Decl. at 002 ¶ 8; PX8009 Garner (Reynolds) Decl. at 004 ¶ 15; Garnick (Altria) Tr. 1687-88).

**Response to Finding No. 58**

Complaint Counsel does not disagree.

59. As a result of the Deeming Rule, any deemed product that was not marketed legally as of February 15, 2007, is considered a “new tobacco product” subject to the requirement of FDA premarket review. This means that manufacturers of these products must secure authorization under one of the three regulatory pathways outlined above. (PX8005 Graham (NJOY) Decl. at 002 ¶ 9; PX8009 Garner (Reynolds) Decl. at 004 ¶ 16; *see also* Garnick (Altria) Tr. 1685-86).

**Response to Finding No. 59**

Complaint Counsel has no specific response.

60. In practical effect, the Deeming Rule subjects all e-cigarette products to the third pathway—the PMTA requirement. This is because “no [e-vapor] product has yet to be identified as a . . . product that was on the market[] as of February 15, 2007.” (PX8009 Garner (Reynolds) Decl. at 004-05 ¶ 18; Garnick (Altria) Tr. 1685-86 (similar)). Thus, “[t]here are no clearly identified grandfathered vapor products that [can] serve as the predicate for a substantial equivalence application. Further, the FDA has stated that manufacturers of [e-vapor products] will face difficulty demonstrating a product is substantially equivalent to a combustible cigarette or smokeless tobacco product.” (PX8005 Graham (NJOY) Decl. at 002-03 ¶ 13).

**Response to Finding No. 60**

Complaint Counsel has no specific response.

61. But, “to prevent [e-vapor] manufacturers from immediately having to remove all newly deemed products from the market upon the effective date of the . . . Deeming Rule,” FDA announced that it would delay enforcement of the Deeming Rule for several years for those products that were on the market as of August 8, 2016, to give manufacturers adequate

time to prepare PMTAs. (PX8009 Garner (Reynolds) Decl. at 005 ¶ 19). In other words, FDA established a grace period permitting then-existing e-cigarette products to “stay on the market provided [the e-vapor manufacturers] filed a PMTA for [those] product[s] by a certain date.” (Garnick (Altria) Tr. 1687).

### **Response to Finding No. 61**

Complaint Counsel does not disagree.

62. The Deeming Rule originally required manufacturers to submit PMTAs for on-market e-vapor products by August 8, 2018, 24 months after the effective date of the Deeming Rule. (Murillo (Altria/JLI) Tr. 2943-44; PX8009 Garner (Reynolds) Decl. at 005 ¶ 19).

### **Response to Finding No. 62**

Complaint Counsel does not disagree.

63. The Deeming Rule has “really changed the game” in the e-vapor industry. (PX7018 Schwartz (Altria) Dep. at 31). It has at least two important practical implications.

### **Response to Finding No. 63**

The proposed finding is vague and conclusory. The cited Schwartz deposition testimony does not explain how or to what extent the Deeming Rule “changed the game” in the e-vapor industry or what Schwartz meant by this statement. (PX7018 Schwartz (Altria) Dep. at 31). It is also vague as to the definition of “changed the game.”

64. *First*, it means that all existing e-cigarette manufacturers ultimately will need to secure PMTA approval from FDA to keep their product on the market. (Garnick (Altria) Tr. 1688-90; PX7009 Burns (JLI) IHT at 74 (“Getting PMTA approval is critical to stay in the marketplace.”)).

### **Response to Finding No. 64**

Complaint Counsel does not disagree.

65. *Second*, the Deeming Rule effectively “froze[]” e-cigarette product offerings as they existed on August 8, 2016. (Garnick (Altria) Tr. 1699; *see also* Jupe (Altria) Tr. 2218 (describing the market for e-vapor products as “locked down”)). By limiting its exercise of enforcement discretion to those products that were on the market as of August 8, 2016, FDA has “prevent[ed] new products from readily entering.” (PX8005 Graham (NJOY) Decl. at 003 ¶ 19). Thus, while manufacturers could acquire (or sell) product lines that existed as of August 8, 2016, they could not introduce new products into the market without

going “through this very expensive and time-consuming PMTA process.” (Garnick (Altria) Tr. 1690, 1699).

### **Response to Finding No. 65**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence because manufacturers can and did make changes to e-cigarette products after August 8, 2016. (CCFF ¶¶ 1198-227). For example, Altria implemented a new gasket for MarkTen Elite to address a leaking issue with its pods. (CCFF ¶¶ 1206-27). Altria introduced the modified version of Elite with the new gasket into distribution in late 2018. (Myers (Altria) Tr. 3382-83; Schwartz (Altria) Tr. 1904 (discussing PX1582 (Altria) at 002); PX7027 (Murillo (Altria/JLI), Dep. at 165-66)). Altria had also developed a new component for its APEX pod-based product and was planning to implement this change without a PMTA in 2018. (PX1638 (Altria) at 001 (Email exchange between Michael Brace and Michelle Baculis discussing implementation of new APEX plugs)). Other manufacturers, including JLI [REDACTED], likewise implemented changes to existing products notwithstanding the Deeming Rule. (CCFF ¶¶ 1202, 1204; *see also* Garnick (Altria) Tr. 1691 (“[A]ny significant change resulted in a new tobacco product for which you needed preapproval, but exactly where the line was [. . .] unclear.”)).

66. Relatedly, the Deeming Rule also largely prohibits any significant *modifications* to the products that were on the market as of August 8, 2016 without first receiving regulatory approval through the PMTA process. (Garnick (Altria) Tr. 1691-92 (“[A]ny significant change resulted in a new tobacco product for which you needed preapproval . . .”)).

### **Response to Finding No. 66**

The proposed finding is vague, incomplete, and misleading because it does not define the term “significant modifications.” Indeed, the evidence is clear that e-cigarette manufacturers can and did make changes to e-cigarette products after August 8, 2016. (*See* Response to RPF ¶ 65).

67. The Deeming Rule refers to “new tobacco products,” (81 Fed. Reg. 28,973), and the statutory definition of that term includes “any *modification* (including a change in design, any component, any part, or any constituent, . . . or in the content, delivery or form of



nicotine, or any other additive or ingredient) of a tobacco product,” (21 U.S.C. § 387j(a)(1) (emphasis added)).

### **Response to Finding No. 67**

Complaint Counsel has no specific response.

68. In January 2017, FDA issued guidance for vape shops indicating that “[m]odifying a product would generally result in a new tobacco product for which a vape shop is required to seek premarket authorization.” (PX1593 (Altria) at 008). The guidance qualified that FDA would not enforce this requirement for changes that were “consistent with the specifications provided by the original manufacturer,” on the assumption that these modifications would not “alter the performance of the tobacco product as described or intended by the original manufacturer.” (PX1593 (Altria) at 008).

### **Response to Finding No. 68**

Compliant Counsel has no specific response.

69. In the absence of specific guidance for other e-vapor products, manufacturers, including Altria, attempted to apply this vape shop guidance to cig-a-likes and pod-based products. (Garnick (Altria) Tr. 1691-93).

### **Response to Finding No. 69**

Complaint Counsel has no specific response.

70. For example, Altria believed that “if the modification changed the aerosol delivery, changed the composition or changed consumer exposure or usage behavior, it was a new product.” (PX7026 Gardner (Altria) Dep. at 42; *see also* Murillo (Altria/JLI) Tr. 2927-28, 3069 (adding nicotine salts to a product would be a significant change that would require a PMTA)).

### **Response to Finding No. 70**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence because the new gasket that Altria implemented in MarkTen Elite not only reduced formaldehyde generation in the product, (*see* CCFF ¶¶ 1228-31), but also increased aerosol mass. (*See* CCFF ¶¶ 1232-34). Notwithstanding these changes to the original Elite product, Altria introduced the modified version of Elite with the new gasket into distribution in late 2018. (Myers (Altria) Tr.

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3382-83; Schwartz (Altria) Tr. 1904 (discussing PX1582 (Altria) at 002); PX7027 (Murillo (Altria/JLI), Dep. at 165-66)).

71. Any new tobacco product that is required to have premarket authorization by FDA and does not have such authorization is considered an adulterated product. (21 U.S.C. § 387b(6); *see also* PX8009 Garner (Reynolds) Decl. at 003 ¶ 12). Introducing adulterated products into the market is prohibited by statute and violations of this prohibition can result in both civil and criminal penalties. (21 U.S.C. §§ 331, 333; *see also* PX8009 Garner (Reynolds) Decl. at 003 ¶ 12).

### **Response to Finding No. 71**

Complaint Counsel does not disagree.

#### **3. The PMTA Process Is Onerous**

72. The PMTA process is an “expensive, time-consuming process.” (Quigley (Altria) Tr. 2009; *see also* Farrell (NJOY) Tr. 358 (agreeing that PMTAs cost millions of dollars); [REDACTED]; Willard (Altria) Tr. 1382 (“[I]t was a very expensive process.”); Garnick (Altria) Tr. 1699 (describing PMTA process as “very expensive and time-consuming”); Schwartz (Altria) Tr. 1866 (PMTA process is “a very costly, protracted process”); Jupe (Altria) Tr. 2218 (explaining that PMTA process is “not dissimilar to kind of the pharmaceutical process of getting a new drug or a medical device on the market”); Murillo (Altria/JLI) Tr. 2921 (describing a PMTA as a “ton of work”); [REDACTED]); Gardner (Altria) Tr. 2583 (explaining that PMTA studies take “roughly two years to execute”); PX8005 Graham (NJOY) Decl. at 004 ¶ 20 (“A PMTA is a very substantial undertaking.”); PX7046 Rothman Dep. at 204 (“[O]btaining PMTA approval is costly and takes multiple years.”)).

### **Response to Finding No. 72**

Complaint Counsel does not disagree.

#### **a. Manufacturer Must Demonstrate That The Product Is Appropriate For The Public Health, Which Requires A Substantial Submission**

73. To obtain FDA authorization, a manufacturer must demonstrate that the product “is appropriate for the protection of the public health.” (21 U.S.C. § 387j(c)(2)(A)).

### **Response to Finding No. 73**

Complaint Counsel does not disagree.

74. The “protection of the public health” standard is unique to tobacco products. For pharmaceuticals, the standard is “safe and effective.” But “tobacco products are not inherently and cannot be safe and effective, so a different standard had to be devised.” Instead, Congress adopted the “appropriate for the protection of the public health” standard. (Murillo (Altria/JLI) Tr. 2919).

#### **Response to Finding No. 74**

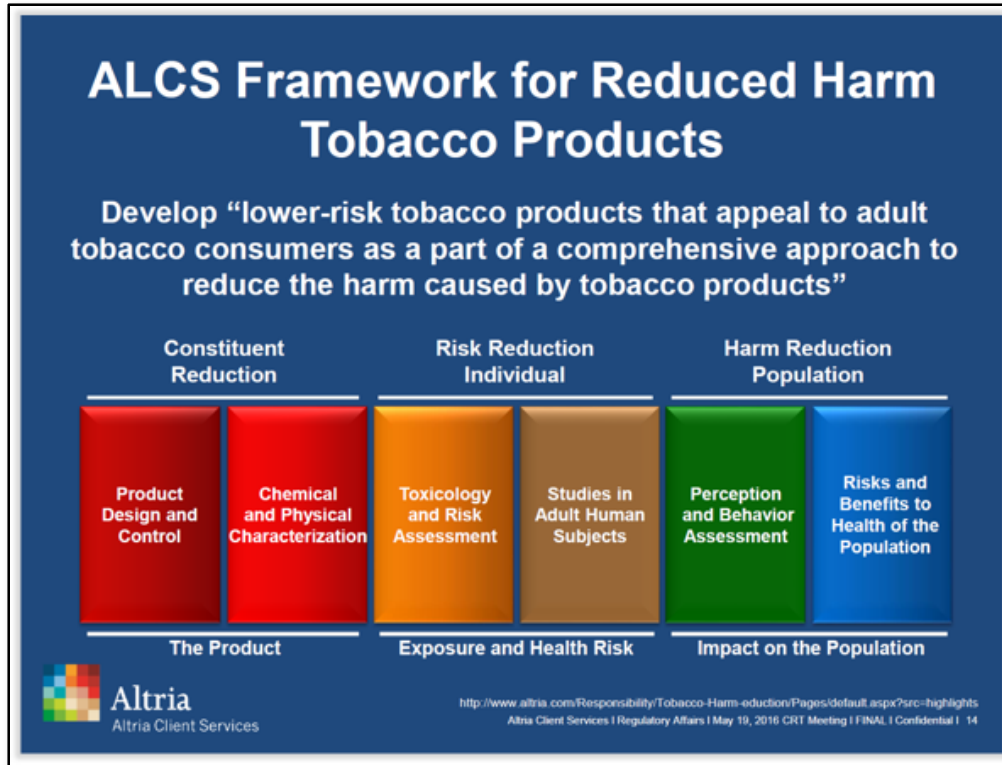
Complaint Counsel has no specific response.

75. In determining whether a manufacturer has met that standard, the Tobacco Control Act instructs FDA to weigh: (1) “the risks and benefits to the *population as a whole*, including users and nonusers of tobacco products”; (2) the “likelihood that *existing users* of tobacco products will *stop* using such products”; and (3) the “likelihood that those who *do not use* tobacco products will *start* using such products.” (21 U.S.C. § 387g(a)(3)(B)(i) (emphases added); *see also* Murillo (Altria/JLI) Tr. 2919, 3032).

#### **Response to Finding No. 75**

Complaint Counsel does not disagree.

76. As Murillo, who served as Altria’s Senior Vice President of Regulatory Affairs, synthesized the framework, a manufacturer must demonstrate that the product (i) “reduce[s] the constituents of harm that smokers are taking in when they’re smoking” (“Constituent Reduction”); (ii) “reduce[s] the risk” relative to other tobacco products (“Risk Reduction Individual”); and (iii) will actually “convert” smokers without having undue unintended effects on the non-tobacco-using population (“Harm Reduction Population”). (Murillo (Altria/JLI) Tr. 2917-20; *see also* PX9027 (FDA) at 027). This framework is shown in the chart below:



(RX2019 (Altria) at 014).

**Response to Finding No. 76**

Complaint Counsel has no specific response, except to add that the proposed finding is incomplete because it fails to mention that the FDA’s framework expressly considers whether the product has any unintended consequences, including youth initiation and/or the appeal to non-smokers. (See Response to RPFF ¶ 81).

77. The specific application elements, which are outlined in the Food, Drug, and Cosmetic Act, are “expansive.” (PX8005 Graham (NJOY) Decl. at 004 ¶ 21; see also RX2019 (Altria) at 017 (summarizing application requirements); Murillo (Altria/JLI) Tr. 2915-20 (discussing application elements)).

**Response to Finding No. 77**

Complaint Counsel has no specific response.

78. A manufacturer must submit “full reports of *all information*”—including that which is “known” or “reasonably should be known” to the applicant—“concerning investigations which have been made to show the *health risks* of such tobacco product and whether such

tobacco product presents *less risk than other tobacco products.*” (21 U.S.C. § 387j(b)(1)(A) (emphases added)).

### **Response to Finding No. 78**

Complaint Counsel has no specific response.

79. The statute also requires manufacturers to produce, among other things, “a full statement of the components, ingredients, . . . and . . . principles of operation”; “a full description of the methods used in, and the facilities . . . used for, the manufacture” of the product; “samples of such tobacco product”; and “specimens of the labeling proposed to be used.” (21 U.S.C. § 387j(b)(1)(B), (C), (E), (F)). It also contains a catchall for “such other information relevant to the subject matter of the application as the [FDA] may require.” (21 U.S.C. § 387j(b)(1)(G); *see also* PX8009 Garner (Reynolds) Decl. at 009 ¶ 30).

### **Response to Finding No. 79**

Complaint Counsel has no specific response.

80. As part of the showing that the product is appropriate for the protection of public health, the manufacturer must address the “relative health risks” compared to “other tobacco products on the market,” including both cigarettes and “other [e-cigarettes].” (PX9027 (FDA) at 027; *see also* Garnick (Altria) Tr. 1604 (explaining that manufacturers must show that the product is less risky than cigarettes and address the risk relative to “other products of the same category”)).

### **Response to Finding No. 80**

Complaint Counsel does not disagree.

81. The manufacturer must also show that the product can convert users of higher risk products, namely smokers. (Jupe (Altria) Tr. 2220; *see also infra* Part V.C.1, V.C.6 (discussing the need to show conversion)).

### **Response to Finding No. 81**

The proposed finding is incomplete and misleading in that it suggests that a manufacturer *must* show that an e-cigarette product can convert smokers. But the evidence is clear that, in applying the “appropriate for the protection of public health” standard, the FDA looks at several factors, including but not limited to, the product’s ability to convert adult smokers. (PX4149 (Altria) at 029; Quigley (Altria) Tr. 1986). Other factors include risk reduction—namely, whether the product offers a substantial reduction in a consumer’s individual health risk versus cigarettes—

and whether the product has any unintended consequences, including youth initiation and/or the appeal to non-smokers. (PX4149 (Altria) at 029; *see also* Quigley (Altria) Tr. 1986-87 (testifying that in determining whether an e-vapor product is appropriate for the protection of public health, the FDA considers whether the product “demonstrated initiation;” that is, whether the product led non-tobacco consumers, of any age, to begin using the product)). However, even Altria’s President of Regulatory Affairs has acknowledged that the “[PMTA process] [is] still a very young regulatory scheme and the FDA isn’t terribly clear about what it wants.” (PX7017 Magness (Altria), Dep. at 88).

82. In June 2019, three years after the Deeming Rule was issued, FDA released a final guidance document offering detailed instructions for e-cigarette PMTAs. (Murillo (Altria/JLI) Tr. 2908-09; *see also* PX9027 (FDA)). This guidance “add[ed] complexity to the PMTA applications.” (PX8009 Garner (Reynolds) Decl. at 010 ¶ 31). The 55-page document instructs applicants to submit a bevy of information ranging from scientific literature to non-clinical (not on human subjects) and clinical (on human subjects) studies. (PX9027 (FDA) at 026-27).

### **Response to Finding No. 82**

Complaint Counsel has no specific response.

83. For example, the June 2019 guidance calls for:

- (a). “Stability information,” including the “established shelf life of the product and changes in pH and constituents (including [harmful or potentially harmful constituents] and other toxic chemicals) over the lifespan of the product,” and “how stability is affected by [different] storage conditions,” (PX9027 (FDA) at 030; Murillo (Altria/JLI) Tr. 3072);
- (b). “A complete list of uniquely identified constituents or chemicals . . . contained within the product or delivered by the product,” including analysis of 33 constituents identified by FDA, such as formaldehyde and nickel, (PX9027 (FDA) at 031-32);
- (c). A “full assessment of the toxicological and pharmacological profile” of the product including “[t]oxicology data from the literature,” “[a]nalysis of constituents . . . under both intense and non-intense use conditions,” and “[c]omputational modeling of the toxicants,” (PX9027 (FDA) at 037-38);

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- (d). A “literature review” of relevant published studies, including a summary describing each study’s “design” and “statistical analysis,” (PX9027 (FDA) at 036); and
- (e). Evaluations of “how consumers perceive product harms” and the “topography of how individual users consume the product (e.g., the number of puffs, puff duration, puff intensity, duration of use),” (PX9027 (FDA) at 041).

**Response to Finding No. 83**

Complaint Counsel has no specific response.

84. As is evident from this sampling of the guidance document, a PMTA requires “a large number of studies.” (PX8009 Garner (Reynolds) Decl. at 011 ¶ 34). As a result, the final application is “voluminous.” (Garnick (Altria) Tr. 1608).

**Response to Finding No. 84**

Complaint Counsel has no specific response.

85. For example, the PMTA for IQOS, a heat-not-burn device manufactured by Philip Morris International (“PMI”), and one of just a handful of PMTAs approved to date, was “close to two million pages.” (PX7017 Magness (Altria) Dep. at 88; *see also* Garnick (Altria) Tr. 1608 (similar)).

**Response to Finding No. 85**

Complaint Counsel has no specific response.

**b. Preparing A PMTA Is A Lengthy Process**

86. The level of “product testing [required for a PMTA] takes a significant amount of time and is a process that cannot be sped-up.” (PX8005 Graham (NJOY) Decl. at 005 ¶ 28; *see also* Garnick (Altria) Tr. 1699 (describing the process as “time-consuming”); Quigley (Altria) Tr. 2009 (same); Schwartz (Altria) Tr. 1866 (similar); Gardner (Altria) Tr. 2583 (similar); [REDACTED]).

**Response to Finding No. 86**

Complaint Counsel does not disagree.

87. The studies required for a PMTA generally cannot begin until a manufacturer has “design lock,” meaning it has “achieved a design for the new product that [is] not going to change.” (Murillo (Altria/JLI) Tr. 2924). “[I]f you change things later, it’s going to cause a lot of delay and [may] even be fatal,” particularly if the change “create[s] some other problem” or causes a manufacturer to “be out of time.” (Murillo (Altria/JLI) Tr. 2930). And, even where a change is not fatal, generally a manufacturer has “to go back and start over at least

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some things.” (Murillo (Altria/JLI) Tr. 2925; *see also* PX7000 Garnick (Altria) IHT at 25-26 (explaining that before starting PMTA studies, “you need to really lock down the design of the product”; “if you don’t do that and you start engaging in studies and the designers change the product, you are going to have to do the studies all over again”)).

### **Response to Finding No. 87**

The proposed finding is incorrect and misleading because Altria, JLI, and others have made changes to their products after the products were already in production. (*See Responses to RPF* ¶¶ 51, 71).

88. After design lock, it takes “approximately two years” of scientific research to prepare a PMTA. (Murillo (Altria/JLI) Tr. 2924).

### **Response to Finding No. 88**

Complaint Counsel has no specific response.

89. “Many studies can take 6-12 months or longer . . . .” (PX8005 Graham (NJOY) Decl. at 005 ¶ 28; *see also* Garnick (Altria) Tr. 1661 (explaining that some of the studies can “take months and months”); Murillo (Altria/JLI) Tr. 2925 (explaining that testing whether a product is stable for 12 months takes 12 months)).

### **Response to Finding No. 89**

Complaint Counsel does not disagree.

90. Reynolds’s experience with a PMTA is illustrative of the length of time that it takes to prepare the application: According to Dr. Charles Garner, Reynolds’s Vice President of Scientific and Regulatory Affairs, { [REDACTED] }. Reynolds estimated that studies took “from one (1) year to three (3) years to complete, which includes planning, protocol development, securing a contract laboratory to perform work, sample generation, testing conducted by the laboratory, data evaluation, and generation of the final reports.” (PX8009 Garner (Reynolds) Decl. at 015 ¶ 45).

### **Response to Finding No. 90**

Complaint Counsel does not disagree.

91. In limited instances, a manufacturer that discovers design flaws in the midst of the testing for a PMTA may be able to save some time using a process known as “bridging,” meaning “building a bridge from the prior data to a new product.” (Gardner (Altria) Tr. 2572; *see also* Murillo (Altria/JLI) Tr. 3004 (“[T]he concept of bridging is that you don’t have to



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redo all of the work required for a PMTA for each change or each SKU [(stock keeping unit)], that you say, well, these things are sufficiently similar to each other and here's how we prove that, and you should rely on this underlying test.")). For example, a manufacturer may be able to use study results for research on an e-liquid with one nicotine concentration for an e-liquid with a different nicotine concentration. (PX8005 Graham (NJOY) Decl. at 005-06 ¶ 32).

### **Response to Finding No. 91**

Complaint Counsel does not disagree.

92. Bridging requires a substantial degree of similarity in the performance of the products, as well as “enforceability testing” to demonstrate that data associated with one product is applicable to another. (PX7027 Murillo (Altria/JLI) Dep. at 74-75, 161-62; *see also* Gardner (Altria) Tr. 2573 (explaining that to get the benefit of bridging the “two products [need to] behave[] the same in delivering an aerosol”); Murillo (Altria/JLI) Tr. 3004 (explaining that bridging requires “prov[ing]” that two products “are sufficiently similar to each other”)).

### **Response to Finding No. 92**

Complaint Counsel has no specific response.

93. Bridging generally is not possible for certain types of evidence, such as stability studies. (Murillo (Altria/JLI) Tr. 2925).

### **Response to Finding No. 93**

The proposed finding is not supported by the evidence cited. At trial, Murillo testified that “it’s really hard” to bridge stability studies, not that doing so is not possible. (Murillo (Altria/JLI) Tr. 2925).

#### **c. PMTAs Are Expensive**

94. Conducting years of scientific studies for a PMTA is a significant expense. (Farrell (NJOY) Tr. 358; Willard (Altria) Tr. 1382; Garnick (Altria) Tr. 1699; Schwartz (Altria) Tr. 1866; Quigley (Altria) Tr. 2009; PX7046 Rothman Dep. at 204).

### **Response to Finding No. 94**

Complaint Counsel does not disagree.

95. Manufacturers must submit a PMTA for each product or “SKU,” and the application can cost approximately \$5 to \$8 million per SKU. Because product lines with different flavors

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and nicotine strengths easily can have ten or more SKUs, a PMTA for a single product line easily can cost up \$50 to \$100 million. (Murillo (Altria/JLI) Tr. 2950-51).

### Response to Finding No. 95

Complaint Counsel has no specific response.

96. Small companies can make the process more affordable by partnering with other small companies—for example, a company that manufactures open-tank devices might join forces with an e-liquid company and “pool[] their resources to try to put lots of applications bundled together.” They also can “try to rely on existing literature,” particularly “if their ingredients are common enough,” but the success of this approach “remains to be seen.” (Murillo (Altria/JLI) Tr. 3019).

### Response to Finding No. 96

Complaint Counsel has no specific response.

97. [REDACTED];  
PX8005 Graham (NJOY) Decl. at 004 ¶ 20; Farrell (NJOY) Tr. 358; Murillo (Altria/JLI) Tr. 3074; PX7009 Burns (JLI) IHT at 71; PX1400 (Altria) at 005, 007, 010-11).

(a). **Reynolds:** [REDACTED]

- (b). **NJOY:** “A PMTA is . . . likely to cost at least tens of millions of dollars.” (PX8005 Graham (NJOY) Decl. at 004 ¶ 20; *see also* Farrell (NJOY) Tr. 358 (acknowledging that PMTAs cost millions of dollars)).

(c). **ITG Brands:** [REDACTED]

- (d). **JLI:** The PMTA for the JUUL products cost over \$100 million. (Murillo (Altria/JLI) Tr. 3074 (agreeing that “the total cost of the [JUUL] PMTA to JLI” was “over \$100 million”); *see also* PX7009 Burns (JLI) IHT at 71 (similar)).
- (e). **Altria:** According to Altria’s cost estimates, PMTAs would cost \$80 to \$90 million for MarkTen cig-a-like, (PX1400 (Altria) at 010); \$9 to \$14 million for MarkTen Bold cartridges, (PX1400 (Altria) at 011), and \$42 to \$50 million for Elite and Elite 2.0 combined, (PX1400 (Altria) at 005, 007).

### Response to Finding No. 97

Complaint Counsel does not disagree.

**d. Preparing PMTAs Requires Specific Expertise**

98. An additional challenge in the PMTA process is the “very specific expertise[]” required to compile an application and generate the underlying studies. (Murillo (Altria/JLI) Tr. 2975).

**Response to Finding No. 98**

Complaint Counsel has no specific response.

99. The relevant tests, “must be performed by accredited labs. These labs are limited in number and capacity.” (PX8005 Graham (NJOY) Decl. at 004 ¶ 26; *see also* Gardner (Altria) Tr. 2557; PX7027 Murillo (Altria/JLI) Dep. at 80 (“[T]here’s a very small number of laboratories that are capable of doing validated methods with respect to vapor products.”)). “[E]ven with . . . pre-existing relationships [with certain labs], NJOY has faced challenges finding available [p]roviders with the capacity to conduct timely research on its products.” (PX8005 Graham (NJOY) Decl. at 005 ¶ 27).

**Response to Finding No. 99**

Complaint Counsel does not disagree, but adds that the evidence cited further notes that “[l]arge tobacco companies, including Altria and Reynolds, and companies such as JUUL that have pre-existing relationships with labs have a significant advantage in being able to get their products tested.” (PX8005 at 004 (¶ 26) (Graham (NJOY), Decl.)).

100. Beyond accreditations, the research requires specialized expertise. For example, “[s]tudies such as in vitro toxicology studies are also extremely difficult to perform with few labs available to test [e-vapor] products.” (PX8005 Graham (NJOY) Decl. at 005 ¶ 29).

**Response to Finding No. 100**

Complaint Counsel does not disagree.

101. Altria was able to locate only two external companies with the capability and capacity for e-vapor PMTA work. (PX7017 Magness (Altria) Dep. at 80). But for some studies, such as gas chromatography/mass spectrometry fingerprinting of e-vapor aerosols, “[t]here were no contract labs available to do this work” in 2018. (Gardner (Altria) Tr. 2616).

**Response to Finding No. 101**

The proposed finding is misleading because, though Altria found two external companies with the capability for performing e-vapor PMTA work, Altria has “more than 400 scientists, physicians, product developers, engineers, regulatory experts and others who are developing innovative products, pursuing their regulatory authorization and constructively engaging with the FDA on policy,” and a “truly world-class facility” that “has nearly 150,000 square feet of purpose designed lab space and the leading equipment which enables [Altria] to design new products from start to finish.” (PX9000 (Altria) at 005; 011 (Nov. 2017 Investor Day public remarks by Altria’s CEO)).

102. The relevant components of the application require “[d]ozens and dozens of scientists at [every] stage[,]” ranging from chemists and physicists to toxicologists and clinicians. (Murillo (Altria/JLI) Tr. 2918-19). Altria’s core team for a given PMTA would have “25 [people], includ[ing] chemists, toxicologists, [a] battery engineer, [a] quality professional who could speak to the manufacturing system, . . . a clinical scientist or two, and then . . . some behavioral scientists.” (PX7017 Magness (Altria) Dep. at 57).

### **Response to Finding No. 102**

Complaint Counsel has no specific response.

103. These scientists must possess specific expertise. (Murillo (Altria/JLI) Tr. 2975). “Conducting human subject studies . . . requires specialist expertise from Clinical Research Organizations . . . and organizations with relevant experience in behavioral research and surveys.” (PX8005 Graham (NJOY) Decl. at 004 ¶ 26). Likewise, “to project the impact of the product on the population, an [e-vapor] manufacturer needs to develop or have access to a population model.” (PX8005 Graham (NJOY) Decl. at 005 ¶ 31). “These tools are not publicly available” and they are “difficult to procure or develop.” (PX8005 Graham (NJOY) Decl. at 005 ¶ 31).

### **Response to Finding No. 103**

Complaint Counsel has no specific response.

104. Many manufacturers of e-vapor products lack “the regulatory experience to oversee the production of a PMTA that is ultimately likely to be favorably acted upon by FDA.” (PX8005 Graham (NJOY) Decl. at 004 ¶ 20; Gardner (Altria) Tr. 2624 (discussing gaps in JLI’s expertise)). And because the PMTA requirements are different from the premarket approval regime applicable to drugs and medical devices, “there are few individuals and counsel familiar with the PMTA process.” (PX8005 Graham (NJOY) Decl. at 004 ¶ 21).

**Response to Finding No. 104**

Complaint Counsel does not disagree, but adds that the evidence cited specifically identifies JLI as one of the few companies with the time and resources to devote to a successful PMTA. (PX8005 at 004 (¶ 20) (Graham (NJOY), Decl.)).

**4. FDA’s Recognition Of A Continuum Of Risk That Supports Converting Cigarette Smokers To E-Vapor Products**

105. In July 2017, approximately a year after issuing the Deeming Rule, FDA took another major step in unfurling a regulatory regime for tobacco products, announcing “a new comprehensive plan for tobacco and nicotine regulation that [would] serve as a multi-year roadmap to better protect kids and significantly reduce tobacco-related disease and death.” (PX9058 (FDA) at 001; *see also* Murillo (Altria/JLI) Tr. 2905-06).

**Response to Finding No. 105**

Complaint Counsel has no specific response.

106. The centerpiece of the new approach was a recognition that nicotine “is delivered through products that represent a continuum of risk and is most harmful when delivered through smoke particles in combustible cigarettes.” (PX9058 (FDA) at 001; *see also* Garnick (Altria) Tr. 1694-97). Nicotine replacement therapy was on the other end of the risk continuum. (Murillo (Altria/JLI) Tr. 2905-06; Jupe (Altria) Tr. 2222-23).

**Response to Finding No. 106**

Complaint Counsel has no specific response.

107. FDA’s new policy objective was to “try to move people down that continuum of risk,” (Murillo (Altria/JLI) Tr. 2905-06), by helping smokers “migrate” from combustible products “to noncombustible tobacco products,” (Garnick (Altria) Tr. 1695).

**Response to Finding No. 107**

Complaint Counsel has no specific response.

108. This concept, known as the “continuum of risk,” is something that members of the tobacco industry, including Altria, had long advocated for FDA to embrace. (Murillo (Altria/JLI) Tr. 2905-06).

**Response to Finding No. 108**

Complaint Counsel has no specific response.

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109. As Murillo recalled, then-FDA Commissioner Dr. Scott Gottlieb “said very specifically, for those who can’t or won’t quit, we want to have a pool of products that they can switch to, on top of which we’re going to try to nudge them toward that pool or toward quitting by considering rules that will lower the content of nicotine in cigarettes to render them less addictive or minimally addictive.” (Murillo (Altria/JLI) Tr. 2906).

**Response to Finding No. 109**

Complaint Counsel has no specific response.

110. In effect, Commissioner Gottlieb “indicat[ed] that it was the new policy of the FDA to foster a market of noncombustible tobacco products, such as e-vapor.” (Garnick (Altria) Tr. 1694-95).

**Response to Finding No. 110**

Complaint Counsel has no specific response.

111. To further that policy, FDA signaled that it would tighten restrictions on cigarettes, while working to facilitate the success of innovative reduced-risk products, such as e-vapor, that could convert adult smokers away from combustible cigarettes and thereby promote overall public health. (PX9058 (FDA) at 001-02).

**Response to Finding No. 111**

Complaint Counsel has no specific response.

112. At the same time, FDA signaled that policies to “help smokers quit cigarettes” must also “protect kids”; accordingly, FDA would be assessing the two goals in tandem, including by seeking input on the role that flavors in e-cigarettes “play in attracting youth and may play in helping some smokers switch to potentially less harmful forms of nicotine delivery.” (PX9058 (FDA) at 001-02).

**Response to Finding No. 112**

Complaint Counsel does not disagree.

**5. Evolving PMTA Deadline For E-Vapor Products On The Market As Of August 2016**

113. In the years since the final Deeming Rule was issued, FDA has repeatedly modified the deadline for manufacturers to submit PMTAs for e-vapor products already on the market as of August 2016. (Murillo (Altria/JLI) Tr. 2943-46).

**Response to Finding No. 113**

Complaint Counsel does not disagree.

114. As noted above, the original PMTA deadline for on-market e-vapor products was August 8, 2018. (*See supra* ¶ 62).

#### **Response to Finding No. 114**

Complaint Counsel does not disagree.

115. A year later, in May 2017, FDA announced that it was extending the original application deadline by three months, to November 2018. (PX8009 Garner (Reynolds) Decl. at 005-06 ¶ 20).

#### **Response to Finding No. 115**

Complaint Counsel does not disagree.

116. A few months after the first extension, in July 2017, as part of the announcement recognizing the continuum of risk, FDA stated that, “to encourage the development of innovative tobacco products that may be less dangerous than cigarettes,” it was extending the PMTA deadline for e-vapor products by almost four years, to August 8, 2022. (PX8009 Garner (Reynolds) Decl. at 006 ¶ 21).

#### **Response to Finding No. 116**

Complaint Counsel does not disagree.

117. In March 2019, FDA announced its intent to modify the PMTA deadline for certain flavored e-vapor products (all flavors other than tobacco, menthol, and mint) by moving it forward one year, to August 8, 2021. (Murillo (Altria/JLI) Tr. 2945; PX8005 Graham (NJOY) Decl. at 003 ¶ 18; RX2012 (FDA) at 003).

#### **Response to Finding No. 117**

Complaint Counsel does not disagree.

118. In March 2018, certain public health organizations filed a lawsuit challenging FDA’s prior extension of the PMTA deadline to August 2022. (Murillo (Altria/JLI) Tr. 2944). The lawsuit was successful, and in the summer of 2019, the U.S. District Court for the District of Maryland ordered FDA to require all PMTAs for newly deemed products to be submitted by May 12, 2020—accelerating the deadline by more than two years. (Murillo (Altria/JLI) Tr. 2945; PX8009 Garner (Reynolds) Decl. at 006 ¶ 23; *see also Am. Acad. of Pediatrics v. FDA*, 379 F. Supp. 3d 461, 498 (D. Md. 2019) (vacating 2017 Guidance); *Am. Acad. of Pediatrics v. FDA*, 399 F. Supp. 3d 479, 481 (D. Md. 2019) (imposing new deadline)).

#### **Response to Finding No. 118**

Complaint Counsel does not disagree.

119. The following year, in the spring of 2020, the deadline was extended once more when the disruption caused by COVID-19 forced manufacturers and FDA to work remotely. The ultimate PMTA deadline for on-market e-vapor products was September 8, 2020. (Murillo (Altria/JLI) Tr. 2945; *Am. Acad. of Pediatrics v. FDA*, No. 18-cv-883, Dkt. No. 182 (D. Md. April 22, 2020) (Order)).

**Response to Finding No. 119**

Complaint Counsel does not disagree.

120. A manufacturer that filed a PMTA for a product by the deadline can continue to market that product pending FDA's review of its submission. (Murillo (Altria/JLI) Tr. 3028-29).

**Response to Finding No. 120**

Complaint Counsel does not disagree.

121. If a manufacturer did not submit a PMTA for an on-market product by the September 2020 deadline, the manufacturer was required to remove that product from the market. (Murillo (Altria/JLI) Tr. 2946).

**Response to Finding No. 121**

Complaint Counsel does not disagree.

**6. FDA's PMTA Review Takes Years**

122. Even after a manufacturer submits a PMTA, it takes years for FDA to review the application and determine whether to approve the product. (Jupe (Altria) Tr. 2301 (explaining that FDA's review of PMTA applications takes "a long time," most likely at least 18 months to two years if not longer); Garnick (Altria) Tr. 1661 ("[I]t takes the FDA a long time to review a PMTA for an e-vapor product."); Gardner (Altria) Tr. 2583 (observing that a year for FDA review would be "optimistic["); PX7048 Rothman Trial Dep. at 156 (conceding that "FDA approval of PMTA applications takes time"))).

**Response to Finding No. 122**

Complaint Counsel does not disagree.

123. It "takes a lot of work to get through" the "complicated, voluminous" applications. (Garnick (Altria) Tr. 1608).

**Response to Finding No. 123**

Complaint Counsel has no specific response.



124. FDA also can require manufacturers to submit supplemental information, which can take time. (Jupe (Altria) Tr. 2222; PX7027 Murillo (Altria/JLI) Dep. at 39).

#### **Response to Finding No. 124**

Complaint Counsel has no specific response.

125. For the handful of tobacco products in other product categories that have previously received PMTA approval, FDA review took two to four years. PMI submitted a PMTA for its IQOS heat-not-burn product in May 2017 and FDA did not approve the product until nearly two years later, in April 2019. (Garnick (Altria) Tr. 1661; PX8009 Garner (Reynolds) Decl. at 014 ¶ 41; *see also* Murillo (Altria/JLI) Tr. 2908 (similar); PX7017 Magness (Altria) Dep. at 282 (similar)). And the application for Swedish Match, an oral tobacco product, took over four years for FDA to approve. (PX7017 Magness (Altria) Dep. at 86, 282).

#### **Response to Finding No. 125**

Complaint Counsel does not disagree.

126. Before the September 2020 deadline, FDA received at least a half million PMTAs for e-vapor products. (Murillo (Altria/JLI) Tr. 2932). Some of these applications were filed well before the deadline and have already been pending for over two years, (Jupe (Altria) Tr. 2301), but no e-vapor product has been approved to date, (Jupe (Altria) Tr. 2301; Garnick (Altria) Tr. 1608).

#### **Response to Finding No. 126**

Complaint Counsel has no specific response.

## **II. INDUSTRY PARTICIPANTS**

### **A. Parties To The Transaction**

#### **1. Altria**

##### **a. Background**

127. Altria Group, Inc. (“Altria”) is a holding company headquartered in Richmond, Virginia. (PX9017 (Altria) at 004).

#### **Response to Finding No. 127**

Complaint Counsel does not disagree.

128. Altria’s operating subsidiaries are engaged primarily in the manufacture and sale of tobacco products in the United States, including traditional cigarettes (sometimes called

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combustible cigarettes), cigars, and smokeless tobacco products. (PX9017 (Altria) at 004; *see also* Begley (Altria) Tr. 1048-49 (listing Altria's operating companies)).

**Response to Finding No. 128**

The proposed finding is incomplete and misleading as it does not mention Altria's Nu Mark operating subsidiary or any innovative products, including e-vapor products sold under the MarkTen brand, that were available until the transaction.

129. Altria's operating companies include Philip Morris USA, the largest cigarette company in the United States and the owner of numerous leading cigarette brands, including Marlboro, the largest-selling cigarette brand in the United States for over forty years. (PX9017 (Altria) at 004-05; Begley (Altria) Tr. 1048-49; Quigley (Altria) Tr. 1995).

**Response to Finding No. 129**

Complaint Counsel does not disagree.

130. Altria owns U.S. Smokeless Tobacco Company, which makes Copenhagen and Skoal, among other smokeless tobacco brands. (PX9017 (Altria) at 004-05; Begley (Altria) Tr. 1049; Quigley (Altria) Tr. 1995).

**Response to Finding No. 130**

Complaint Counsel does not disagree.

131. Altria also owns John Middleton Co, which sells machine-made cigars and pipe tobacco, as well as Nat Sherman, which previously sold premium cigars and super premium cigarettes. (PX9017 (Altria) at 004; Jupe (Altria) Tr. 2202; Begley (Altria) Tr. 1049).

**Response to Finding No. 131**

Complaint Counsel does not disagree.

132. From 2012 to 2018, Altria also had an active operating company called Nu Mark LLC ("Nu Mark"), which sold innovative tobacco products in the United States, including e-cigarettes. (PX9017 (Altria) at 004-05; Schwartz (Altria) Tr. 1850; Quigley (Altria) Tr. 1995; Murillo (Altria/JLI) Tr. 2898).

**Response to Finding No. 132**

The proposed finding is incomplete to the extent that it fails to mention that Altria shut down Nu Mark at the time of the transaction.

133. Altria's operating companies are tasked with two functions—marketing and manufacturing. (Schwartz (Altria) Tr. 1849).

**Response to Finding No. 133**

The proposed finding is incomplete and misleading to the extent that it fails to mention that Nu Mark was involved in developing and improving innovative products. (PX1172 (Altria) at 003 (Willard interview with the *Wall Street Journal* dated March 23, 2019) (stating that Altria had “developed very satisfying products that early on were converting adult cigarette smokers”)).

134. There also are two service companies within the Altria family of companies: Altria Group Distribution Company (“AGDC”) and Altria Client Services LLC (“ALCS”). (PX9017 (Altria) at 004; Begley (Altria) Tr. 1069; Schwartz (Altria) Tr. 1849; Myers (Altria) Tr. 3298).

**Response to Finding No. 134**

Complaint Counsel does not disagree.

135. As its name implies, AGDC provides sales and distribution services to the Altria operating subsidiaries, taking finished goods “all the way through to [the] wholesalers and retailers, as well as . . . going into retail stores and selling [Altria's] trade programs and representing [Altria's] brands to [its] retail trade partners.” (Myers (Altria) Tr. 3298; PX9017 (Altria) at 004). AGDC also “bring[s] the feedback from the trade and [Altria's] distributors—retail, wholesale—to the operating companies, once [it] learn[s] what [the companies'] plans are, and then help[s] construct these trade programs; provide[s] [the operating companies] feedback about how things are going and then, in general, just report[s] and measure[s] the success [the sales teams are] having for them.” (Myers (Altria) Tr. 3299).

**Response to Finding No. 135**

Complaint Counsel has no specific response.

136. AGDC works with large distributors, including McLane and Core-Mark, which take and fulfill retailers' orders. (Myers (Altria) Tr. 3299-300).

**Response to Finding No. 136**

Complaint Counsel does not disagree.

137. In addition, AGDC works directly with convenience stores, such as 7-Eleven, which is the largest convenience store chain in the United States and Altria's largest source of business. (Begley (Altria) Tr. 1101; Myers (Altria) Tr. 3307).

**Response to Finding No. 137**

Complaint Counsel does not disagree.

138. ALCS provides various support services to the operating companies in areas such as legal, regulatory, finance, human resources, and government affairs. (Jupe (Altria) Tr. 2202; *see also* PX9017 (Altria) at 004).

**Response to Finding No. 138**

Complaint Counsel does not disagree.

139. The costs of the service companies are allocated to the operating companies in proportion to each operating company's revenue, such that the operating companies with the highest revenue bear the greatest cost of the services. (Begley (Altria) Tr. 1062).

**Response to Finding No. 139**

Complaint Counsel has no specific response.

**b. Altria Invested Billions In Attempting To Internally Develop Potentially Reduced-Risk Products, Each Of Which Failed**

140. Altria recognizes that “over 50 percent of conventional cigarette consumers . . . desire something that will meet their satisfaction and needs and have the potential of reduced risk associated with nicotine over time.” (Gifford (Altria) Tr. 2709).

**Response to Finding No. 140**

The proposed finding is incomplete and misleading because it fails to mention that Altria's long-term goal prior to the transaction was to lead the U.S. e-vapor category through a portfolio of superior reduced-risk products. (*See, e.g.*, PX4015 (Altria) at 007 (Jody Begley's Nov. 2017 Investor Day presentation and speaker notes); PX9045 (Altria) at 006 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018) (“Nu Mark's goal is to lead the e-vapor category with a portfolio of superior, potentially reduced-risk products . . . .”); PX4042 (Altria) at 006 {  
 [REDACTED]  
 [REDACTED] }

141. Over the last thirty years, Altria's companies (including its predecessor parent company, Philip Morris Companies) and their scientists have worked hard to develop innovative products that are potentially less harmful than conventional combustible cigarettes. (Willard (Altria) Tr. 1203, 1320, 1325; Jupe (Altria) Tr. 2212).

**Response to Finding No. 141**

The proposed finding is incomplete and misleading to the extent that it fails to mention that Altria also acquired numerous innovative products that were potentially less harmful than conventional combustible cigarettes. Several successful e-cigarette products, [REDACTED] [REDACTED] } were acquired from other manufacturers. { [REDACTED] [REDACTED] [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

142. Altria was prepared to make the necessary investments to increase revenue from noncombustible tobacco products and, over the years, it spent “in excess of \$2 billion” on internal development of reduced-risk products, all before entering the e-vapor industry. (Willard (Altria) Tr. 1154-55, 1327; *see also* Jupe (Altria) Tr. 2213 (agreeing that Altria spent “substantial resources” on reduced-risk products)).

**Response to Finding No. 142**

The proposed finding is incomplete and misleading to the extent that it fails to mention that Altria also acquired numerous innovative products that were potentially less harmful than conventional combustible cigarettes. (*See* CCFF ¶¶ 24, 138, 151).

143. Altria believed that “if [it] could come up with products that would satisfy the product needs of adult cigarette smokers but do it with a product that had less harm associated with it, or less risk associated with it, that [it] could over time switch those cigarette smokers from combustible cigarettes to those reduced-harm products.” (Willard (Altria) Tr. 1325).

**Response to Finding No. 143**

The proposed finding is incomplete and misleading to the extent that it fails to mention that Altria also acquired numerous innovative products that were potentially less harmful than conventional combustible cigarettes. (*See* CCFF ¶¶ 24, 138, 151). Acquiring innovative products

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is commonplace in the industry. For example, { [REDACTED] } were acquired from other manufacturers. { [REDACTED]

{ [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

144. Despite its considerable investments, Altria “really didn’t have success with [its] internally developed products.” (Willard (Altria) Tr. 1332-33; *see also* Jupe (Altria) Tr. 2213 (“[W]e make very good cigarettes, make very good smokeless tobacco, but to significantly reduce the risk, I would say we have not had that innovation success.”)).

#### **Response to Finding No. 144**

The proposed finding is incorrect, misleading, contrary to the weight of the evidence, and unreliable as it relies solely on the self-serving testimony of current and former Altria executives. In an interview with the *Wall Street Journal* in March 2019, former Altria CEO Howard Willard touted Altria’s innovation success, stating that Altria “developed very satisfying [e-vapor] products that early on were converting adult cigarette smokers.” (PX1172 (Altria) at 003; *see* CCFE ¶ 442). As a result, in 2017, { [REDACTED]

{ [REDACTED] } Although JUUL surpassed MarkTen in late 2017 and then Vuse in 2018 to become the market leader, Altria still had the third-highest share in the closed-system e-cigarette market when it exited the e-cigarette business. (*See* CCFE ¶ 1510 (showing shares of closed-system e-cigarettes in the twelve months from October 2017 to September 2018) (citing PX5000 at 067 (Table 5) (Rothman Expert Report); CCFE ¶ 136 (*in camera*)).

Although Complaint Counsel does not disagree that some of Altria's innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”); *see also* Jupe (Altria) Tr. 2183 (“Q. And knowing that some R&D projects are going to fail, innovation is about placing multiple bets. Would you agree with that statement? A. I couldn’t agree with you more.”)).

And several of Altria's “bets” in the e-vapor space succeeded. Indeed, the record includes many examples of Altria's ability to innovate and improve its e-cigarette products. For example, Altria launched MarkTen Bold, a cigalike that used “a proprietary recipe for nicotine salts” and that offered “nicotine delivery at levels approaching that of cigarettes.” (PX9000 (Altria) at 017 (Nov. 2017 Investor Day remarks)). On July 26, 2018, Willard told investors that MarkTen Bold (and MarkTen Elite) were “[t]he drivers of the growth in second quarter and first half” and were “getting traction with consumers.” (PX9047 (Altria) at 009-10 (Altria's Q2 2018 Earnings Call)).

In addition, shortly before withdrawing Elite from the market, Altria successfully designed and implemented a new gasket that addressed the leaking issue with Elite's pods. (CCFF ¶¶ 1206-36; *see* PX1579 (Altria) at 001 (email from Craig Schwartz thanking the product development team “for the excellent work done to fix the leaking associated with the MarkTen Elite Pod”)). Before it abruptly exited the e-cigarette business in December 2018, Altria was not only working

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to develop and commercialize the next-generation of e-vapor products, including Elite 2.0 with nicotine salts and PMI's pod-based product, VEEV, with its MESH technology, but also researching other innovations, including flavor development incorporating "sensomics," ways to incorporate Bluetooth technology into e-cigarettes, and so-called "Smart-Pod" technology. (CCFF ¶¶ 1555, 1571-74).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce "internally developed products." Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] }  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its "blu" e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

145. As the *Wall Street Journal* assessed in a 2008 article surveying a series of failed product launches by Altria, Altria "has put effort into engineering reduced-risk products—so far without much success." (RX1916 (WSJ) at 001). Those past failures are summarized below:

**Response to Finding No. 145**

The proposed finding is irrelevant, unreliable, and should be given little weight because it relies solely on a news article published over thirteen years ago about products that predate e-cigarettes. The proposed finding is also incomplete and misleading because the subject of the article—as its title suggests—is a variation on the traditional combustible cigarette. (RX1916 (WSJ) at 001 ("Altria Drops New Filter for Cigarettes, In Strategy Setback")). Moreover, the article notes that, at the time, "Several other cigarette makers have struggled to develop 'reduced-



risk' smoking products without success” and goes on to list struggling products from companies *other* than Altria. (RX1916 (WSJ) at 002). The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria did not develop and sell successful e-cigarette products in the years after it established Nu Mark in 2012 until its exit from the business in December 2018. (*See* Response to RPF ¶ 144; CCFF ¶¶ 125, 989-94).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called “failures.” Altria’s product development team used what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria’s used feedback from consumer research to inform the next round of product development efforts)).

The proposed finding is also incomplete and misleading to the extent that it fails to mention that Altria also acquired numerous innovative products. (*See* CCFF ¶¶ 24, 138, 151).

#### **i. De-Nic**

146. De-Nic “was a combustible cigarette that went through a process that reduced the level of nicotine in the cigarette.” (Willard (Altria) Tr. 1326; *see also* PX1075 (Altria) at 062 (showing De-Nic products with different nicotine levels)).

#### **Response to Finding No. 146**

Complaint Counsel has no specific response.

147. Philip Morris engineers drew on a process called “super critical fluid extraction,” which is how coffee beans are decaffeinated. (Jupe (Altria) Tr. 2206). They modified the fluid extraction process to work with a tobacco leaf. (Jupe (Altria) Tr. 2206).

#### **Response to Finding No. 147**

Complaint Counsel has no specific response.

148. Richard Jupe, the current head of Altria’s product development division, testified that “over a period from about ’86 to ’92,” Philip Morris “built a whole new factory” and spent “a third of a billion dollars in order to make this process work.” (Jupe (Altria) Tr. 2112, 2206).

#### **Response to Finding No. 148**

Complaint Counsel has no specific response.

149. Philip Morris “tested [De-Nic] across the country in different areas, different brands, different variants, made improvements to the process, but all in all, it was a consumer failure.” (Jupe (Altria) Tr. 2206).

#### **Response to Finding No. 149**

The proposed finding is irrelevant, unreliable, and should be given little weight because it relies solely on the self-serving testimony of an Altria executive about a combustible cigarette product that was developed over thirty years ago. The proposed finding is also vague because it does not define or otherwise explain the term “consumer failure.” The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria did not develop and sell successful e-cigarette products in the years after it established Nu Mark in 2012 until its exit from the business in December 2018. (*See* Response to RPF ¶ 144; CCF ¶¶ 125, 989-94).

#### **ii. Accord**

150. Accord was the Altria companies’ first attempt at a heat-not-burn product. It was essentially “a cigarette that was heated but not heated so much that it burned.” (Willard (Altria) Tr. 1326).

#### **Response to Finding No. 150**

Complaint Counsel has no specific response.

151. As Jupé explained, burning tobacco leaves produces thousands of chemicals, including 70 carcinogens. (Jupe (Altria) Tr. 2207). By heating tobacco in a “controlled environment”—effectively “in an oven”—one can “reduce the temperature by almost a third,” (Jupe (Altria) Tr. 2207), and, in doing so, “produce significantly lower levels of carcinogens than if you had actually burned the tobacco.” (Willard (Altria) Tr. 1326).

#### **Response to Finding No. 151**

Complaint Counsel has no specific response.

152. The Accord experiment cost Philip Morris “around \$250 million,” which included R&D as well as the cost of “building a factory to make a very unique cigarette.” (Jupe (Altria) Tr. 2209).

**Response to Finding No. 152**

The proposed finding is unsupported by the cited evidence. Jupe testified that Altria outsourced the construction of Accord and did not build a factory to produce this product. (Jupe (Altria) Tr. 2209 (“We didn’t make the device, that was outsourced . . .”).) Otherwise, Complaint Counsel has no specific response.

153. The Accord project started in earnest in the early 1990s and shut down in 2006. (Jupe (Altria) Tr. 2207).

**Response to Finding No. 153**

Complaint Counsel has no specific response.

154. Consumers “rejected [Accord] based on taste, flavor,” and because of its bulky size. “[T]hey were smoking a cigarette out of a pager.” (Jupe (Altria) Tr. 2207; *see also* RX1916 (WSJ) at 002 (describing Accord as “too strange for U.S. smokers to embrace”).)

**Response to Finding No. 154**

The proposed finding is irrelevant, unreliable, and should be given little weight because it relies on the self-serving testimony of an Altria executive and a news article published over thirteen years ago about products that predate e-cigarettes. Complaint Counsel adds that RX1916 states only that Accord was unsuccessful because a battery powered cigarette was “too strange” for consumers at the time; it makes no mention of any other shortcomings with the product. (RX1916 (WSJ) at 002). The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria did not develop and sell successful e-cigarette products in the years after it established Nu Mark in 2012 until its exit from the business in December 2018. (*See* Response to RPF ¶ 144; CCFF ¶¶ 125, 989-94).

**iii. SCOR**

155. Altria companies also developed SCOR, which stood for “Smoke Constituent Reduction,” a project to design a cigarette with an activated carbon filter that could remove some of the carcinogens and smoke. (Jupe (Altria) Tr. 2209; Willard (Altria) Tr. 1326-27; RX1916 (WSJ) at 001).

**Response to Finding No. 155**

Complaint Counsel has no specific response.

156. Altria built yet another factory to manufacture the product. (Jupe (Altria) Tr. 2210). As Jupe explained, “[t]his was a unique filter” requiring Altria to “buil[d] equipment to make the filter.” (Jupe (Altria) Tr. 2210).

**Response to Finding No. 156**

The proposed finding is incorrect and misleading to the extent that the phrase “built yet another factory” suggests that Altria had also built a factory for Accord. Jupe testified that Altria outsourced the production of Accord and did not build a factory to manufacture this product. (Jupe (Altria) Tr. 2209 (“We didn’t make the device, that was outsourced . . .”).) Otherwise, Complaint Counsel has no specific response.

157. Jupe estimated that Altria spent “about \$200 million over that eight-year period” when SCOR was being developed and manufactured. (Jupe (Altria) Tr. 2210).

**Response to Finding No. 157**

Complaint Counsel has no specific response.

158. The product was launched as Marlboro Ultra Smooth, and Altria later added Marlboro Ultra Lights and Basic Ultra Lights. But, despite the products’ sale in test markets around the country for more than three years, the carbon-based products “drew little attention from consumers” and Altria “pull[ed] the plug” in 2008. (RX1916 (WSJ) at 001-02; *see also* Jupe (Altria) Tr. 2210-11).

**Response to Finding No. 158**

The proposed finding is irrelevant, unreliable, and should be given little weight because it relies only on the self-serving testimony of an Altria executive and a news article published over thirteen years ago about products that predate e-cigarettes. The proposed finding is also vague because it does not define or otherwise explain the phrase “drew little attention.” The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria did not develop and sell successful e-cigarette products in the years after it

established Nu Mark in 2012 until its exit from the business in December 2018. (See Response to RPPF ¶ 144; CCFF ¶¶ 125, 989-94).

#### iv. Taboka Tobaccopaks And Marlboro Snus

159. Altria companies internally developed a tobacco pouch product called Taboka Tobaccopaks. (Willard (Altria) Tr. 1328-29).

#### **Response to Finding No. 159**

Complaint Counsel has no specific response, but notes that the proposed finding is irrelevant because the product at issue is not a closed-system e-cigarette and thus not included in the relevant product market in this case. (See CCFF ¶¶ 208-407).

160. “The ‘spit-free’ product is tobacco in small pouches known as snus (rhymes with ‘goose’) placed between cheek and gum.” (RX1916 (WSJ) at 002). The pouches would then deliver tobacco flavor as well as nicotine that “would be delivered through absorption in the gum,” which was “dramatically less harmful” than combustible cigarettes. (Willard (Altria) Tr. 1328).

#### **Response to Finding No. 160**

Complaint Counsel has no specific response, but notes that the proposed finding is irrelevant because the product at issue is not a closed-system e-cigarette and thus not included in the relevant product market in this case. (See CCFF ¶¶ 208-407).

161. Altria had hoped that this product format would achieve greater success with women, who by and large rejected moist smokeless tobacco. But once the product was launched, Altria discovered that women did not like putting it in their mouth, much less removing the wet pouch. (Willard (Altria) Tr. 1329-30).

#### **Response to Finding No. 161**

Complaint Counsel has no specific response, but notes that the proposed finding is irrelevant because the product at issue is not a closed-system e-cigarette and thus not included in the relevant product market in this case. (See CCFF ¶¶ 208-407).

162. When Altria launched Taboka, it “did a lot of trial efforts and those type of things, and there just was no consumer stickiness with the product. So [the company] ended that [product]” in 2008. (PX7038 Myers (Altria) Dep. at 202-03; RX1916 (WSJ) at 002).

**Response to Finding No. 162**

The proposed finding is irrelevant, unreliable, and should be given little weight because it relies only on the self-serving testimony of an Altria executive and a news article published over thirteen years ago about products that predate e-cigarettes. The proposed finding is also vague because it does not define or otherwise explain the term “consumer stickiness.” The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria did not develop and sell successful e-cigarette products in the years after it established Nu Mark in 2012 until its exit from the business in December 2018. (See Response to RPF 144; CCFF ¶¶ 125, 989-94).

163. Altria then developed and marketed Marlboro Snus, which was an “evolution of Taboka” that “put the Marlboro name on it.” (Willard (Altria) Tr. 1330). That was also unsuccessful and withdrawn from the market. (Willard (Altria) Tr. 1330-31).

**Response to Finding No. 163**

The proposed finding is irrelevant, unreliable, and should be given little weight because it relies only on the self-serving testimony of a former Altria executive about products that predate e-cigarettes. The proposed finding is also vague because it does not define or otherwise define the term “unsuccessful.” The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria did not develop and sell successful e-cigarette products in the years after it established Nu Mark in 2012 until its exit from the business in December 2018. (See Response to RPF 144; CCFF ¶¶ 125, 989-94).

**v. Marlboro Moist Smokeless Tobacco**

164. In 2007, Altria launched its own smokeless tobacco, Marlboro Moist Smokeless Tobacco, also known as Marlboro MST. (Schwartz (Altria) Tr. 1913; RX1916 (WSJ) at 002).

**Response to Finding No. 164**

Complaint Counsel does not disagree.

165. Altria “tried for a little over a year to get traction with [Marlboro MST], did a lot of great things at retail . . . to give it visibility and create awareness for it.” (Myers (Altria) Tr. 3313). It even slashed the price from \$3 per tin to \$1 per tin. (RX1916 (WSJ) at 002). But Altria never had “much to show for it.” (Schwartz (Altria) Tr. 1913). “[T]he product just wasn’t good, and the consumer didn’t adopt it.” (Myers (Altria) Tr. 3313).

#### **Response to Finding No. 165**

The proposed finding is misleading and unsupported by the cited evidence. Schwartz testified that MST was launched in Atlanta and there is no evidence that the product was offered outside of that one city. (Schwartz (Altria) Tr. 1913).

166. Unable to succeed with internal development of smokeless tobacco products, in 2009, Altria bought U.S. Smokeless Tobacco, owner of Copenhagen and Skoal, for about \$11 billion. (Willard (Altria) Tr. 1331; Schwartz (Altria) Tr. 1913).

#### **Response to Finding No. 166**

Complaint Counsel has no specific response.

167. Altria now holds the leading position in the United States smokeless tobacco category through its ownership of U.S. Smokeless Tobacco. (Willard (Altria) Tr. 1151).

#### **Response to Finding No. 167**

Complaint Counsel does not disagree.

168. Altria’s initial failures in smokeless tobacco followed by its success with an acquisition of U.S. Smokeless Tobacco is emblematic of a larger theme in the company’s history: “[W]here Altria has done a great job is buying companies, bolting them to [its] infrastructure, [its] phenomenal sales infrastructure, marketing infrastructure, and [it] tend[s] to make them better once . . . [it] acquire[s] them.” (Schwartz (Altria) Tr. 1913).

#### **Response to Finding No. 168**

Complaint Counsel has no specific response.

169. “But from an organic point of view,” Altria does not “have a good track record” in developing innovative alternatives to cigarettes. (Schwartz (Altria) Tr. 1913).

#### **Response to Finding No. 169**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria did not develop and sell successful e-cigarette products in

the years after it established Nu Mark in 2012 until its exit from the business in December 2018. (See Response to RPPF ¶ 144; CCF ¶¶ 125, 989-94).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce products that were developed “organic[ally].” Several successful e-cigarette products, [REDACTED] } [REDACTED] } were acquired from other manufacturers. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial

Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

170. In the 2000s, recognizing that reduced-harm products involved “a much greater need for scientists and R&D people and access to lab space,” Altria spent \$350 million to create the Center for Research and Technology “to really focus on internal development of [ ] reduced-risk products.” (Willard (Altria) Tr. 1332; see also PX9000 (Altria) at 011).

**Response to Finding No. 170**

Complaint Counsel does not disagree.

171. The Center for Research and Technology, which opened in 2007, is a “state-of-the-art” facility with 150,000 square feet of lab space, leading equipment, and “hundreds” of scientists. (Jupe (Altria) Tr. 2211-13; PX9000 (Altria) at 011).

**Response to Finding No. 171**

Complaint Counsel does not disagree.

172. As Jupe testified, “[f]rom buildings, from the equipment, from salaries, from research budgets” Altria has invested “billions of dollars” in the Center. (Jupe (Altria) Tr. 2211-13).

**Response to Finding No. 172**

Complaint Counsel does not disagree.



173. Even so, nearly fourteen years later, Altria has still not successfully commercialized an internally developed project. (Jupe (Altria) Tr. 2212-13).

**Response to Finding No. 173**

The proposed finding is unreliable and should be given little weight because it relies only on the self-serving testimony of an Altria executive. The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria did not develop and sell successful e-cigarette products in the years after it established Nu Mark in 2012 until its exit from the business in December 2018. (*See* Response to RPF ¶ 144; CCFF ¶¶ 125, 989-94).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] } [REDACTED] [REDACTED] [REDACTED] [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

**c. Altria Created Nu Mark As An Innovative Tobacco Product Company**

174. In 2012, Altria redoubled its efforts to introduce reduced-risk products by establishing a new operating company—Nu Mark—devoted to developing and marketing innovative tobacco products for adult tobacco consumers. (Murillo (Altria/JLI) Tr. 2898).

**Response to Finding No. 174**

Complaint Counsel does not disagree.

175. The goal of Nu Mark was to “have a range of products that [Altria] could use to convert smokers away from smoking and to innovative products, like electronic cigarettes.” (Murillo (Altria/JLI) Tr. 2898-99).

**Response to Finding No. 175**

Complaint Counsel has no specific response.

176. Over the next six years, Nu Mark came to have about 145 employees. (Quigley (Altria) Tr. 1938).

**Response to Finding No. 176**

Complaint Counsel does not disagree.

177. Nu Mark also was supported by ALCS, including about 50 people from the product development group and 20 people from the regulatory group. (Quigley (Altria) Tr. 1940-41).

**Response to Finding No. 177**

Complaint Counsel does not disagree.

178. Nu Mark was a strategic priority for Altria, as evidenced by the “resources that were given to [it], both people and dollars.” (PX7014 Baculis (Altria) Dep. at 38).

**Response to Finding No. 178**

Complaint Counsel does not disagree.

179. Altria “put many of [its] best people from Altria into the Nu Mark business, some of [its] best performers, and [it] had been quite generous in providing them with financial resources and other resources.” (PX7031 Willard (Altria) Dep. at 261).

**Response to Finding No. 179**

Complaint Counsel does not disagree.

180. As Altria’s former CEO, Howard Willard, testified at trial, Altria put substantial resources into Nu Mark and “spent well over half a billion dollars, maybe up to a billion dollars, investing in the e-vapor category.” (Willard (Altria) Tr. 1341). That investment included internal development as well as product acquisitions. (Willard (Altria) Tr. 1343).

**Response to Finding No. 180**

Complaint Counsel does not disagree, but adds that Willard admitted in this line of questioning that Altria's goal was to achieve "leadership" in the e-vapor category. (Willard (Altria) Tr. 1341 ("Q: Did you want to achieve leadership in the e-vapor category? A. Yes, we did. Q. Did you put substantial resources into the e-vapor products sold by NuMark to try to achieve leadership in that category? A. Yes, we did.")).

**d. Nu Mark's Early E-Vapor Efforts Failed**

181. For all of Altria's resources and investment, Nu Mark never launched a commercially successful product. Instead, Nu Mark lost money every single year after its creation. (Willard (Altria) Tr. 1369).

**Response to Finding No. 181**

The proposed finding is incorrect, incomplete, misleading, and contrary to the weight of the evidence. Altria's former CEO, Howard Willard, admitted at trial that Altria achieved its goal of attaining a leading position in the U.S. e-vapor market. (Willard (Altria) Tr. 1341; *see also* PX4042 (Altria) at 006 {

[REDACTED]

[REDACTED]

[REDACTED] } Although JUUL surpassed MarkTen in late 2017 and then Vuse in 2018 to become the market leader, Altria still had the third-highest share in the closed-system e-cigarette market when it exited the e-cigarette business. (*See* CCFE ¶ 1510 (showing shares of closed-system e-cigarettes in the twelve months from October 2017 to September 2018) (citing PX5000 at 067 (Table 5) (Rothman Expert Report)); CCFE ¶ 136 (*in camera*)).

Altria executives touted Nu Mark's achievements both internally and externally. On July 15, 2018, Altria's Craig Schwartz wrote Michael Brace, Altria's Senior Director for Vapor Products, that "MarkTen Elite is already Margin Positive, setting aside one-time investments" in long-term store fixtures. (PX1194 (Altria) at 001; *see* PX1056 (Altria) at 028 (MarkTen Elite had

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positive marginal contribution of \$1.5 million through June 2018); *see also* CCFF ¶ 497 (JLI testimony on Altria being well-equipped to do well in e-vapor)). Less than two weeks later, on a July 26, 2018 earnings call, Willard told investors that Elite and MarkTen Bold were driving growth for Nu Mark and “getting traction with consumers.” (PX9047 (Altria) at 009-10 (Altria’s Q2 2018 Earnings Call); CCFF ¶ 1499). And, on August 4, 2018, Schwartz wrote to Altria’s former Chairman that “MarkTen Elite can hunt . . . so again, best yet to come.” (PX1260 (Altria) at 002); CCFF ¶ 1500). As of August 2018, MarkTen was the second fastest growing e-vapor brand in the United States behind only JUUL. (PX1008 (Altria) at 001 (email from former Nu Mark President Brian Quigley)).

The proposed finding is also incorrect, incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Nu Mark failed to meet its financial expectations. Although Complaint Counsel does not disagree that Nu Mark never achieved profitability, in the years immediately prior to Altria’s exit from the e-cigarette business, Nu Mark met or exceeded its financial targets approved by Altria’s Board. (PX4073 (Altria) at 002 § [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* PX7022 (Begley (Altria), Dep. at 51 (testifying that his annual bonuses were tied to the performance of Nu Mark); PX7022 (Begley (Altria), Dep. at 55 (testifying that he received a bonus every year that he was the President and General Manager of Nu Mark)).

[REDACTED]

Moreover, Complaint Counsel adds that, while Nu Mark never achieved profitability, the commercial challenges that Altria faced were hardly unique. Because of the long-term strategic importance of e-cigarettes, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Nevertheless, ITG remains committed to competing in e-vapor because of its “opportunity for growth.” (PX7012 (Eldridge (ITG), Dep. at 188-89)). Yet—unlike Altria—Reynolds and ITG continue to compete in the U.S. closed-system e-cigarette market today. (CCFF ¶ 1135).

182. As Brian Quigley, the former general manager of Nu Mark explained, “the overall operating structure and bureaucracy of the company was not designed to do what [it] needed to do to compete in [e-vapor].” (PX7041 Quigley (Altria) Dep. at 148).

### **Response to Finding No. 182**

The proposed finding is incomplete, misleading, contrary to the weight of the evidence, and unreliable because it relies solely on the self-serving testimony of a former Altria executive. The evidence in this case shows not only that Altria achieved success in the closed-system e-cigarette market, but that Nu Mark achieved the strategic and financial goals that the company set. (See Response to RPF ¶ 181). The proposed finding is also vague because the term “overall operating structure and bureaucracy” as well as the phrase “not designed to do what it needed to do” are undefined and unexplained.

183. Development for electronic products like e-cigarettes required “an entirely different construct” than what was required for conventional tobacco products such as cigarettes. (PX7024 Crosthwaite (Altria/JLI) Dep. at 267). It required “engineering skills, software skills.” (PX7006 Crosthwaite (Altria/JLI) IHT at 106). And it is “much harder” to develop innovative electronic products “than it is to maintain and line extend products that are in the combustible cigarette business.” (PX7031 Willard (Altria) Dep. at 262).

### **Response to Finding No. 183**

The proposed finding is incomplete, misleading, contrary to the weight of the evidence, and unreliable because it relies solely on the self-serving testimony of former Altria executives. The evidence in this case shows not only that Altria achieved success in the closed-system e-cigarette market, but that Nu Mark achieved the strategic and financial goals that the company set.

(See Response to RPF 181). The proposed finding is also vague because the term “entirely different construct” is undefined.

The proposed finding is inaccurate and misleading to the extent that it suggests that Altria lacked the ability to innovate. Altria was ranked second in terms of high-quality e-cigarette patents, and had the fourth largest overall patent portfolio in the industry. (CCFF ¶¶ 1837-41; PX1608 (Altria) at 002, 015, 024). Altria invested in and developed many new flavors. (CCFF ¶¶ 1466-71). Altria also developed other innovative features, such as magnetic pods for MarkTen Elite. (CCFF ¶¶ 1477-81). In addition, Altria demonstrated the ability to implement improvements to its existing products, including the gasket fix for MarkTen Elite that stopped leaking and reduced formaldehyde generation. (CCFF ¶¶ 1206-34, 1489-92). JLI, for its part, feared Altria’s ability to innovate in e-cigarettes. Using its “Competitive Analysis Framework,” JLI concluded that MarkTen Elite (along with a PMI e-cigarette product) were two of only three products (besides JUUL) that had “Long-Term Viability.” (PX2289 (JLI) at 021; CCFF ¶ 1522). JLI’s competitive assessment took into account “Innovation Sustainability,” and scored Altria’s products based on the “Quality of current talent,” the “Ability to recruit high-quality talent,” and “Ownership of IP building blocks.” (PX2289 (JLI) at 021).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to develop products internally. Several successful e-cigarette products, {

} were acquired from other manufacturers. {

}; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also

acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

**i. Nu Mark’s Failed Internal Development**

184. Beginning in 2013, Nu Mark launched a series of internal development efforts, all of which were “named after bodies of water,” (Murillo (Altria/JLI) Tr. 2940-41), and all of which were worked on by scientists and engineers at Altria’s Center for Research and Technology. (Willard (Altria) Tr. 1149).

**Response to Finding No. 184**

Complaint Counsel has no specific response other than that the proposed finding is vague because it does not identify with any specificity the “series of internal development projects” that Nu Mark purportedly launched beginning in 2013.

185. By 2015, Nu Mark had five projects to develop new e-vapor devices underway. Of those, two were designed to compete against cig-a-likes and two were closed-system products designed to appeal to open tank users, while one was still evolving. (PX1135 (Altria) at 020, 046).

**Response to Finding No. 185**

The proposed finding is incomplete and misleading because it fails to mention the products that Nu Mark acquired during this time. (See CCFE ¶¶ 24, 138, 151).

186. As discussed in greater detail below, three years later, in 2018, none of those projects had yielded a viable product. (See *infra* Part XVI.C.3). Some, such as Project Bayou, a cig-a-like concept intended to offer a longer-lasting battery and better e-liquid formulation, had long since been abandoned. (RX1292 (Altria) at 043-50 (excluding Bayou from list of ongoing projects)).

**Response to Finding No. 186**

The proposed finding is incomplete and misleading. Although Complaint Counsel does not disagree that some of Altria’s innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFE ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that



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fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”)); *see also* Jupe (Altria) Tr. 2183 (“Q. And knowing that some R&D projects are going to fail, innovation is about placing multiple bets. Would you agree with that statement? A. I couldn’t agree with you more.”)). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space succeeded or that it never introduced a commercially successful e-cigarette product. (*See* Responses to RPF ¶¶ 144, 181).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called “failures.” Altria’s product development team used what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria’s used feedback from consumer research to inform the next round of product development efforts)).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] }  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands

also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

187. Other projects could not get past the concept planning phase. For example, Project Lake began as an idea for a cig-a-like device with single-use cartridges, (PX1135 (Altria) at 054), was later reconceived as a pod concept, (PX1930 (Altria) at 035), and was ultimately shelved when it became clear that consumers perceived value in larger, multi-use pods, (PX1930 (Altria) at 035 (explaining need to expand cartridge volume); PX1139 (Altria) at 001 (stating that the project had “been put on hold”); *see also infra* Part XVI.C.3.a).

### **Response to Finding No. 187**

The proposed finding is incomplete and misleading. Although Complaint Counsel does not disagree that some of Altria’s innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”)); *see also* Jupé (Altria) Tr. 2183 (“Q. And knowing that some R&D projects are going to fail, innovation is about placing multiple bets. Would you agree with that statement? A. I couldn’t agree with you more.”)). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space succeeded or that it never introduced a commercially successful e-cigarette product. (*See* Responses to RPF ¶¶ 144, 181).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called “failures.” Altria’s product development team used

what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria’s used feedback from consumer research to inform the next round of product development efforts)).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] }  
 { [REDACTED] }  
 { [REDACTED] }  
 { [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

188. Still other projects, such as Laguna and Hudson, were languishing in the prototype phase, where they ran into design problem after design problem. Project Laguna—a closed-tank system designed to appeal to open-system users—had spent nearly a year and a half in the concept development phase and was ultimately put on hold because of resource shortages. (RX0496 (Altria) at 040; *see also infra* Part XVI.C.3.b). And Project Hudson, a pod-based device that likewise aspired to provide the “sensory experience” of an open system, had some prototypes but “didn’t get very far.” (Murillo (Altria/JLI) Tr. 2939, 2941; *see also* PX7015 Gogova (Altria) Dep. at 32 (“It was really only [a] concept coming from product development . . . There were early prototypes which product development was playing with, but there was no concrete product . . . ready for PMTA filing.”); *see infra* Part XVI.C.3.d).

### **Response to Finding No. 188**

The proposed finding is incomplete and misleading. Although Complaint Counsel does not disagree that some of Altria’s innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that

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fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”)); *see also* Jupe (Altria) Tr. 2183 (“Q. And knowing that some R&D projects are going to fail, innovation is about placing multiple bets. Would you agree with that statement? A. I couldn’t agree with you more.”)). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space succeeded or that it never introduced a commercially successful e-cigarette product. (*See* Responses to RPF ¶¶ 144, 181).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called “failures.” Altria’s product development team used what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria’s used feedback from consumer research to inform the next round of product development efforts)).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] }  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands

also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

189. Part of Altria’s problem was that it “tende[d] to kind of chase” the e-vapor marketplace rather than anticipate where it was going. (PX7016 Jupe (Altria) Dep. at 176). In 2015 and 2016, Altria’s development “portfolio included a lot of cigalike products,” a “format that ultimately didn’t turn out to be successful.” (Willard (Altria) Tr. 1334-35; *see also* PX1135 (Altria) at 020 (listing development projects designed to compete with cig-a-likes)).

### **Response to Finding No. 189**

The proposed finding is incorrect, incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria was unsuccessful in the e-vapor business or that it did not achieve its goal of attaining a leading position in the U.S. closed-system e-cigarette market. (*See* Response to RPF ¶ 181). The proposed finding is also vague in that the phrase “tende[d] to kind of chase’ the e-vapor marketplace” is undefined. Complaint Counsel does not disagree that Altria’s development portfolio in 2015 and 2016 included several cigalike products.

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that Altria’s R&D portfolio was unsuccessful. Although Complaint Counsel does not disagree that some of Altria’s innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”)); *see also* Jupe (Altria) Tr. 2183 (“Q. And knowing that some R&D projects are going to fail, innovation is about

placing multiple bets. Would you agree with that statement? A. I couldn't agree with you more.”)). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria's “bets” in the e-vapor space ever succeeded. (*See* Response to RPF ¶ 144).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] } [REDACTED] [REDACTED] [REDACTED] [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

190. It was not until June 2017, two years after JUUL was launched, (PX2158 (JLI) at 031), that Altria began working on an internal pod-based product concept designed to appeal to cigarette smokers, (RX0496 (Altria) at 038). That project, named Panama, was in the works for less than a year before it was paused to free up resources to fix the many problems plaguing Altria's on-market products. (PX1130 (Altria) at 009-10, 014; PX1139 (Altria) at 001; *see also infra* Part XVI.C.3.c).

### **Response to Finding No. 190**

The proposed finding is inaccurate and misleading because although Altria officially paused work on Project Panama, the research on which the project was based continued and Altria applied what it learned to MarkTen Elite, another pod-based product. (PX1130 (Altria) at 009 (“Panama & Elite Update” dated March 15, 2018) (“Continue with Panama research plan & apply learnings to Elite”)). The proposed finding is also vague and misleading because the phrase “plaguing Altria's on-market products” is undefined and unsupported by the cited evidence.

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The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] } [REDACTED] [REDACTED] [REDACTED] [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

191. All told, although Nu Mark ultimately pursued at least a half dozen internal device projects, many of which were the subject of “years” of effort, none ever “yielded fruit.” (Murillo (Altria/JLI) Tr. 2940-41; *see also* PX7041 Quigley (Altria) Dep. At 148-49; PX7018 Schwartz (Altria) Dep. At 164).

### **Response to Finding No. 191**

The proposed finding is incorrect, incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria was unsuccessful in the e-vapor business or that it did not achieve its goal of attaining a leading position in the U.S. closed-system e-cigarette market. (*See* Response to RPF ¶ 181). The proposed finding is also vague in that the phrase “none ever ‘yielded fruit’” is undefined and unexplained.

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that Altria’s R&D portfolio was unsuccessful. Although Complaint Counsel does not disagree that some of Altria’s innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that

fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”)); *see also* Jupe (Altria) Tr. 2183 (“Q. And knowing that some R&D projects are going to fail, innovation is about placing multiple bets. Would you agree with that statement? A. I couldn’t agree with you more.”)). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space ever succeeded. (*See* Response to RPF ¶ 144).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] }  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

## ii. Altria’s Failed Acquisitions Of E-Vapor Products

192. Unable to develop an e-vapor product internally, Altria did what it always did when its innovation efforts failed: It turned to acquiring existing products. (Willard (Altria) Tr. 1343-44).

### **Response to Finding No. 192**

The proposed finding is incorrect, incomplete, and misleading. Although Complaint Counsel does not disagree that some of Altria’s innovation efforts in the e-vapor space did not



succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep. at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”)); *see also* Jupe (Altria) Tr. 2183 (“Q. And knowing that some R&D projects are going to fail, innovation is about placing multiple bets. Would you agree with that statement? A. I couldn’t agree with you more.”)). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space succeeded or that it never introduced a commercially successful e-cigarette product. (*See* Responses to RPF ¶¶ 144, 181).

The proposed finding is also incomplete and misleading to the extent that it suggests that acquiring an e-vapor product from another manufacturer is not a common and potentially viable path to success in the closed-system e-cigarette market. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] } { [REDACTED] } { [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

193. In fact, every product that Nu Mark launched into the marketplace was a result of an external acquisition, licensing arrangement, or partnership with another e-vapor company.

MarkTen King Size was a Kimree product, MarkTen XL was a rebranded version of Green Smoke’s device, MarkTen Elite was from, Apex was made by PMI, and Cync and VIM—which Altria never commercialized—were developed by Joyetech and KangerTech, respectively. (PX7018 Schwartz (Altria) Dep. at 164; *see also* Garnick (Altria) Tr. 1742-43; PX7017 Magness (Altria) Dep. at 288).

### **Response to Finding No. 193**

Complaint Counsel does not disagree that Altria acquired the rights to many of its e-cigarette products from other e-vapor companies. But the proposed finding is incomplete and misleading to the extent that it suggests that Altria had no role in the development and commercialization these products. For example, Altria launched MarkTen Bold, a cigalike that used its own “proprietary recipe for nicotine salts” and that offered “nicotine delivery at levels approaching that of cigarettes.” (PX9000 (Altria) at 017 (Nov. 2017 Investor Day remarks)). In addition, shortly before withdrawing MarkTen Elite from the market, Altria successfully designed and implemented a new gasket that addressed the leaking issue with Elite’s pods. (CCFF ¶¶ 1206-36).

The proposed finding is also incomplete and misleading to the extent that it suggests that acquiring an e-vapor product from another manufacturer is not a common and potentially viable path to success in the closed-system e-cigarette market. Several successful e-cigarette products, [REDACTED] } were acquired from other manufacturers. [REDACTED] [REDACTED] [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

194. Most of these products were acquired by Nu Mark in 2017 or later and are discussed in greater depth below. (*See infra* Parts III, V, VII, IX). But Nu Mark’s first two products, MarkTen King Size and MarkTen XL, have older roots and are discussed here:

**Response to Finding No. 194**

Complaint Counsel has no specific response.

**(a) MarkTen King Size**

195. In 2013, Nu Mark introduced its first e-vapor product, a cig-a-like called MarkTen King Size. (PX7007 Murillo (Altria/JLI) IHT at 126; Gifford (Altria) Tr. 2734). That product came from a Chinese contract manufacturer named Kimree. (PX7018 Schwartz (Altria) Dep. at 164).

**Response to Finding No. 195**

Complaint Counsel does not disagree.

196. MarkTen King Size was essentially a shorter version of the later iteration, MarkTen XL. (PX7002 Schwartz (Altria) IHT at 37). It came in two nicotine strengths: 1.5 percent nicotine and 2.5 percent nicotine. (RX0175 (Altria) at 003).

**Response to Finding No. 196**

Complaint Counsel does not disagree.

197. At the time, the e-vapor category was led by cig-a-likes and Nu Mark's goal was to compete "[a]gainst Vuse and [NJOY] and the other products" in the cig-a-like category "to achieve market leadership." (PX7018 Schwartz (Altria) Dep. at 144).

**Response to Finding No. 197**

The proposed finding is inaccurate, misleading, and unsupported by the cited testimony. Schwartz testified that "our goal with MarkTen King-Size was *to compete in the e-vapor space against Vuse and Joy and the products that were in there.*" (PX7018 Schwartz (Altria) Dep. at 134 (emphasis added)). Nu Mark's goal was to achieve a top 2 share position in the entire "closed system market," (PX4040 (Altria) at 006 ("Nu Mark 2016-2018 Strategic Plan")), not simply "the cig-a-like category," and the way that Altria approached that goal was to "remain[] nimble in execution to achieve success in a rapidly changing market landscape." (PX4508 (Altria) at 006 (draft presentation entitled "e-Vapor Leadership – Product Technology, 2015 Strategy Meeting"));

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*see also* PX9000 (Altria) at 005 (Nov. 2017 Investor Day remarks) (“So we’ll be clear: We aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products.”); CCF ¶¶ 100-03).

198. But by mid-2015, Nu Mark found that neither the 1.5 percent nor the 2.5 percent nicotine products were “competitive with Vuse or satisfying enough to drive conversion from a traditional cigarette or most other e-vapor products.” (RX0175 (Altria) at 003). After concluding that King Size would not “drive conversion and sustainable volume[,] and risk[ed] damaging the credibility of the brand,” Altria abandoned the product in favor of MarkTen XL. (RX0175 (Altria) at 003; *see also* PX7002 Schwartz (Altria) IHT at 82 (explaining that MarkTen King Size “proved to be less than successful”).

### **Response to Finding No. 198**

The proposed finding is inaccurate and misleading to the extent that it suggests that all e-vapor customers prefer e-cigarette products with a high nicotine strength. (CCFF ¶¶ 1177-88). In fact, Altria’s Dr. Gardner admitted that some consumers prefer e-vapor products with a lower nicotine strength. (Gardner (Altria) Tr. 2673-74). For this reason, Reynolds offers Vuse Alto in nicotine strengths of 1.8%, 2.4%, and 5% because Reynolds has found that “consumers prefer different nicotine strengths” as “some consumers prefer a higher nicotine strength” while “[o]thers like [Huckabee] prefer a lower nicotine strength product.” (Huckabee (Reynolds) Tr. 395).

Similarly, {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

} Otherwise, Complaint Counsel has no specific response.

### **(b) Green Smoke And MarkTen XL**

199. In April 2014, Nu Mark acquired the e-vapor business of an Israeli company named Green Smoke, Inc. (Willard (Altria) Tr. 1460; Schwartz (Altria) Tr. 1864).

### **Response to Finding No. 199**

Complaint Counsel does not disagree.

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200. Nu Mark incorporated Green Smoke’s technology into a new iteration of the MarkTen brand, the “MarkTen XL,” which also was a cig-a-like. (Willard (Altria) Tr. 1345; Gifford (Altria) Tr. 2734; *see also* PX7002 Schwartz (Altria) IHT at 35 (explaining that MarkTen XL “was a former Green Smoke product that [Altria] reskinned into a Mark Ten presentation”); RX0746 (Altria) at 028 (“Green Smoke product portfolio overlaps with MarkTen portfolio”).

### **Response to Finding No. 200**

Complaint Counsel does not disagree.

201. After the launch of MarkTen XL, Nu Mark kept the Green Smoke brand in the market and used it to target an “[o]lder [adult vaper] consumer demographic” and explore “alternative distribution channels,” such as tobacco stores and e-commerce. (PX4040 (Altria) at 038).

### **Response to Finding No. 201**

Complaint Counsel does not disagree, but adds that the cited exhibit states that Green Smoke had the “Potential To Enhance Overall Nu Mark Share Performance.” (PX4040 (Altria) at 037).

202. Green Smoke ultimately would fall victim to the same problems as MarkTen XL, including undesirable form factor, a faulty battery design, and inadequate nicotine satisfaction. (*See infra* Parts III.B, III.F, V.C).

### **Response to Finding No. 202**

The proposed finding should be disregarded because none of the proposed findings in Parts III.B, III.F, or V.C discuss Green Smoke.

## **2. Juul Labs, Inc.**

### **a. Background**

203. Juul Labs, Inc. (“JLI”) is an electronic cigarette company founded in the San Francisco area. (PX2534 (JLI) at 002).

### **Response to Finding No. 203**

Complaint Counsel does not disagree.

204. JLI traces its roots to 2007, when its two cofounders, James Monsees and Adam Bowen—both graduate students in Stanford’s product design program—set out to develop a reduced-risk alternative to cigarettes. (PX2158 (JLI) at 031; O’Hara (JLI) Tr. 563).

**Response to Finding No. 204**

Complaint Counsel has no specific response.

**i. Structure**

205. In 2007, Monsees and Bowen founded Ploom, Inc., a company focused on heat-not-burn, and launched an eponymous product two years later. (PX2534 (JLI) at 002; PX2158 (JLI) at 031; Pritzker (JLI) Tr. 766). “Ploom achieved limited commercial success, drawing investment from Japan Tobacco to scale the product globally.” (PX2158 (JLI) at 031).

**Response to Finding No. 205**

Complaint counsel has no specific response.

206. The company then developed “PAX,” a loose-leaf vaporizer device that debuted in 2012. (PX2158 (JLI) at 031; O’Hara (JLI) Tr. 563; Pritzker (JLI) Tr. 766).

**Response to Finding No. 206**

Complaint Counsel does not disagree.

207. The company was renamed Pax Labs, Inc., in June 2015. (PX2158 (JLI) at 031; PX2534 (JLI) at 002; O’Hara (JLI) Tr. 563).

**Response to Finding No. 207**

Complaint Counsel does not disagree.

208. In the summer of 2015, the company launched an e-cigarette called “JUUL,” which it had been developing since 2013. (PX2158 (JLI) at 031; Pritzker (JLI) Tr. 771).

**Response to Finding No. 208**

Complaint Counsel does not disagree.

209. In June 2017, Pax Labs renamed itself JUUL Labs, Inc. and spun out Pax Labs, Inc. as a separate stand-alone corporation with ownership of the loose-leaf vaporizer device. JLI retained the e-cigarette assets. (PX2534 (JLI) at 002; PX2158 (JLI) at 031; Pritzker (JLI) Tr. 766).

**Response to Finding No. 209**

Complaint Counsel does not disagree.

210. Since that time, “all of JLI’s activities have been in support of just one product: the JUUL system.” (PX2534 (JLI) at 003).

**Response to Finding No. 210**

Complaint Counsel does not disagree.

211. By 2018, JLI employed approximately 600 people, (PX2534 (JLI) at 004), and generated over \$1 billion in sales, (PX2142 (JLI) at 006).

**Response to Finding No. 211**

Complaint Counsel does not disagree.

**ii. JLI's Mission Is To Convert Adult Smokers**

212. JLI's mission is to "transition the world's one billion smokers off of combustible cigarettes and eliminate their use." (Robbins (JLI) Tr. 3243; *see also* Pritzker (JLI) Tr. 769 ("[JLI's goal is] to convert smokers to vaporization.")). Stated more succinctly, "[JLI's] Mission Is to End Cigarettes." (PX2158 (JLI) at 007).

**Response to Finding No. 212**

Complaint counsel has no specific response.

213. JLI "views converting users of traditional cigarettes and other tobacco products as the engine for its future growth." (PX2158 (JLI) at 052). As such, it considers the "entire global cigarette category" as its "long-term addressable market." (PX2158 (JLI) at 039).

**Response to Finding No. 213**

The proposed finding is vague because the phrase "long-term addressable market" is undefined. The proposed finding is also incorrect, misleading, and contrary to the weight of the evidence to the extent that it suggests that the "entire global cigarette category" is a properly defined relevant product market in this case. On the contrary, the evidence establishes that the sale of closed-system e-cigarettes in the United States is the appropriate relevant product market. (CCFF ¶¶ 208-408). Moreover, the evidence shows that JLI considered closed-system e-cigarettes as a distinct market. (CCFF ¶¶ 252-59).

**b. JUUL Is An Innovative Breakthrough**

214. Although most of the major players in the e-vapor industry acquired their products, JLI "is one of the few companies that is responsible for the design and manufacturing of its own

products.” (Valani (JLI) Tr. 907; *see also* O’Hara (JLI) Tr. 576-77). JUUL was “researched, designed, and developed[] at [JLI’s] headquarters.” (PX2534 (JLI) at 002).

#### **Response to Finding No. 214**

Complaint Counsel has no specific response.

215. This internal development was made possible by JLI’s “deep bench, with senior talent from Apple, Google, Nest, [and] Boston Scientific, . . . among others.” (PX2153 (JLI) at 002). JLI “employs over 50 engineers with experience at Apple, Microsoft, IDEO, Maxim Integrated, GoPro, and Fitbit.” (PX2158 (JLI) at 055). And it “has an advantage in recruiting based upon its location in Silicon Valley, the heart of technology innovation.” (PX2158 (JLI) at 055; *see also* PX7024 Crosthwaite (Altria/JLI) Dep. at 269-70 (observing that JLI is in an “entirely different talent system” from tobacco companies)).

#### **Response to Finding No. 215**

The first sentence of the proposed finding is incomplete, misleading, and unsupported by the cited exhibit. PX2153 does not indicate whether the “senior talent” worked at JLI at the time it developed its only product or whether these individuals even worked in product development. (PX2153 (JLI) at 002). Indeed, page two of PX2153 specifically mentions Kevin Burns, who joined JLI long after JUUL’s success. (PX2153 (JLI) at 002). The second sentence of the proposed finding is also incomplete and misleading. Two of JLI’s current executives—current CEO K.C. Crosthwaite and current Chief Regulatory Officer Joe Murillo—are not only former tobacco executives, but former Altria executives. (PX7024 (Crosthwaite (Altria/JLI), Dep. at 7; Murillo (Altria/JLI) Tr. 2896).

216. By the end of 2016, JUUL’s “revolutionary design” and “superior functionality” had begun to attract a significant consumer following and JUUL was tied for the number six share position nationally among e-vapor products. (PX2158 (JLI) at 048; RX0746 (Altria) at 014).

#### **Response to Finding No. 216**

The proposed finding is incomplete and misleading because it fails to mention that cigalikes were the number one selling e-vapor product at the time. (RX0272 (Altria) at 013; *see* PX4040 (Altria) at 015 (“Nu Mark 2016-2018 Strategic Plan”)).



**i. JUUL Has A Discrete, Intuitive Design**

217. JUUL was “really the first pod product in the marketplace.” (Gifford (Altria) Tr. 2750; *see also* Crozier (Sheetz) Tr. 1488; PX8000 Crozier (Sheetz) Decl. at 003 ¶ 13).

**Response to Finding No. 217**

Complaint counsel has no specific response.

218. Like most closed-system devices, JUUL “has three components: (1) an electronic device that couples with (2) a liquid-filled pod at one end,” which doubles as the mouthpiece, “and (3) a charger at the other end.” (PX2534 (JLI) at 004-05).

**Response to Finding No. 218**

Complaint Counsel does not disagree.

219. But, within the context of the classic three-part structure, JUUL offered a number of signature features that resonated with adult consumers, including “the unique form-factor body, the liquid-level viewing window, the reversible pod with locking gaps, the fresh air flow design, and the simple user operation.” (PX2534 (JLI) at 006; *see also* Begley (Altria) Tr. 1079; Crozier (Sheetz) Tr. 1555-56; PX7015 Gogova (Altria) Dep. at 120; PX7030 Wexler (Turning Point Brands) Dep. at 46)).

**Response to Finding No. 219**

The proposed finding is incomplete and misleading because it fails to mention that cigalikes were the number one selling e-vapor product at the time. (RX0272 (Altria) at 013; *see* PX4040 (Altria) at 015 (“Nu Mark 2016-2018 Strategic Plan”)).

220. “Prior to the emergence of Juul, most e-cigarettes were cigalikes,” (PX8011 Eldridge (ITG Brands) Decl. at 006 ¶ 25), which have a cylindrical, cigarette-like shape, (Gifford (Altria) Tr. 2722; *see also* Jupe (Altria) Tr. 2177-78).

**Response to Finding No. 220**

Complaint Counsel does not disagree.

221. JUUL, by contrast is “more rectangular.” (Willard (Altria) Tr. 1348):



(RX0279 (Altria) at 011, 052).

### **Response to Finding No. 221**

Complaint Counsel does not disagree.

222. JUUL also has a “simple, intuitive, [and] easy-to-use” product design, (Begley (Altria) Tr. 1095), including “a pod that clicks into a battery.” (Crozier (Sheetz) Tr. 1488). These are all features that contributed to JUUL’s success. (Begley (Altria) Tr. 1094-95; Crozier (Sheetz) Tr. 1555-56; *see also* PX2158 (JLI) at 047 (“[P]roduct design also has a material impact on consumer acceptance. Convenience, form factor, and ease-of-use were all hurdles that limited first generation [e-vapor] adoption.”)).

### **Response to Finding No. 222**

Complaint Counsel does not disagree, but adds that MarkTen Elite offered an innovative magnetic pod insertion that Altria’s Begley characterized as “clearly a differentiator” vis-a-vis JUUL, (PX7022 (Begley (Altria), Dep. at 190-92), which required customers to push pods into the device. (CCFF ¶ 1478).

223. In addition, by not resembling a cigarette, JUUL “resolved for at least many adult smokers . . . the social friction of being viewed as a smoker, and . . . it allowed them to leave some of that baggage on the sidelines.” (Begley (Altria) Tr. 1095).

### **Response to Finding No. 223**

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The proposed finding is incomplete, misleading, and unreliable because it relies only on the self-serving testimony of Altria executives to support its claim about the “social friction” of traditional cigarettes. When asked whether cigalikes were less attractive because they maintained the “stigma” of smoking, Paul Crozier, who is Sheetz’s category manager for cigarettes and tobacco products, responded that he did not “recall that being a product concern.” ((PX7019 (Crozier (Sheetz), Dep. at 35))).

**ii. JUUL Was Designed To Mimic The Nicotine Experience Of A Cigarette**

224. JUUL also has two key features that allow it to deliver superior nicotine satisfaction: a powerful battery and a proprietary e-liquid formula with nicotine salts. (PX2158 (JLI) at 048 (touting JUUL’s “[r]obust battery” and “high nicotine satisfaction”); PX7030 Wexler (Turning Point Brands) Dep. at 37 (explaining that these two features contribute to nicotine satisfaction)).

**Response to Finding No. 224**

The proposed finding is vague because the term “powerful battery” is undefined; it does not identify with specificity the other e-cigarette batteries to which the JUUL battery is being compared. Complaint Counsel does not disagree that JUUL has a proprietary e-liquid formula with nicotine salts.

225. *First*, JUUL has a superior battery compared to its cig-a-like predecessors, which provides more power and more vapor, thereby allowing JUUL to overcome one of the central drawbacks of the cig-a-like form. (PX2158 (JLI) at 047-48 (contrasting the “weak batteries” of predecessor products with JUUL’s “superior functionality”); PX8003 Wexler (Turning Point Brands) Decl. at 002 ¶ 7 (discussing the limited power of cig-a-likes)).

**Response to Finding No. 225**

The proposed finding is incomplete and misleading to the extent that it implies that cigalikes do not compete with JUUL. On the contrary, JLI viewed its competition as all closed-system e-cigarettes, including cigalikes. (CCFF ¶¶ 252-59, 299-326; *see also* Farrell (NJOY) Tr. 290-91 § [REDACTED])

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[REDACTED] } For example, in an internal email exchange from April 2017—ten months before Elite was introduced—JLI executives discussed the extent to which MarkTen’s growth was funded by couponing as well as the nature of MarkTen promotions over the previous year. (CCFF ¶ 299 (citing PX2585 (JLI) at 001); *see also* CCFF ¶ 301 (discussing a June 2017 McKinsey slide deck on pricing strategy prepared for JLI that compares prices of JUUL’s pod product with other closed-system e-cigarette products, including cigalikes MarkTen XL, Vuse Solo, and Blu Plus) (citing PX2579 (JLI) at 007); PX2079 (JLI) at 014 (“Product Roadmap” dated January 2018) (slide entitled “Competition from big companies” and listing MarkTen Bold, a cigalike, as one of JUUL’s competitors)). Similarly, a May 2018 JLI slide deck entitled “Flavor Competitive Landscape” includes a slide comparing JUUL’s flavor offerings to those of “top competitors,” including both Elite and MarkTen, as well as cigalikes Vuse Solo, Vuse Ciro, and Blu Plus. (PX2090 (JLI) at 009).

226. *Second*, “JUUL use[s] nicotine salts which [leads] to greater nicotine satisfaction than products that [do] not do that.” (Crozier (Sheetz) Tr. 1556).

### **Response to Finding No. 226**

Complaint Counsel does not disagree that that JUUL uses nicotine salts. But the proposed finding is incorrect, incomplete, and misleading to the extent that it suggests that all e-vapor customers desire a product with nicotine salts or that nicotine salts are the only means to provide a satisfying e-vapor experience. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Indeed, closed-

system e-cigarette products without nicotine salts are still marketed today. (*See* CCFE ¶¶ 1166, 1176).

227. “[N]icotine salts are the end result of combining nicotine with an acid.” (Quigley (Altria) Tr. 1978). Generally, “the more acid you added” to an e-liquid formulation, “the lower the pH of the liquid, and . . . the more nicotine salt would be created.” (Quigley (Altria) Tr. 2006; *see also* Gardner (Altria) Tr. 3086-87 (explaining that JUUL’s inclusion of “nicotine salts” and a “lower pH” was key to providing “the experience the smoker was looking for”); Jupe (Altria) Tr. 2138 (similar)).

### **Response to Finding No. 227**

The proposed finding is incorrect, incomplete, and misleading to the extent that it suggests that all e-vapor customers desire a product with nicotine salts or that nicotine salts are the only means to provide a satisfying e-vapor experience. (*See* Response to RPF ¶ 226).

228. JUUL developed an e-liquid that combined “a nicotine and benzoic acid formulation.” (PX2534 (JLI) at 005; Gardner (Altria) Tr. 2659). That benzoic acid creates the nicotine salts in JUUL’s products. (Gardner (Altria) Tr. 2659).

### **Response to Finding No. 228**

Complaint Counsel does not disagree.

229. Nicotine salts deliver nicotine “deeper into the lungs,” (Gardner (Altria) Tr. 3086-87), and offer a “smoking experience very similar to conventional cigarettes,” (PX7015 Gogova (Altria) Dep. at 120). (*See also* PX2158 (JLI) at 036 (explaining that nicotine salts “allow[] for a nicotine absorption rate that closely matches that of a comparative traditional cigarette”); PX2168 (JLI) at 011 (similar)).

### **Response to Finding No. 229**

Complaint counsel has no specific response.

230. As one of JLI’s cofounders, Adam Bowen, explained: “Salt chemistry basically ‘fixes’ e-cigs so they perform as expected (like a cigarette).” (PX2274 (JLI) at 001; *see also* Jupe (Altria) Tr. 2284 (explaining that nicotine salts are essential to the delivery of nicotine satisfaction); Crozier (Sheetz) Tr. 1556 (similar); Quigley (Altria) Tr. 2007-08 (similar); Gardner (Altria) Tr. 3086-87 (similar)).

### **Response to Finding No. 230**

The proposed finding is incorrect, incomplete, and misleading to the extent that it suggests that all e-vapor customers desire a product with nicotine salts or that nicotine salts are the only means to provide a satisfying e-vapor experience. (*See* Response to RPF ¶ 226).

231. This insight enabled JUUL to be “the first [product] on the market to get as close to a cigarette as they did” in terms of the “rapid” uptake of nicotine. (PX7030 Wexler (Turning Point Brands) Dep. at 43-44; *see also* Gifford (Altria) Tr. 2748-49 (explaining that nicotine salts allowed JUUL to provide a nicotine experience “very similar” to a cigarette); Quigley (Altria) Tr. 2007-08 (similar); PX7014 Baculis (Altria) Dep. at 101-02 (“JUUL was one of the first products that actually delivered on the nicotine satisfaction that many adult smokers were looking for.”)).

### **Response to Finding No. 231**

The proposed finding is incorrect, incomplete, and misleading to the extent that it suggests that all e-vapor customers desire a product with nicotine salts or that nicotine salts are the only means to provide a satisfying e-vapor experience. (*See* Response to RPF ¶ 226).

232. Unlike JLI, as of 2015, the cig-a-likes by Vuse and MarkTen, “did not use nicotine salts.” (PX7005 Danaher (JLI) IHT at 116).

### **Response to Finding No. 232**

The proposed finding is incomplete and misleading to the extent that it implies that nicotine salts are required for a closed system e-cigarette to be desired by consumers. (*See* Response to RPF ¶ 226).

233. With what it described as “best-in class nicotine satisfaction,” JLI determined that it had “converted ~2% of the tobacco market [in 2017] with distribution in roughly a quarter of the market.” (PX2153 (JLI) at 003).

### **Response to Finding No. 233**

The proposed finding is vague because the phrase “best-in class nicotine satisfaction” is undefined. The proposed finding is also incorrect, misleading, and contrary to the weight of the evidence to the extent that it suggests that the “tobacco market” is a properly defined relevant product market in this case. On the contrary, the evidence establishes that the sale of closed-system

e-cigarettes is the appropriate relevant product market. (CCFF ¶¶ 208-407). In fact, ordinary course documents show that JLI viewed closed-system e-cigarettes as a distinct market. (CCFF ¶¶ 252-59). Moreover, Respondents' expert, Dr. Murphy, conceded that traditional cigarettes should not be included in the relevant product market. (PX7047 (Murphy, Dep. at 128 ("I'm not saying [combustible cigarettes] should be included if you wanted to find a relevant market."))).

234. Other sources bear this out. Jack Stout, the Senior Vice President for Merchandising and Demand Chain for 7-Eleven, observed that, although cigarette unit sales had historically declined steadily at a rate of about 3-4 percent per year, "with the introduction and rapid growth of JUUL, the decline in cigarette unit sales accelerated to 5-6% at 7-Eleven in 2018." (PX8001 Stout (7-Eleven) Decl. at 001 ¶¶ 2, 6).

#### **Response to Finding No. 234**

The proposed finding is incorrect and misleading because it confuses correlation with causation. The suggestion that JUUL converted one-to-two percent of 7-Eleven cigarette customers in 2018 is unsupported by the evidence cited. The proposed finding is also incorrect, misleading, and contrary to the weight of the evidence to the extent that it suggests that traditional cigarettes are properly included in the relevant product market. On the contrary, the evidence establishes that the sale of closed-system e-cigarettes is the appropriate relevant product market. (CCFF ¶¶ 208-407). Moreover, Respondents' expert, Dr. Murphy, conceded that traditional cigarettes should not be included in the relevant product market. (PX7047 (Murphy, Dep. at 128 ("I'm not saying [combustible cigarettes] should be included if you wanted to find a relevant market."))).

235. Sheetz reached a similar conclusion based on a customer survey it conducted showing that "at least 30% of smokers who tried JUUL did not return to smoking traditional cigarettes." Sheetz concluded, "This suggests that the growth in the rate of decline of traditional cigarette sales was caused at least in part by the growth in vapor products." (PX8000 Crozier (Sheetz) Decl. at 002 ¶ 8).

#### **Response to Finding No. 235**

The proposed finding is incorrect, misleading, and contrary to the weight of the evidence to the extent that it suggests that traditional cigarettes are properly included in the relevant product market. On the contrary, the evidence establishes that the sale of closed-system e-cigarettes is the appropriate relevant product market. (CCFF ¶¶ 208-407). Moreover, Respondents' expert, Dr. Murphy, conceded that traditional cigarettes should not be included in the relevant product market. (PX7047 (Murphy, Dep. at 128 ("I'm not saying [combustible cigarettes] should be included if you wanted to find a relevant market.")). The proposed finding is also misleading because the cited declaration attributes the rate of decline of cigarettes to e-vapor in general and not to JUUL specifically. (PX8000 at 002 (¶ 8) (Crozier (Sheetz), Decl.)).

236. Tobacco industry analysts interpreted the market evidence the same way, concluding by 2018 that JUUL was converting cigarette smokers and stealing share from cigarette brands. (Willard (Altria) Tr. 1359; RX0858 (Altria) at 003-04; *see also* Gifford (Altria) Tr. 2825-28 (describing RX0858 as showing "the outside world was clearly seeing . . . that JUUL was very successful in converting adult smokers"); Robbins (JLI) Tr. 3243, 3247-48 (discussing JUUL's competition with the cigarette category according to market data); PX7036 Garnick (Altria) Dep. at 163-64 (describing JUUL as "having more success at converting smokers than virtually any other non-combustible tobacco product out there"); PX7039 Robbins (JLI) Dep. at 189-91 (recalling analysis "that showed, as JUUL [sales] go[] up, as JUUL grows, cigarettes [sales] go down, and showing a direct relationship that [JUUL] w[as] recruiting from combustible smoker[s]")).

### **Response to Finding No. 236**

The proposed finding is incorrect, misleading, and contrary to the weight of the evidence to the extent that it suggests that traditional cigarettes are properly included in the relevant product market. On the contrary, the evidence establishes that the sale of closed-system e-cigarettes is the appropriate relevant product market. (CCFF ¶¶ 208-407). Moreover, Respondents' expert, Dr. Murphy, conceded that traditional cigarettes should not be included in the relevant product market. (PX7047 (Murphy, Dep. at 128 ("I'm not saying [combustible cigarettes] should be included if you wanted to find a relevant market.")).

### **B. There Are Numerous Other E-Vapor Competitors**



237. The e-vapor marketplace is highly competitive, with category leadership “chang[ing] hands numerous times over the past seven years.” (Willard (Altria) Tr. 1155; *see also* PX7014 Baculis (Altria) Dep. at 101 (“[T]he category changed leadership fairly frequently over time.”); RX0176 (Altria) at 134 (discussing the “rise and fall of multiple leading brands”)).

### **Response to Finding No. 237**

The proposed finding is incorrect, misleading, and contrary to the weight of the evidence. Both ordinary course documents and Dr. Rothman’s calculations show that the closed-system e-cigarette market was highly concentrated both before and after the transaction. (CCFF ¶¶ 1735-63). Moreover, the evidence shows that only two companies—JLI and Reynolds—have led the closed-system e-cigarette market in terms of units of closed-system consumables (i.e., cartridges, pods, and disposables) since 2015. (PX5000 at 030 (¶ 61, Table 1) (Rothman Expert Report)). Reynolds was the market leader in 2015, 2016, and 2017. (PX5000 at 030 (¶ 61, Table 1) (Rothman Expert Report)). But JLI’s share grew rapidly in 2017 and 2018, and it had by far the highest share in 2018 (59.8%) and the first two quarters of 2019 (74.9%). (PX5000 at 030 (¶ 61, Table 1) (Rothman Expert Report)). The proposed finding is also vague because the term “category leadership” is undefined.

The proposed finding is also incomplete and misleading to the extent that it suggests that post-transaction market conditions show that the market was not harmed by Altria’s exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759 (citing PX5001 at 008-09 (¶ 14, n.26) (Rothman Rebuttal Report))). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” estimating the loss of consumer surplus from Altria’s exit. (CCFF ¶¶ 1525, 1416; PX5001 at 047 (¶ 86, n.207) (Rothman Rebuttal Report)). Assuming that Altria

would have maintained a 10 percent share of the closed-system e-cigarette market, Dr. Rothman calculated that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (CCFF ¶ 1525).

238. Over time, the market has seen “an influx of new competitors” and “new products.” (RX0176 (Altria) at 134; *see also* PX7030 Wexler (Turning Point Brands) Dep. at 57 (“[T]here’s new alternatives every month across open systems and closed systems and Cigalikes.”); RX1456 (JLI) at 001 (discussing new product entries)).

### **Response to Finding No. 238**

The proposed finding is vague because the term “over time” is undefined. The proposed finding is also incomplete and misleading because the reference to “an influx of new competitors” in RX0176 is in the context of “early stage e-vapor products” in the 2013 to 2016 time frame. (RX0176 (Altria) at 134).

The proposed finding is also incorrect, misleading, and contrary to the weight of the evidence to the extent that it suggests that the “influx of new competitors” or any of these “new products” are competitively significant. Both ordinary course documents and Dr. Rothman's calculations show that the closed-system e-cigarette market was highly concentrated both before and after the transaction. (CCFF ¶¶ 1735-63).

The proposed finding is further incorrect, misleading, and contrary to the weight of the evidence to the extent that it suggests that open systems are properly included in the relevant product market. (CCFF ¶¶ 351-83). On the contrary, the evidence establishes that the sale of closed-system e-cigarettes is the appropriate relevant product market. (CCFF ¶¶ 208-407). Complaint Counsel adds that Dr. Murphy did not offer an opinion on whether the relevant product market includes open-system e-cigarettes. (CCFF ¶ 2086).

Finally, the proposed finding is incomplete and misleading to the extent that it suggests that post-transaction market conditions show that the market was not harmed by Altria's exit. Dr.

Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759 (citing PX5001 at 008-09 (¶ 14, n.26) (Rothman Rebuttal Report))). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” estimating the loss of consumer surplus from Altria’s exit. (CCFF ¶¶ 1525, 1416; PX5001 at 047 (¶ 86, n.207) (Rothman Rebuttal Report)). Assuming that Altria would have maintained a 10 percent share of the closed-system e-cigarette market, Dr. Rothman calculated that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (CCFF ¶ 1525).

239. At the same time, products that failed to develop a consumer following were continuously “being removed from the market because they . . . failed to succeed.” (Willard (Altria) Tr. 1244; *see also* Murphy Tr. 3129-30 (“[P]roducts leaving the marketplace is a normal part of the competitive process, and, indeed, it’s part of the process by which products that are relatively unsuccessful are replaced by more successful products.”)).

### **Response to Finding No. 239**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

While specific products may have been removed from the market, no other e-vapor competitor exited the market, other than Altria. (*See* CCFF ¶¶ 1132-43).

#### **1. Reynolds (Brand: Vuse)**

240. Reynolds American Inc. (“Reynolds”) is the parent company of multiple tobacco companies, including R.J. Reynolds Tobacco Company, Santa Fe Natural Tobacco Company, Inc., and American Snuff Company. (PX8008 Huckabee (Reynolds) Decl. at 002 ¶ 5). Reynolds describes itself as the second largest tobacco company in the United States. (Huckabee (Reynolds) Tr. 372).

### **Response to Finding No. 240**

Complaint Counsel does not disagree.

241. Reynolds owns RAI Innovations Company, which in turn owns RJR Vapor Company, Reynolds's e-cigarette business. (Huckabee (Reynolds) Tr. 372; PX8008 Huckabee (Reynolds) Decl. at 002 ¶ 5).

**Response to Finding No. 241**

Complaint Counsel does not disagree.

242. British American Tobacco indirectly owns all Reynolds's shares. (PX8008 Huckabee (Reynolds) Decl. at 002 ¶ 5).

**Response to Finding No. 242**

Complaint Counsel does not disagree.

243. Reynolds currently sells four different vapor products in the United States, all under the brand name "Vuse":

(a). **Vuse Solo** is a cig-a-like product with "a bold taste" that was launched in 2013. Its nicotine content is 4.8 percent, and it has an electronic control that limits usage to 540 puffs. (PX8008 Huckabee (Reynolds) Decl. at 007-08 ¶ 18(a)).

(b). **Vuse Ciro** is a cig-a-like product with "a particularly refined flavor." After acquiring the product, Reynolds introduced it in July 2016. The nicotine content is 1.5 percent. (PX8008 Huckabee (Reynolds) Decl. at 008-09 ¶ 18(b)).

(c). **Vuse Vibe** is a "closed system e-cigarette" with Reynolds's "largest capacity cartridge." Reynolds acquired the product shortly before the Deeming Rule went into effect and began selling it in July 2016. (PX8008 Huckabee (Reynolds) Decl. at 009 ¶ 18(c)).

(d). **Vuse Alto** is a pod-based device. Reynolds acquired it from Smoore after August 2016 and reintroduced the product in August 2018. (PX8008 Huckabee (Reynolds) Decl. at 010 ¶ 18(d)). { [REDACTED]

[REDACTED] The cartridge is held in place by a magnetic tip. (PX8008 Huckabee (Reynolds) Decl. at 010 ¶ 18(d)).

**Response to Finding No. 243**

Complaint Counsel does not disagree.

244. Although Reynolds has continued to market its cig-a-like products, they are not the focal point of its marketing and price promotions. (Gifford (Altria) Tr. 2863; *see also* [REDACTED]).

**Response to Finding No. 244**

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The proposed finding is vague because the term “focal point” is undefined. The proposed finding is also incorrect and misleading to the extent that it suggests that Reynolds does not value its cigalike products. The evidence shows that Reynolds continues to market three cigalike products: Vuse Ciro, Vuse Solo, and Vuse Vibe. (CCFF ¶ 1174). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

245. [REDACTED]

[REDACTED] }

**Response to Finding No. 245**

Complaint Counsel does not disagree.

246. In January 2020, following the August 2018 introduction of Vuse Alto, Reynolds became, and has remained, the market leader in device share. (*See infra* Part XII.A.4; *see also* [REDACTED]).

**Response to Finding No. 246**

The proposed finding is incomplete and misleading. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

The proposed finding is also incomplete and misleading to the extent that it suggests that device share is a reliable metric to assess competition in the closed-system e-cigarette market. (CCFF ¶¶ 1762-63). In calculating market shares for the closed-system e-cigarette market, Dr. Rothman used shares of consumables (i.e., cartridges, pods, and disposables) rather than devices because “[c]onsumables better reflect the extent to which consumers are purchasing the products

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repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products.” (PX7048 (Rothman, Trial Dep. at 69)). Indeed, at trial, Huckabee explained that device share “is a good indicator for the amount of consumers that are trying our products,” but that “repeat trial and ongoing repertoire usage” are “different things.” (Huckabee (Reynolds) Tr. 398-99). Pod share, on the other hand, gives Reynolds “an indication for the amount of consumer purchases and uses of our product.” (Huckabee (Reynolds) Tr. 401). Huckabee testified that JLI has the highest pod share today, (Huckabee (Reynolds) Tr. 402), and, moreover, that he considers { [REDACTED]

## 2. NJOY (Brand: NJOY)

247. NJOY, LLC (“NJOY”) is an electronic nicotine delivery system company. It is not affiliated with a traditional tobacco company. (PX8004 Farrell (NJOY) Decl. at 001 ¶¶ 3, 6).

### Response to Finding No. 247

Complaint Counsel does not disagree.

248. Founded in 2007, NJOY, Inc. (which subsequently went bankrupt but whose assets were purchased by NJOY, LLC) was one of the first U.S. companies to sell e-vapor products. (PX8004 Farrell (NJOY) Decl. at 001 ¶¶ 5, 6).

### Response to Finding No. 248

Complaint Counsel does not disagree.

249. NJOY currently sells two e-vapor products:

- (a). **NJOY Ace** is a pod-based product. (PX8004 Farrell (NJOY) at Decl. at 001 ¶ 4). The pod and device, which are sold separately, connect magnetically. (Farrell (NJOY) Tr. 214-15). The nicotine contents are 2.4 percent and 5 percent. (Farrell (NJOY) Tr. 230). { [REDACTED]

- (b). **NJOY Daily** is a disposable cig-a-like product, launched in approximately 2015. (PX8004 Farrell (NJOY) Decl. at 001 ¶ 4; Farrell (NJOY) Tr. 215). It is sold as a single piece that includes both the battery and cartridge. (Farrell (NJOY) Tr. 212).

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It comes in two flavors, menthol and rich tobacco, and two nicotine strengths, 4.5 percent and 6 percent. (Farrell (NJOY) Tr. 213). The product lifespan varies by usage but NJOY has equated one Daily to a pack of cigarettes. (Farrell (NJOY) Tr. 217). [REDACTED]

### Response to Finding No. 249

Complaint Counsel does not disagree.

250. [REDACTED]

### Response to Finding No. 250

Complaint counsel has no specific response.

251. NJOY previously sold three additional products that have since been discontinued:

- (a). **NJOY Loop** was a cig-a-like product that consisted of two cig-a-likes inside a charging case. (Farrell (NJOY) Tr. 352; *see also* PX2449 (JLI) at 067 (depicting product)). It came in five flavors at 4.5 percent nicotine by weight. (RX1766 (PMI) at 006). [REDACTED] NJOY decided that, from a business perspective, it did not make sense to continue to manufacture and sell that product. (Farrell (NJOY) Tr. 353).
- (b). **NJOY King** was a disposable cig-a-like product launched in approximately 2013. (Gardner (Altria) Tr. 2598; *see also* RX2025 (depicting product); [REDACTED]). King contained high nicotine levels and no salts, which made the product experience “intensely harsh.” (Gardner (Altria) Tr. 2598). It was so harsh that “[a]dult smokers could not use th[e] product on a routine basis” and it thus could not “deliver nicotine satisfaction.” (Gardner (Altria) Tr. 2598, 2600). NJOY has since pulled the product from the market for business reasons. (Farrell (NJOY) Tr. 357-58; Gardner (Altria) Tr. 2600).
- (c). **NJOY PFT** was a pre-filled tank (hence, “PFT”) that NJOY had on the market in 2018. (Farrell (NJOY) Tr. 206, 357). At some point, NJOY decided that, from a business perspective, it did not make sense to continue to manufacture and sell that product. (Farrell (NJOY) Tr. 357).

### Response to Finding No. 251

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The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. While specific products may have been removed from the market, no other e-vapor competitor exited the market, other than Altria. (See CCFB ¶¶ 1132-43).

252. NJOY did not file a PMTA for any of its discontinued products. In the opinion of NJOY's Chief Revenue Officer, Andrew Farrell, it would not be worth "investing millions of dollars to keep a product on shelf if I really didn't think that it could sell in amounts that I needed it to to satisfy my plan for the business in the future." (Farrell (NJOY) Tr. 358-59).

### **Response to Finding No. 252**

The proposed finding is incomplete and misleading because Farrell stated several times that he was unfamiliar with NJOY's reasoning for discontinuing its products, (Farrell (NJOY) Tr. 357, 359 ("Again, I wasn't involved in the final decision to discontinue [the PFT] product.") ("I can't speak on behalf of NJOY and what it would do with a product or not . . .")), as well as with the PMTA process. (Farrell (NJOY) Tr. 358 ("I'm not involved in the regulatory submission process")).

253. [REDACTED]  
[REDACTED]; see also *infra* Parts XII.A.4, XIII.C).

### **Response to Finding No. 253**

[REDACTED]  
[REDACTED]

### **3. ITG Brands (Brand: blu)**

254. ITG Brands, LLC, is a U.S. subsidiary of British-based tobacco company Imperial Brands PLC. (PX8011 Eldridge (ITG Brands) Decl. at 001 ¶ 3). It is the third-largest tobacco company in the United States, after Altria and Reynolds. (PX8011 Eldridge (ITG Brands) Decl. at 001-02 ¶¶ 2, 6).

### **Response to Finding No. 254**

Complaint Counsel does not disagree.



255. ITG Brands was created in 2015, after Imperial Brands acquired several U.S. brands and assets in a divestiture stemming from the merger of Reynolds American and Lorillard Tobacco, then the second- and third-largest tobacco companies in the United States, respectively. (PX8011 Eldridge (ITG Brands) Decl. at 001 ¶ 3). That acquisition included certain cigarette brands from both companies, as well as Lorillard’s e-cigarette brand blu. (PX8011 Eldridge (ITG Brands) Decl. at 001 ¶ 3).

#### **Response to Finding No. 255**

Complaint Counsel does not disagree.

256. ITG Brands shares responsibility for e-vapor in the United States with its sister company, Fontem U.S. LLC, whose ultimate parent entity also is Imperial Brands. (PX8011 Eldridge (ITG Brands) Decl. at 001 ¶ 4). Fontem handles new product development, including R&D and acquisitions, while ITG Brands is “the sales agent.” (PX7012 Eldridge (ITG Brands) Dep. at 32-33).

#### **Response to Finding No. 256**

Complaint Counsel does not disagree.

257. ITG Brands currently sells cigarettes, cigars, and e-vapor products. (PX8011 Eldridge (ITG Brands) Decl. at 001 ¶ 2).

#### **Response to Finding No. 257**

Complaint Counsel does not disagree.

258. ITG Brands’s e-vapor products are sold under the brand name blu. (PX8011 Eldridge (ITG Brands) Decl. at 001 ¶ 2, 004 ¶ 19). The current blu line consists of the following products:
- (a). **myblu** is a pod device that ITG Brands introduced in 2017. (PX8011 Eldridge (ITG Brands) Decl. at 004-05 ¶ 19). ITG acquired this pod system from a company called Von Erl. (PX7012 Eldridge (ITG Brands) Dep. at 88-89). The pods are available in four flavors—Tobacco Chill Intense, Tobacco Intense, Gold Leaf, and Menthol. Both Tobacco Chill Intense and Tobacco Intense have nicotine salts. (PX8011 Eldridge (ITG Brands) Decl. at 005 ¶ 23; PX7012 Eldridge (ITG Brands) Dep. at 77-78). All four flavors are available at varying nicotine strengths. (PX8011 Eldridge (ITG Brands) Decl. at 005 ¶ 23). The *myblu* pod product line accounts for the largest share of ITG Brands’s e-vapor revenue. (PX7012 Eldridge (ITG Brands) Dep. at 49-50).
  - (b). **blu Plus** is a cig-a-like device with pre-filled cartridges that screw into the device. (PX8011 Eldridge (ITG Brands) Decl. at 005 ¶ 19). It is available in two flavors, Classic Tobacco and Magnificent Menthol, both at 2.4 percent nicotine strength. (PX8011 Eldridge (ITG Brands) Decl. at 005 ¶ 23). These products do not contain nicotine salts. (PX7012 Eldridge (ITG Brands) Dep. at 168).

- (c). **blu Disposables** are single-use prefilled cig-a-likes that are designed to be discarded. (PX8011 Eldridge (ITG Brands) Decl. at 005 ¶ 19; PX7012 Eldridge (ITG Brands) Dep. at 49). “The blu Disposables, to which the [FDA] flavor ban does not apply, come in Vivid Vanilla, Cherry Crush, Classic Tobacco, Magnificent Menthol, and Polar Mint favors, all at a 2.4 [percent] nicotine strength.” (PX8011 Eldridge (ITG Brands) Decl. at 005 ¶ 23). These products do not contain nicotine salts. (PX7012 Eldridge (ITG Brands) Dep. at 168).

### **Response to Finding No. 258**

Complaint Counsel does not disagree. Complaint Counsel adds that although blu’s sales volume in units has increased every year since 2016, its share of the closed-system e-cigarette market has declined every year since 2016 due to the explosive growth of JUUL. (PX8011 at 006 (¶ 26) (Eldridge (ITG), Decl.)).

259. ITG Brands previously marketed a vapor product called Salt of the Earth, which was pulled from the market after “a quick introduction.” (PX7012 Eldridge (ITG Brands) Dep. at 181).

### **Response to Finding No. 259**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. While specific products may have been removed from the market, no other e-vapor competitor exited the market, other than Altria. (*See* CCF ¶¶ 1132-43).

260. Fontem filed PMTAs for the blu and myblu products. (PX7012 Eldridge (ITG Brands) Dep. at 90-92; PX8010 Folmar (ITG Brands) Decl. at 001 ¶ 3). The company believes that its products meet the standard that FDA applies to PMTAs. (PX7012 Eldridge (ITG Brands) Dep. at 92-93).

### **Response to Finding No. 260**

Complaint Counsel does not disagree.

261. Most of blu’s marketing focuses on myblu Intense, the pod product with nicotine salts. (Gifford (Altria) Tr. 2863).

### **Response to Finding No. 261**

The proposed finding is unreliable and should be given little weight because it relies only on the self-serving testimony of an Altria executive who has no foundation for the cited testimony.

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Altria no longer competes in the closed-system e-cigarette market and its CEO has no basis to testify as to the “focus” of blu’s marketing efforts.

#### 4. Japan Tobacco International (Brand: Logic)

262.

[REDACTED]

[REDACTED] There are two products in the Logic line:

- (a). **Logic Pro** is a hybrid product. (Crozier (Sheetz) Tr. 1489). It is a long, cylindrical device that is “too big” to be considered “a true cig-a-like.” (Crozier (Sheetz) Tr. 1489). The cartridge screws in. (Crozier (Sheetz) Tr. 1489). The e-liquid contains 2.0 percent nicotine, (RX1429 (JLI) at 004), and no salts, (RX1739 (ITG Brands) at 019).
- (b). **Logic Power** is a cig-a-like product available in disposable and refillable formats. (RX1616 (JLI) at 057). It has 2.7 percent nicotine, (PX2344 (JLI) at 004), and no salts, (RX1739 (ITG Brands) at 019).

#### Response to Finding No. 262

Complaint Counsel does not disagree.

263. JTI also manufactures Vapeleaf, a hybrid of an e-cigarette and a heat-not-burn product. (RX0555 (Altria) at 036; *see also* PX2542 (JLI) at 004; [REDACTED]). “The device heats a non-nicotine liquid. Then the vapor passes through a capsule and heats granulated tobacco.” (RX0555 (Altria) at 036).

#### Response to Finding No. 263

Complaint Counsel does not disagree.

264. As of September 2020, JTI through its Logic Pro had just 0.3 percent device share in the pod-based products market. (Murphy Tr. 3152-53).

#### Response to Finding No. 264

The proposed finding is incomplete and misleading to the extent that it suggests that device share is a reliable metric to assess competition in the closed-system e-cigarette market. (CCFF ¶¶ 1762-63). In calculating market shares for the closed-system e-cigarette market, Dr. Rothman used shares of consumables (i.e., cartridges, pods, and disposables) rather than devices because “[c]onsumables better reflect the extent to which consumers are purchasing the products

repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products.”  
(PX7048 (Rothman, Trial Dep. at 69)).

### **5. Turning Point Brands (Brand: RipTide)**

265. Turning Point Brands is a company that specializes in tobacco products other than combustible cigarettes, such as smokeless tobacco. (PX8003 Wexler (Turning Point Brands) Decl. at 001 ¶ 2). [REDACTED]; *see also* PX8003 Wexler (Turning Point Brands) Decl. at 001 ¶ 4).

#### **Response to Finding No. 265**

Complaint Counsel does not disagree.

266. In 2018, Turning Point introduced a pod-based system called RipTide RipStick, which is sold in 4,000 to 6,000 convenience stores as well as online. (PX8003 Wexler (Turning Point Brands) Decl. at 003 ¶ 12).

#### **Response to Finding No. 266**

Complaint Counsel does not disagree.

267. RipTide is available in 2.4 percent and 5 percent strengths, uses synthetic nicotine rather than tobacco-derived nicotine, and does not contain nicotine salts. (RX1790 (Turning Point Brands) at 007, 018, 039).

#### **Response to Finding No. 267**

Complaint Counsel does not disagree.

### **6. E-Alternative Solutions (Brand: Leap)**

268. E-Alternative Solutions (“EAS”) is part of Swisher Tobacco Company. (Crozier (Sheetz) Tr. 1482; RX1616 (JLI) at 021).

#### **Response to Finding No. 268**

Complaint Counsel does not disagree.

269. EAS sells e-cigarettes under the brand name Leap. (Crozier (Sheetz) Tr. 1482).

(a) Leap is a pod-based system. (Crozier (Sheetz) Tr. 1490).

(b) Leap Go is a { [REDACTED] .

**Response to Finding No. 269**

Complaint Counsel does not disagree.

270. Leap products are carried in Sheetz. (PX8000 Crozier (Sheetz) Decl. at 003 ¶ 14).

**Response to Finding No. 270**

Complaint Counsel does not disagree.

271. EAS also marketed a product called Cue Vapor, a closed-system device that was larger than classic pods such as JUUL. (RX1616 (JLI) at 021; PX2289 (JLI) at 122-23).

**Response to Finding No. 271**

Complaint Counsel does not disagree.

**7. Many Other E-Vapor Products On Market**

272. There are also many thousands of other e-vapor products on the U.S. market, as measured by SKUs (stock keeping units). (Murillo (Altria/JLI) Tr. 2932, 2950-51; O'Hara (JLI) Tr. 519-20).

**Response to Finding No. 272**

The proposed finding is vague because the “market” is undefined. The proposed finding is also incorrect, misleading, and contrary to the weight of the evidence to the extent that it suggests that the “many thousands of other e-vapor products” are competitively significant. Both ordinary course documents and Dr. Rothman’s calculations show that the closed-system e-cigarette market was highly concentrated both before and after the transaction. (CCFF ¶¶ 1735-63).

The proposed finding is also incorrect, misleading, and contrary to the weight of the evidence to the extent that it suggests that open systems are properly included in the relevant product market. (CCFF ¶¶ 351-83). On the contrary, the evidence establishes that the sale of closed-system e-cigarettes is the appropriate relevant product market. (CCFF ¶¶ 208-407). Complaint Counsel adds that Dr. Murphy did not offer an opinion on whether the relevant product market includes open-system e-cigarettes. (CCFF ¶ 2086).

273. In addition to those discussed above, other prominent brands include Bidi Vapor, MNGO, and Glas. (Farrell (NJOY) Tr. 225 (listing brands NJOY is “keeping an eye on”); { [REDACTED] }).

#### **Response to Finding No. 273**

The proposed finding is vague because the term “prominent” is undefined. The proposed finding is also incorrect, misleading, and contrary to the weight of the evidence to the extent that it suggests that any of the cited brands are competitively significant. (See PX5000 at 030 (¶ 61, Table 1) (Rothman Expert Report)).

274. As of 2019, products that were introduced in limited distribution before the August 8, 2016 Deeming Date continued to be reintroduced and commercialized on a broader scale. Stout, from 7-Eleven, observed that six months after Altria invested in JLI, new products were still entering the market. (PX7044 Stout (Altria) Dep. at 23, 87).

#### **Response to Finding No. 274**

Complaint counsel has no specific response.

275. An October 2018 market analyst report made a similar observation, reporting, “Along with Big Tobacco, there is a tidal wave of independent competitors entering the nicotine salt landscape today. Three of the more popular products that we have come across are Phix (whose product looks very similar to Altria’s Markten Elite), Myle (who have a very similar product to Juul) and Suorin, who sell a range of vape pens including the ‘Vagon’ . . .” (RX1425 (JLI) at 008).

#### **Response to Finding No. 275**

The proposed finding is vague because the terms “tidal wave” and “nicotine salt landscape” are undefined. The proposed finding is also incorrect, misleading, and contrary to the weight of the evidence to the extent that it suggests that these “independent competitors” are competitively significant. Both ordinary course documents and Dr. Rothman’s calculations show that the closed-system e-cigarette market was highly concentrated both before and after the transaction. (CCFF ¶¶ 1735-63).

The proposed finding is also incorrect, misleading, and contrary to the weight of the evidence to the extent that it suggests that open systems are properly included in the relevant

product market. (CCFF ¶¶ 351-83). On the contrary, the evidence establishes that the sale of closed-system e-cigarettes is the appropriate relevant product market. (CCFF ¶¶ 208-407). Complaint Counsel adds that Dr. Murphy did not offer an opinion on whether the relevant product market includes open-system e-cigarettes. (CCFF ¶ 2086).

Complaint Counsel adds that RX1425 states: “It perhaps doesn’t come as a surprise, with so many Juul knockoffs around, that Juul recently filed a number of legal cases for patent infringements.” (RX1425 (JLI) at 008).

### **III. ALTRIA BEGAN REASSESSING THE VIABILITY OF ITS E-VAPOR PORTFOLIO WELL BEFORE DISCUSSING SPECIFIC TERMS WITH JLI**

#### **A. In 2017, Altria Was Caught Flat-Footed By Rising Consumer Demand For Pods**

##### **1. Pods, Led By JUUL, Revived A Stagnant E-Vapor Industry**

276. By the beginning of 2017, Altria had been involved in the e-vapor business for four years, since Nu Mark launched the first MarkTen cig-a-like product in 2013. (Jupe (Altria) Tr. 2226).

#### **Response to Finding No. 276**

The proposed finding is factually inaccurate and vague.

The proposed finding is inaccurate; the parties agree that before 2013, in 2012, Altria established its Nu Mark operating company with the goal of developing and marketing innovative tobacco products, including e-cigarette products, for adult tobacco consumers. (CCFF ¶ 125 (citing (JX0001 at 002 (¶ 12))); *see also* CCFF ¶¶ 126-27). Altria had been investing and participating in activities related to reduced harm products, including e-cigarettes, since well before 2013. (CCFF ¶¶ 409-12).

The proposed finding is vague as to what Altria’s “involvement” in the e-vapor business was four years prior to “the beginning of 2017.”

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277. At this point, Nu Mark’s entire product line was cig-a-likes. (PX7014 Baculis (Altria) Dep. at 145 (explaining that, as of 2017, Nu Mark’s “portfolio [was] only cigalikes”).

**Response to Finding No. 277**

The proposed finding is vague and unsupported as to the 2017 timeframe; however, Complaint Counsel does not disagree that Nu Mark sold cigalike closed-system e-cigarettes, and not pod-based closed-system e-cigarettes, in 2017.

278. [REDACTED], by 2015, growth had stalled, (Begley (Altria) Tr. 1055).

**Response to Finding No. 278**

The statement that “by 2015, growth had stalled” is unsupported and vague. Indeed, Respondents cite conflicting testimony on that point. Respondents cite Begley, but fail to address his full testimony that { [REDACTED]

[REDACTED] } Later, Begley testified that “from ’15 through probably at least halfway through 2017, it was a relatively stagnant market . . . .” (Begley (Altria) Tr. 1055).

279. In February 2017, Jody Begley, then president and general manager of Nu Mark, took stock of the e-vapor business during a presentation for the Altria Board of Directors regarding Nu Mark’s three-year plan. (RX0746 (Altria) at 001, 003).

**Response to Finding No. 279**

The proposed finding is vague and unsupported as to the meaning of “took stock of the e-vapor business.” Respondents cite only a cover email and the cover of a presentation entitled “Nu Mark 2017 Three Year Strategic Plan.” (RX0746 (Altria) at 001, 003).

280. Altria operating companies share these three-year plans, including analysis of past and projected financial performance, with the Altria Board every February. (Begley (Altria) Tr. 1055-56).

**Response to Finding No. 280**



The proposed finding is misleading and unsupported as to the “analysis of past . . . financial performance.” In fact, Begley testified that, each year, operating companies share a three-year plan and the financials associated with the three-year plan, and that “the conversation generally focuses more on the current year you’re in, but we do provide financial projections for the three years.” (Begley (Altria) Tr. 1056).

281. According to Begley, at the start of 2017, “the market was still primarily cigalikes” and “still a flat market” without “a lot of incremental interest among adult smokers.” (Begley (Altria) Tr. 1066; *see also* PX7010 Gifford (Altria) IHT at 146 (explaining that, from 2014 to 2017, there was “interplay, open systems going to close[d], within closed system branch changing places, but there was really no growth that was occurring”).

### **Response to Finding No. 281**

The proposed finding is misleading, vague, and irrelevant. The proposed finding is misleading as to “the start of 2017.” Begley expressly stated he was discussing “early 2017,” which is vague as to timing. (Begley (Altria) Tr. 1066). In addition, the second citation to PX7010 Gifford (Altria) IHT at 146 is addressing a market that includes open systems; it is thus irrelevant and misleading because the appropriate relevant product market in which to evaluate the transaction’s anticompetitive effects is the closed-system e-cigarette market. (CCFF ¶¶ 208-407).

282. Summarizing the e-vapor industry’s performance over the previous several years, the deck that Begley presented to the Board stated that “e-vapor category growth ha[d] slowed.” (RX0746 (Altria) at 008). In fact, between 2015 and 2016, industry volume had shrunk by 9 percent. (RX0746 (Altria) at 008).

### **Response to Finding No. 282**

Complaint Counsel has no specific response except that Respondents misleadingly omit a portion of the cited document describing growth in the e-vapor industry: the e-vapor industry experienced year-over-year growth in terms of industry volume and consumer expenditures between 2013 and 2015. (RX0746 (Altria) at 008). Specifically, industry volume grew 170% in 2013, 70% in 2014, and 15% in 2015. (RX0746 (Altria) at 008). Similarly, consumer expenditures

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grew 160% in 2013, 70% in 2014, 10% in 2015, and 2% in 2016. (RX0746 (Altria) at 008). Respondents further ignore that 2017 projected growth rates for both industry volume and consumer expenditures remained stable at 2016 levels. (RX0746 (Altria) at 008).

283. In 2016, shipment volume for Nu Mark’s e-vapor products had grown by six percent. (RX0746 (Altria) at 006; *see also* Gifford (Altria) Tr. 2734 (noting that MarkTen saw sales “increasing slightly through time” but never taking off); RX0562 (Altria) at 007 (showing MarkTen sales volume, starting at a low baseline, actually declined throughout most of 2015)).

**Response to Finding No. 283**

The proposed finding is misleading as to Nu Mark’s and MarkTen’s performance in 2016. Respondents ignore that Nu Mark’s financial performance improved in 2016 and again in 2017. (CCFF ¶¶ 1074-75, 1088-95, 1098-102, 480-89). Respondents likewise ignore that MarkTen’s performance improved in 2016 and again in 2017. For example, Respondents ignore {

[REDACTED]

[REDACTED]

[REDACTED] }

Respondents also ignore that, in 2017, Nu Mark {

[REDACTED]

[REDACTED]

[REDACTED] }

The proposed finding also misleadingly describes RX0562 (Altria) at 007, which shows that MarkTen sales were volatile in 2015 and ultimately declined only before rebounding from 2016 to 2018. The proposed finding is misleading because it fails to put MarkTen’s 2015 sales in context to competitors; according to RX0562 (Altria) at 007, competitors Logic and blu also saw some sales decline in 2015.

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284. But this modest increase in shipment volume was insufficient to cover Nu Mark’s operating costs. As a result, the company reported a \$118 million loss for 2016. (RX0746 (Altria) at 007; Gifford (Altria) Tr. 2726; *see also infra* Part IX.F.1).

**Response to Finding No. 284**

The proposed finding is misleading for the reasons set forth in response to RFPP ¶ 283 and RPF 1077-84). In particular, although Nu Mark reported \$118 million in losses for 2016, Respondents ignore Gifford testimony that {

[REDACTED]

} Similarly, Respondents ignore that Nu Mark’s {

[REDACTED] } Respondents also fail to provide

Gifford’s full testimony about the 2016 losses—he testified that Nu Mark’s losses were predicted by the company. (Gifford (Altria) Tr. 2726). Respondents finally fail to address {

[REDACTED]

[REDACTED]

[REDACTED] }

285. In addition, Nu Mark’s three-year plan at the time projected that the company would continue incurring substantial losses for two more years—\$75 million in 2017 and \$33 million in 2018—before hopefully breaking even in 2019. (RX0746 (Altria) at 007; Gifford (Altria) Tr. 2726; Begley (Altria) Tr. 1067; *see also infra* Part IX.F.1).

**Response to Finding No. 285**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. (See Responses to RPF 1077-84). Respondents misleadingly indicate that Altria was only “hopeful” that it could achieve its breakeven goals in 2019. Neither Gifford nor Begley indicated in their testimony that Nu Mark could not achieve its breakeven goal in 2019. In fact, the forecast Respondents cite, (*see* RX0746 (Altria) at 007), shows an improvement trend, and this forecast is bolstered by Nu Mark’s {

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as described in the responses to RPF 283-84. (*See Responses to RPF 283-84*). The weight of the evidence indicates that Altria expected its closed-system e-cigarettes would become profitable. (CCFF 1083-87). In addition, Respondents ignore Nu Mark’s improving financial and sales performance in 2018. (CCFF 485, 487, 1096-111; *see also* CCFF 1112-31 (regarding Elite’s growing sales)). Finally, Respondents fail to acknowledge that {

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_ }

286. These 2017 projections were more pessimistic than the projections prepared the previous year, which had projected that Nu Mark would become profitable in 2018. (Gifford (Altria) Tr. 2725-26; Begley (Altria) Tr. 1061-62; PX4040 (Altria) at 012 (financial projections from February 2016); *see also* Gifford (Altria) Tr. 2724-25 (discussing 2016 projections)). Indeed, it was the third year in a row that Nu Mark had pushed out the timeline for projected profitability by yet another year. (Gifford (Altria) Tr. 2726-27; *see also infra* Part IX.F.1).

#### **Response to Finding No. 286**

The proposed finding is vague as to the term “pessimistic” and misleading for the reasons set forth in response to RPF Part IX.F.1. (*See Responses to RPF 1077-84*). Gifford’s testimony states that Altria “pushed out” its breakeven projection, (Gifford (Altria) Tr. 2725-26), and that you would expect “some variability” in projections with a new category such as e-vapor. (Gifford (Altria) Tr. 2728-29).

287. The revised assessment was driven by Altria’s failure to “get[] the volume [growth] that was predicted.” (Gifford (Altria) Tr. 2728). At the time, neither Nu Mark nor the e-vapor industry generally were seeing meaningful growth. (Gifford (Altria) Tr. 2729, 2734 (observing that MarkTen’s growth “basically levels out in the trends”); RX0746 (Altria) at 008).

#### **Response to Finding No. 287**

The first sentence of the proposed finding is misleading for the reasons set forth in response to RPF 286. (*See Response to RPF 286*). The second sentence of the proposed finding is

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vague as to the timeframe being addressed. The second sentence of the proposed finding is also misleading and contrary to the weight of the evidence for the reasons set forth in response to RPF 282-84 and 286. (*See Responses to RPF 282-84, 286*).

288. At the same time, the “number of adult vapers ha[d] declined,” falling by 21 percent in the twelve months from December 2015 to December 2016, with over 2 million users leaving the category. (RX0746 (Altria) at 010).

### **Response to Finding No. 288**

The proposed finding is misleading for the reasons set forth in response to RPF 282-84, 286. (*See Responses to RPF 282-84, 286*).

289. [REDACTED]; *see also* PX7007 Murillo (Altria/JLI) IHT at 117 (explaining that by “early 2015,” it was clear that “cig-a-like products were not going to be of sufficiently deep and broad appeal . . . to convert large numbers of [smokers]”).

### **Response to Finding No. 289**

The proposed finding is vague as to the timeframe being addressed, and misleading for the reasons set forth in response to RPF 282-84, 286. (*See Responses to RPF 282-84, 286*).

290. This assessment was confirmed by a study Altria conducted in early 2017 of consumers who had left the vapor category. The primary reason for their departure was that e-vapor products “did not provide a ‘satisfying experience,’” meaning that they “could not/did not replace a cigarette experience/occasion.” (RX1290 (Altria) at 025).

### **Response to Finding No. 290**

The proposed finding is misleading for the reasons set forth in response to RPF 282-84, 286. (*See Responses to RPF 282-84, 286*).

The proposed finding is also misleading with respect to the proffered “primary reason for their departure.” While Complaint Counsel cannot locate the cited page of RX1290—Respondents provided only native files, not a paginated PDF version of the exhibit—Complaint Counsel has been able to find the quote language under the header: “Key reasons these AS were not currently

using the category.” This page of RX1290 does not ascribe the specific reason why adult smokers left the category, as Respondents contend. Further, Respondents cite no testimony to suggest the quote in the proposed finding is “the primary reason for their departure.”

291. Despite “stagnant” growth and consumer attrition, (Begley (Altria) Tr. 1055; RX0746 (Altria) at 010), Altria continued to believe that the “adult vaper[]” consumer category, which dwarfed both “dippers” and “cigar smokers,” “represent[ed] a significant longer-term opportunity.” (RX0746 (Altria) at 011).

### **Response to Finding No. 291**

The first clause of proposed finding is vague as to the subject of the finding (be it the closed-system e-cigarette market, the industry, or Nu Mark), and is misleading and contrary to the weight of the evidence for the reasons set forth in response to RPF ¶¶ 282-84, 286, and 288. (*See* Responses to ¶¶ 282-84, 286, 288).

The proposed finding is also vague as to the timeframe being addressed. Respondents have cited contradicting testimony from Begley. (*See* Response RPF ¶ 278). To the extent that the proposed finding stands for the proposition that Altria recognized the significant long-term opportunity that closed system e-cigarettes presented, Complaint Counsel does not disagree.

292. The presentation that Begley made to the Board stated that in the year ahead, Nu Mark’s focus would be on a “disciplined” expansion of its MarkTen cig-a-likes. (RX0746 (Altria) at 013).

### **Response to Finding No. 292**

The proposed finding is misleading, vague, inaccurate, and contrary to the weight of the evidence. Respondents cite RX0746 (Altria) at 013, which contains the header “Disciplined Approach to Expand MarkTen,” and includes figures from May 2015 to May 2016. Respondents fail to cite any evidence that RX0746 (Altria) at 013 is addressing future plans. It is vague what “disciplined” approach means, and to the extent Respondents are arguing that Nu Mark was planning on a limited approach to MarkTen in the future, RX0746 (Altria) at 012 contradicts that

argument in its outline of Nu Mark’s future plans to grow MarkTen: “2017 Nu Mark Initiatives: Strategy: Establish MarkTen as a leading brand in the closed system e-vapor segment . . . expand distribution of MarkTen to achieve ~80% MOC e-vapor volume coverage . . . expand MarkTen varieties . . . Grow MarkTen e-commerce . . . .”

293. Since its launch in 2015, MarkTen had expanded to 51,000 stores and Nu Mark planned to add an additional 21,000 stores in 2017. (RX0746 (Altria) at 013-14, 017).

### **Response to Finding No. 293**

The proposed finding is vague as to the time being addressed and is thus misleading. Respondents rely on forecasts for 2017 when actual data exists: MarkTen was available in about 65,000 stores in November 2017. (CCFF ¶ 486). This number of stores constituted “roughly 70% of U.S. e-vapor volume in mainstream channels” in February 2018. (CCFF ¶ 459). Furthermore, the proposed finding fails to place MarkTen’s expansion in context, as Howard Willard did when he informed investors at the February 2018 CAGNY conference that “[in] 2017, MarkTen grew volume by approximately 60%, far outpacing competitive cig-alike brands.” (CCFF ¶ 459; *see* CCFF ¶¶ 486, 494; *see also* CCFF ¶¶ 1088-95, 1100-01).

294. At the same time, Nu Mark would expand MarkTen Bold, its higher nicotine cig-a-like cartridge with some nicotine salts, which had “[I]aunched on e-commerce and in 5,000 lead market retail stores in November 2016.” (RX0746 (Altria) at 018).

### **Response to Finding No. 294**

The proposed finding is vague and misleading. The proposed finding is vague and misleading as to the clause describing MarkTen Bold as a “higher nicotine cig-a-like cartridge with some nicotine salts.” MarkTen Bold was a cigalike, (CCFF ¶ 21), that had four percent nicotine by weight and nicotine salts. (CCFF ¶¶ 464, 1196). In November 2017, Altria told investors that its pharmacokinetic (or PK) studies showed that MarkTen Bold offered nicotine delivery at levels approaching that of cigarettes. (CCFF ¶ 1197).

The proposed finding also misleadingly omits what occurred after the initial launch of MarkTen Bold described in RX0746 (Altria) at 018. In fact, a year later, in November 2017, Altria told investors that MarkTen Bold had promising early results and that those results led Nu Mark to plan to expand MarkTen Bold to an additional 15,000 stores by the end of 2017. (CCFF ¶ 1102; *see also* CCFF ¶ 1499). By February 2018, MarkTen Bold was selling in 25,000 retail stores. (CCFF ¶ 465).

The proposed finding is vague as to what “at the same time” timeframe is being addressed.

295. At the time of Begley’s Board presentation, Bold was showing only a minor impact on MarkTen’s bottom line, largely stealing share from the original MarkTen cig-a-like and boosting the MarkTen brand’s total share by less than two percent in stores where it was sold. (RX0746 (Altria) at 019).

#### **Response to Finding No. 295**

The proposed finding overstates the cited evidence and is misleading. Respondents cite to RX0746 (Altria) at 019, which makes no reference to “MarkTen’s bottom line,” what impact MarkTen Bold had on Altria or Nu Mark, or MarkTen’s financial performance.

The proposed finding makes the unsupported conclusion that MarkTen Bold was “largely stealing share from the original MarkTen cig-a-like[.]” The proposed finding misleadingly omits that according to RX0746 (Altria) at 018, MarkTen Bold was “launched on e-commerce and in 5,000 lead market retail stores” at some undefined point in November 2016, and that the data set RX0746 (Altria) at 019 covers a mere seven weeks from November 6, 2016 to January 1, 2017 for some unknown number of stores. The proposed finding also misleadingly omits MarkTen Bold’s actual store expansion in 2017 and 2018, (*see* Response to RPF ¶ 294), and further omits public remarks about Bold’s sales expansion in 2018. In April 2018, “MarkTen volume sales [were] increasing, primarily driven by Bold expansion.” (CCFF ¶ 467). Then, in June 2018, Howard Willard continued to talk about MarkTen Bold as one of “[t]he drivers of the growth in second



quarter and first half” and that it was “getting traction with consumers.” (CCFF ¶ 1113). Indeed, in June 2018, Willard told investors that MarkTen Bold was a “primary product” that was sold in “large numbers of stores.” (CCFF ¶ 130).

296. While Nu Mark’s portfolio remained focused on cig-a-likes, there were early signs by the time of Begley’s February 2017 Board presentation that the e-vapor industry was shifting toward pods. (RX0746 (Altria) at 038; *see also* Begley (Altria) Tr. 1066).

#### **Response to Finding No. 296**

The proposed finding is vague and unsupported as to the second clause. But Complaint Counsel does not dispute that, in 2017, Nu Mark’s sold cigalike closed-system e-cigarettes and not pod-based closed-system e-cigarettes. (*See* CCFF ¶ 138).

297. Begley’s presentation to the Board included the statistic that over the past year “competitive hybrid products”—a reference to pod-based e-vapor products—had more than doubled in market share, growing to nearly nine percent of the e-vapor category in the multi-outlet convenience channel as of January 2017. (RX0746 (Altria) at 038; *see also* Gifford (Altria) Tr. 2722 (describing how Altria called pod-based products “hybrid in the beginning”)).

#### **Response to Finding No. 297**

Complaint Counsel has no specific response.

298. During that time, JUUL was surging and had grown to the number six position nationally, with three percent of the e-vapor category. (RX0746 (Altria) at 014, 038).

#### **Response to Finding No. 298**

The proposed finding is vague. The proposed finding is vague as to the timeframe being addressed. The proposed finding is also vague as to what is the “e-vapor category” they are addressing. Respondents cite to RX0746 (Altria) at 038, which addresses the “MOC” channel only, as Respondents acknowledge in RPF ¶ 297. To the extent that the proposed finding stands for the proposition that closed-system e-cigarettes make up the relevant market, (*see* CCFF ¶¶ 235-37), Complaint Counsel does not disagree.

299. Four months later, at the end of April 2017, pods had jumped to 21 percent of the dollar share of the e-vapor category in convenience stores, largely by stealing share from cig-a-like devices. (RX1103 (Altria) at 005; Begley (Altria) Tr. 1070).

**Response to Finding No. 299**

The proposed finding is unsupported by the cited evidence. Respondents do not cite any evidence to support their conclusion that pods were “largely [] stealing share from cig-a-like devices” and the citation does not state that that conclusion. To the extent that the proposed finding stands for the proposition that both pods and cigalikes compete for share in the closed-system e-cigarette market, Complaint Counsel does not disagree.

300. As of April 2017, JUUL continued to be far and away the leader of the emerging pod-based devices segment, with over 400,000 weekly unit sales. (RX1290 (Altria) at 010).

**Response to Finding No. 300**

The proposed finding is vague, incomplete, misleading, and unsupported by the cited evidence. Complaint Counsel does not disagree that, in April 2017, JLI sold more JUUL devices on a weekly basis than any other closed-system e-cigarette competitor that sold a pod-based product. Respondents, however, appear to have cited the wrong exhibit and/or the wrong page as there is no page in the record marked RX1290 (Altria) at 010 and the tenth page of the referenced exhibit (including native files) does not support their proposed finding. The term “pod-based devices segment” is misleading because the evidence shows that the appropriate relevant product market—closed-systems e-cigarettes—consists of both pod-based products and cigalikes. (CCFF ¶¶ 208-407).

The proposed finding is incomplete and misleading to the extent that it suggests that device share is a reliable metric to assess competition in the closed-system e-cigarette market. (CCFF ¶¶ 1762-63). In calculating market shares for the closed-system e-cigarette market, Dr. Rothman used shares of consumables (i.e., cartridges, pods, and disposables) rather than devices because

“[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products.”

(PX7048 (Rothman, Trial Dep. at 69)).”

## 2. In The Spring Of 2017, Altria Began Searching For A JUUL-Fighter To Compete In The Pod Market

301. With cig-a-likes stagnating and pods on the rise, Altria began searching in the spring of 2017 for opportunities to branch out from MarkTen cig-a-like and to participate in the pod market. (Begley (Altria) Tr. 1069-70; Gifford (Altria) Tr. 2730; RX1103 (Altria) at 006).

### Response to Finding No. 301

The proposed finding is generally unsupported, in addition to being vague and contrary to the weight of the evidence with respect to Respondents’ assertion “with cig-a-likes stagnating.” (See Response to RPF ¶ 291).

The proposed finding is unsupported by Respondents’ cite to Gifford’s testimony, (Gifford (Altria) Tr. 2730), which addresses all of 2017 and not specifically the spring of 2017. The proposed finding is also unsupported by Respondents cite to RX1103 (Altria) at 006, which states that “adding a closed tank product to Nu Mark’s portfolio is a priority,” but does not expressly state whether that is a reference to pod-based products. The term “pod market” is misleading, as the evidence in the record shows that the appropriate relevant product market is the closed-system e-cigarette market. (CCFF ¶¶ 208-407).

302. As Begley explained, because this was after August 8, 2016 (the predicate date under the Deeming Rule), Altria “didn’t have the ability . . . to develop anything internally to compete without waiting multiple years to compete, and . . . thought it was important to go scan the environment to see if there were any pod products that were available.” (Begley (Altria) Tr. 1072; *see also* RX0865 (Altria) at 005 (“In the near term, Nu Mark does not have the ability to market an internally developed [pod-based] product for [adult smokers].”)).

### Response to Finding No. 302

The proposed finding is vague, confusing, incomplete, misleading, and contrary to the weight of the evidence. To the extent that the proposed finding implies that Nu Mark's cigalikes were not already competing with JLI's pod-based products in the closed-system e-cigarette market, it is misleading and contrary to the weight of the evidence. (CCFF ¶¶ 299-350).

To the extent that the proposed finding implies that Altria lacked any competitive pod-based options in the near term because of the FDA's deeming deadline, the finding is misleading because it fails to mention that Altria licensed APEX, a pod-based closed system e-cigarette, from PMI, and was able to begin selling APEX in the U.S. without first obtaining a PMTA. (CCFF ¶¶ 1620-25). APEX was a promising pod-based product. (CCFF ¶¶ 1626-35). PMI continued to work on APEX and currently sells VEEV, an improved version of APEX outside of the United States. (CCFF ¶¶ 1636-43, 1647-50). The proposed finding is misleading because it also fails to mention that {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } PMI's Martin King testified that when PMI and Altria entered into the Joint Research, Development, and Technology Sharing Agreement ("JRDTA") the intention was for Altria to commercialize PMI's e-cigarette products in the U.S., including the closed-system e-cigarette product, VEEV. (CCFF ¶ 1646; *see* CCFF ¶¶ 1588-619).

The proposed finding is misleading and contrary to the weight of the evidence because despite the Deeming Rule (1) Altria commercialized a product with nicotine salts and high nicotine strength as well as a pod-based product, (CCFF ¶¶ 1195-97); (2) Altria successfully designed and implemented closed-system e-cigarette product improvements, (CCFF ¶¶ 1206-34); (3) Altria implemented or was planning to implement other product improvements on its existing closed-

system e-cigarettes, (CCFF ¶¶ 1235-36); and (4) Altria had other potential acquisitions or collaborations that it could have pursued with firms whose closed-system e-cigarettes were on the market prior to the Deeming Rule. (CCFF ¶¶ 1717-21).

To the extent that the proposed finding implies that the only relevant competition between Respondents involved competition with existing closed-system e-cigarettes and not innovation competition for closed-system e-cigarettes, the proposed finding is misleading and contrary to the weight of the evidence in the record detailing the extensive innovation competition that took place between Respondents. (CCFF ¶¶ 1478-81, 1538-87).

The first sentence of proposed finding is vague and confusing as to what “this” is that Respondents are addressing.

303. In the spring of 2017, Altria launched what it called “Project Mule”—a project for pursuing “potential acquisitions of pod-based products.” (Begley (Altria) Tr. 1069; *see also* RX1103 (Altria) at 006 (“Adding a closed-tank product to Nu Mark’s portfolio is a priority[.]”)).

### **Response to Finding No. 303**

Complaint Counsel has no specific response.

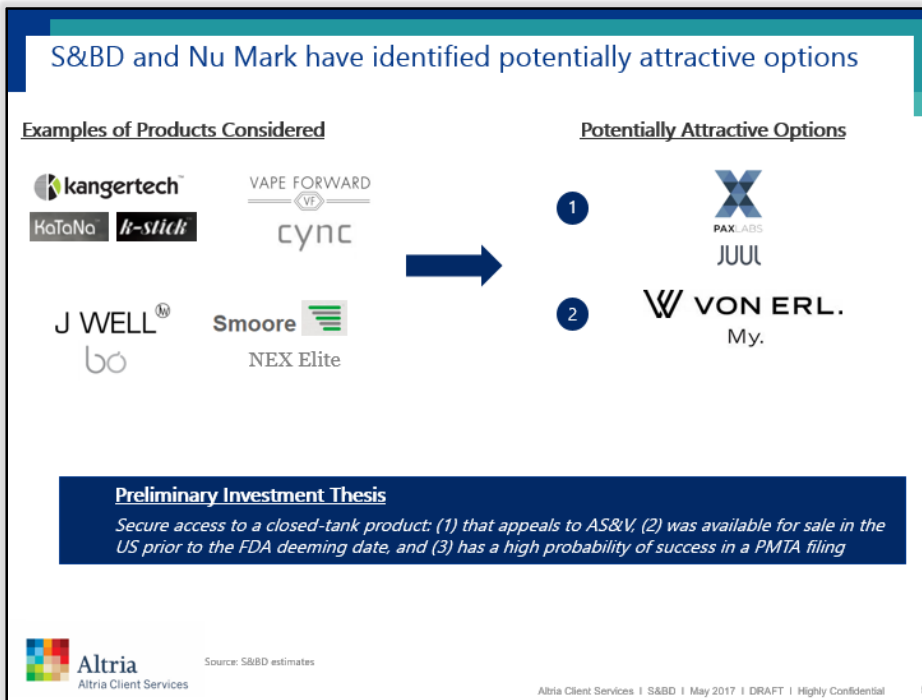
304. As Altria’s leadership explained to the Board in May 2017, the pods segment was a highly attractive opportunity that was not addressed in Nu Mark’s portfolio, and thus the company’s strategic priority was to quickly acquire a product. (PX1286 (Altria) at 015). (The Board deck refers to the relevant segment as “[c]losed tank for adult smoker,” but Altria later updated this nomenclature to “small pod-based system.” (RX0865 (Altria) at 008 (explaining that “[c]losed [t]ank” means “[p]od [b]ased”))).

### **Response to Finding No. 304**

The proposed finding is unsupported by the cited evidence and misleading. Respondents do not cite any evidence that RX0865 (Altria) at 008 is an updated version of PX1286 (Altria) at 015.

305. Altria’s Strategy & Business Development (S&BD) group surveyed the market and drilled down on six potential pod products and associated companies that might merit an investment. (*See* RX1103 (Altria) at 007). Based on “conversations with a number of

different companies” and consumer research, S&BD recommended in late-May 2017 that the company pursue an acquisition of JLI or, alternatively as a second choice, a partial acquisition of a company called Von Erl. (Begley (Altria) Tr. 1073; RX1103 (Altria) at 007, 023). The four products that S&BD did not recommend pursuing were k-stick, bo, Cync, and NEX Elite. (RX1103 (Altria) at 007). S&BD’s recommendations are shown in the following chart:



(RX1103 (Altria) at 007).

### **Response to Finding No. 305**

The first and third sentences of the proposed finding are misleading and unsupported. Respondents cite RX1103 (Altria) at 007, 023, which, contrary to Respondents’ conclusions, do not state that S&BD surveyed the market or the targets, and it does not include any recommendation not to pursue any acquisition.

306. As a Project Mule update prepared in May 2017 explained, “Juul is an attractive closed-system product based on: (1) early market success in the MOC channel with limited distribution; (2) ALCS qualitative [adult smoker and vaper] research; and (3) ALCS preliminary product integrity testing.” (RX1103 (Altria) at 009). The update continued, “S&BD recommends accelerated evaluation of the opportunity, though a transaction could be expensive and complex.” (RX1103 (Altria) at 009).

**Response to Finding No. 306**

Complaint Counsel has no specific response.

307. S&BD added that JUUL was the “[t]op performer” among adult smokers and vapers “seeking [a] ‘smoking experience’” and the device form “alleviate[d] social friction” for those who did not “want to look like they’re smoking.” (RX1103 (Altria) at 012). In addition, “Juul offers key benefits of a hybrid e-vapor system,” providing cig-a-like users “better . . . performance without sacrificing convenience” and open-system users “convenience in a non ‘cigarette’ form.” (RX1103 (Altria) at 012).

**Response to Finding No. 307**

Complaint Counsel has no specific response.

308. By this point, JLI and Altria representatives, including Begley, had met to discuss a potential investment. (Begley (Altria) Tr. 1008). That initial conversation, which took place in April 2017, “led nowhere.” (Begley (Altria) Tr. 1008, 1074).

**Response to Finding No. 308**

The second sentence of the proposed finding is misleading as to the timing of the conversations with JLI in 2017. Begley did not testify about which conversation(s) in 2017 “led nowhere.” (Begley (Altria) Tr. 1074).

309. But Altria remained in contact with JLI, discussing a possible meeting of more senior leaders later in the summer. (PX1342 (Altria) at 001).

**Response to Finding No. 309**

The proposed finding is vague as to time period. The document cited in the proposed finding is an email between Altria and JLI dated June 6, 2017, only several weeks after dates that Respondents failed to define in April 2017. (*See* Response to RPF ¶ 308).

310. The fallback acquisition opportunity recommended by S&BD, Von Erl, was an Austrian-based company whose U.S. e-vapor portfolio included open-system, cig-a-like, and pod products, marketed under the brand name My. (RX1103 (Altria) at 019).

**Response to Finding No. 310**

The first clause of the proposed finding is vague, unsupported by the cited evidence, conclusory, and misleading. Respondents’ citation for the proposed finding, RX1103 (Altria) at

019, makes no reference Respondents' conclusion that Von Erl was a "fallback acquisition opportunity recommended by S&BD[.]"

311. Von Erl already had received multiple investment proposals from third parties. (RX1103 (Altria) at 018). Although S&BD submitted an investment proposal, (RX1103 (Altria) at 023), Imperial's ITG Brands already had the inside track and by July 2017, Von Erl had made a distribution deal with Imperial, (RX0865 (Altria) at 012; *see also* Begley (Altria) Tr. 1074).

### **Response to Finding No. 311**

The first sentence of the proposed finding is misleading and unsupported by Respondents' citation to RX1103 (Altria) at 018. Respondents indicate that Von Erl had received multiple investment proposals from third parties. However, Respondents' cited support states, "Von Erl, has received proposals from AVI and another third party" and AVI is not defined. (RX1103 (Altria) at 018).

The second sentence of the proposed finding is misleading and unsupported as to Respondents' claim that "Imperial's ITG Brands already had the inside track." Respondents fail to cite to any support for the rationale for ITG Brand's so-called "inside track." The second sentence also omits the fact that Imperial did not announce that it acquired Von Erl until February 2, 2018. (*See* Response to RPF ¶ 312).

312. A few months later, Imperial announced that it was acquiring Von Erl and would relaunch the products under a new brand name, *myBlu*. (RX1912 at 001-02).

### **Response to Finding No. 312**

The first clause of the proposed finding is unsupported and misleading as to the meaning of "a few months later." Respondents cite RX1912, Imperial's announcement that it bought Von Erl, dated February 2, 2018. February is six months after July 2017. (*See* Response to RPF ¶ 311).



313. With Von Erl off the table and a future partnership with JLI still aspirational, S&BD began exploring an investment in one of the four products that it had initially recommending not pursuing: Cync. (RX0865 (Altria) at 023-24; RX1103 (Altria) at 007).

### **Response to Finding No. 313**

The proposed finding is unsupported by the cited evidence, misleading, and contrary to the weight of the evidence.

The first clause of the proposed finding is unsupported by the cited evidence, misleading, and contrary to the weight of the evidence. According to RPF ¶ 312, Imperial announced it acquired Von Erl in February 2018. Respondents do not cite to any evidence that Von Erl was sold prior to February 2018. Respondents also fail to provide support their claim that “a future partnership with JLI [was] still aspirational.” Instead, Respondents cite RX0865 (Altria) at 023, which shows a lightened picture of a JUUL. That alone fails to support Respondents’ claim.

The second clause is unsupported; Respondents fail to support their claim that S&BD initially recommended not pursuing certain products. (*See* Response to RPF ¶ 305).

314. Meanwhile, in late June, the e-vapor product team at Nu Mark began to explore a possible investment in NEX Elite, a product developed and manufactured by a Chinese company called Smoore. (PX4126 (Altria) at 001). NEX Elite was another product that S&BD had considered as part of its original Project Mule assessment but declined to pursue. (RX1103 (Altria) at 007; RX0865 (Altria) at 012).

### **Response to Finding No. 314**

The proposed finding is misleading and contrary to the weight of the evidence as to the clause that indicates that S&BD had “declined to pursue” NEX Elite. Respondents fail to cite any evidence that expressly or implicitly states anyone declined to pursue NEX Elite—instead, Respondents cite evidence that Altria considered NEX Elite. (RX1103 (Altria) at 007; RX0865 (Altria) at 012).

## **3. FDA’s Endorsement Of The Continuum Of Risk Raised The Stakes**

315. In July 2017, as Altria was searching for an entry into the growing pod market, FDA embraced the continuum of risk as part of its comprehensive plan for nicotine regulation. (PX9058 (FDA) at 001; *see also supra* Part I.D.4).

### **Response to Finding No. 315**

The term “pod market” is vague and, to the extent that the proposed finding implies that Nu Mark’s cigalikes were not already competing with JLI’s pod-based products in the closed-system e-cigarette market, it is misleading and contrary to the weight of the evidence. (CCFF ¶¶ 299-350). The proposed finding is conclusory, unsupported by the cited evidence, misleading, and vague; the proposed finding makes inferential, misleading, and embellished leaps based on the FDA’s statement in the citation. (*See Responses to RPF 44-55*).

316. From Altria’s perspective, this “was a major policy statement by the agency at the time” and it “embraced the concept that . . . [people at Altria] had been working on” for a long time and that they “hoped was reflected in the Tobacco Control Act”—“the idea that there should be these alternative products.” (Murillo (Altria/JLI) Tr. 2906; *see also* Murillo (Altria/JLI) Tr. 2905-06 (explaining that announcement was “very significant” to the industry—it was the first time FDA “embraced a policy where you try to move people down th[e] continuum of risk” of tobacco products “rather than just banking on quitting”); Willard (Altria) Tr. 1337 (similar); Garnick (Altria) Tr. 1694-95 (similar)).

### **Response to Finding No. 316**

Complaint Counsel does not disagree.

317. As Willard explained, “this was a big step forward in the FDA signing on to help in an area where Altria had had a long-term strategy and . . . had mixed success, but it gave [Altria] hope for the future.” (Willard (Altria) Tr. 1337; *see also* Garnick (Altria) Tr. 1694-95). “[F]or the FDA to say it is now our primary strategy, or an important strategy, that these products get on the market and are used to switch adult cigarette smokers, that was very encouraging to [Altria] that [its] strategy may have greater potential in the future than it otherwise might [have],” (Willard (Altria) Tr. 1340), as a result of FDA “do[ing] what it could to foster this new market of noncombustible tobacco products,” (Garnick (Altria) Tr. 1695).

### **Response to Finding No. 317**

Complaint Counsel does not disagree.

## **4. Altria And JLI Had Initial, Exploratory Discussions In Mid- To Late-2017**

318. As 2017 progressed, Altria continued to view JLI as the most promising acquisition in the burgeoning market for pod-based devices. (RX0865 (Altria) at 013).

**Response to Finding No. 318**

The term “market for pod-based devices” is vague and, to the extent that the proposed finding implies that Nu Mark’s cigalikes were not already competing with JLI’s pod-based products in the closed-system e-cigarette market, it is misleading and contrary to the weight of the evidence. (CCFF ¶¶ 299-350). Furthermore, the proposed finding is unsupported by the citation to RX0865 (Altria) at 013, which lists “potentially attractive options,” including JUUL and CYNC, but CYNC is shaded lightly. This page does not support Respondents’ conclusion in the proposed finding that “Altria continued to view JLI as the most promising acquisition in the burgeoning market for pod-based devices.”

319. In late July, senior leaders from both companies met to discuss possibilities for collaboration. The meeting was attended by Riaz Valani and Zach Frankel, both members of JLI’s Board, and Isaac Pritzker, the son and business partner of JLI Board member and investor Nicholas Pritzker. Howard Willard, then COO, and Billy Gifford, then CFO, attended on behalf of Altria. (Valani (JLI) Tr. 902; RX1459 (JLI) at 001-02; *see also* PX1284 (Altria) at 018 (describing JLI meeting attendees)).

**Response to Finding No. 319**

The proposed finding is vague and misleading as to the discussion regarding any “collaboration.” The discussion between JLI and Altria was not simply regarding “collaboration”; Respondents cite RX1459 (JLI) at 001, which states, “Although they proposed an equity investment and collaboration on distribution, marketing, etc. they also intimated that they had done deals with every structure under the sun and were very open to discussing along other lines.”

320. According to Frankel’s notes from the meeting, Altria suggested that “there may be an opportunity where the two [companies] working together is highly complementary.” In particular, Altria could help with an assortment of services, including distribution, brand development, and “FDA + regulatory engagement as well as whole gov’t affairs org.” (RX1459 (JLI) at 003).

**Response to Finding No. 320**

The proposed finding relies on hearsay (“Frankel’s notes”) and, as such, should be disregarded or given little weight. The proposed finding is also vague as to what Frankel’s notes contemplate with the term “highly complementary,” particularly when Altria was the largest tobacco company in the U.S., (CCFF ¶ 119), and both Altria and JLI were competing head-to-head in the market for closed-system e-cigarettes. (CCFF ¶¶ 1417-92). The proposed finding is also incomplete and misleading because virtually all contemplated services were quickly terminated after the transaction. (CCFF ¶¶ 1880-83).

321. Altria also emphasized the importance of “combat[ing]” youth usage and detailed Altria’s youth prevention efforts across the tobacco industry, including its point-of-sales programs and how youth issues informed its approach to flavor development. (RX1459 (JLI) at 002).

#### **Response to Finding No. 321**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF ¶ 320. (See Response to RPF ¶ 320). Altria confirmed to investors that JLI did not take any of Altria’s services regarding youth usage as part of the transaction. (PX9018 (Altria) at 005 (“[W]e offered JUUL services related to underage tobacco prevention . . . JUUL has not accepted Altria’s offers of assistance in addressing youth related issues.”)). JLI was able to implement measures to restrict youth access to its products and address regulatory issues without help from Altria. (PX2098 (JLI) at 003 (JLI Fourth Quarter 2018 Earnings Call script)).

322. Isaac Pritzker’s takeaway was that Altria was not “sufficiently aware of growth and product advantage of Juul to create the conditions for a particularly favorable deal.” (RX1459 (JLI) at 001). But he added that he wanted to “switch every adult smoker in the world to Juul and then off nicotine entirely and [he was] reasonably open to how [JLI] accomplish[ed] that,” such as through a potential partnership with Altria. (RX1459 (JLI) at 001).

#### **Response to Finding No. 322**

The proposed finding is incomplete and misleading because it fails to include the full relevant quotes from Pritzker, who says in the cited email, “I wasn’t convinced they [Altria] were sufficiently aware of growth and product advantage of Juul to create the conditions for a

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particularly favorable deal. Not to mention, in light of the FDA announcement, I think there is a potential that their partnership could do more harm to our regulatory position than to help it.” (RX1459 (JLI) at 001). In addition, Pritzker stated that he was open to a potential partnership with Altria in the cited email, contrary to what the proposed finding indicates. (RX1459 (JLI) at 001).

323. In August 2017, Altria leadership informed the Board that the company was pursuing an investment in JLI, explaining that senior leaders had met with “key . . . investors” in JLI (then called Pax) but the discussions had remained high level, with JLI likely “favor[ing] a minority investment.” (PX1284 (Altria) at 018, 020).

### **Response to Finding No. 323**

The proposed finding is misleading and unsupported by the cited evidence. First, the statement that “the discussions had remained high level” is misleading and unsupported by the cited evidence. PX1284 does not address in sufficient detail what was discussed. Second, the last clause describing that “JLI likely ‘favor[ing] a minority investment’” is also misleading and unsupported—it is not clear if PX1284 (Altria) at 020 is describing Altria’s hypothesis or what was actually discussed between JLI and Altria.

### **5. In Late 2017, Nu Mark Took What It Could Get, Acquiring Elite And Cync, Its Third And Fourth Choices**

324. By mid-2017, Nu Mark was “in a very difficult situation.” (Schwartz (Altria) Tr. 1866). As Craig Schwartz, then the Senior Vice President of Operations at Nu Mark, summarized, Altria “only had a cigalike product in MarkTen XL. As uplifting as Commissioner Gottlieb’s comments were in July of 2017 with regards to the continuum of health risk, the rules by which you had to play by and compete in the United States were incredibly difficult,” as a result of the Deeming Rule. Altria found itself with “virtually nothing in [Nu Mark’s] pipeline, in-house pipeline, for [it] to sell. Cigalike was declining very quickly. The pod business was growing exponentially, driven by JUUL. And . . . [Altria was] getting [its] butt[] kicked week in and week out.” (Schwartz (Altria) Tr. 1866; *see also* PX7018 Schwartz (Altria) Dep. at 153 (characterizing Nu Mark as “far behind” its competition); PX7014 Baculis (Altria) Dep. at 145 (explaining that lack of pod product was a “significant gap in [Nu Mark’s] portfolio”); Begley (Altria) Tr. 1070 (similar)).

### **Response to Finding No. 324**

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The proposed finding is misleading, self-serving, and contrary to the weight of the evidence. The proposed finding is misleading and contrary to the weight of the evidence because it fails to mention that, in 2017, Begley told investors that MarkTen was sold in “about 65,000 stores and has nearly tripled its market share since 2014. It is now one of the leading e-vapor brands.” (CCFF ¶ 486; *see also* CCFF ¶ 1100). The first sentence of the proposed finding is also misleading because it fails to mention that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

325.

[REDACTED] }

#### **Response to Finding No. 325**

The proposed finding is vague and misleading for the reasons stated in response to RPF ¶ 302. (*See* Response to RPF ¶ 302). The proposed finding is also vague as to the timeframe being addressed, and vague and conclusory as to the description { [REDACTED] [REDACTED] }. To the extent that the proposed finding implies that Nu Mark’s cigalikes were not already competing with JLI’s pod-based products in the closed-system e-cigarette market, it is misleading and contrary to the weight of the evidence. (CCFF ¶¶ 299-350). Furthermore, the proposed finding is unreliable as it relies solely on the self-serving testimony of an Altria executive.

326. As a result, Altria acquired rights to its fallback choices, NEX Elite and Cync. (Begley (Altria) Tr. 1074-75; RX1103 (Altria) at 007; RX0865 (Altria) at 012; *see also* { [REDACTED] [REDACTED] }).

#### **Response to Finding No. 326**

The proposed finding is vague, misleading, and unsupported by the evidence as to the characterization of “fallback choices.”

327. Nu Mark viewed Elite as “the best of what was available at the time.” (Begley (Altria) Tr. 1075).

**Response to Finding No. 327**

The proposed finding is misleading. Although accurately quoted, Begley further testified that Nu Mark also acquired CYNOC because Nu Mark “thought multiple options in the pod-based space would be helpful.” (Begley (Altria) Tr. 1075).

328. Nu Mark licensed the exclusive right to commercialize NEX Elite from Smoore in late October 2017, for a sum of \$500,000. (Schwartz (Altria) Tr. 1862-63, 1868-69; PX7018 Schwartz (Altria) Dep. at 86; PX0032 (Altria) at 017).

**Response to Finding No. 328**

Complaint Counsel has no specific response.

329. Schwartz, who negotiated the acquisition of Elite with Smoore, was not aware of any other e-vapor companies that were interested in NEX Elite at the time. (Schwartz (Altria) Tr. 1867, 1869-70).

**Response to Finding No. 329**

The proposed finding is unreliable and misleading because it relies on self-serving, after-the-fact testimony of an Altria employee. { [REDACTED] } have licensed technology from Smoore. (CCFF ¶ 168 (*in camera*); CCFF ¶¶ 186, 193).

330. As Richard Jupe, the current head of Altria’s Product Development division, explained, Elite “was kind of the best of the worst type of thing. In other words, it’s what you could acquire. But the mind-set was to take that as a foundation, test it, learn from it, put it in the market, and then ultimately improve it over the medium term.” (Jupe (Altria) Tr. 2246).

**Response to Finding No. 330**

The proposed finding is unreliable and contrary to the weight of the evidence. { [REDACTED] } have licensed technology from Smoore. (CCFF ¶¶ 168, 186, 193). The proposed finding is unreliable because it relies solely on the self-serving, after-the-fact testimony from an

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Altria employee. The proposed finding is also contrary to the weight of the evidence: Begley testified that Altria hoped Elite would disrupt JUUL's growth, (CCFF ¶ 558), and Schwartz informed Altria's former Chairman that Elite was "showing promise" with "the best yet to come." (CCFF ¶ 1125). With respect to the last sentence of the proposed finding, Complaint Counsel agrees that Altria accelerated Elite's launch, (CCFF ¶¶ 570-71), and invested in improving Elite and in marketing it. (CCFF ¶¶ 559, 568, 1124, 1126, 1206-36, 1281-94).

331. Similarly, the Cync acquisition was a "strategic hedge." (RX0865 (Altria) at 023). Altria acquired Cync from a U.S.-based entrepreneur, (Schwartz (Altria) Tr. 1915), { [REDACTED] }. And Altria did so knowing that adult smoker "adoption" was one of the key strategic risks of the investment. (RX0865 (Altria) at 026).

### **Response to Finding No. 331**

The proposed finding is misleading because Begley testified that Nu Mark acquired CYNC because Nu Mark "thought multiple options in the pod-based space would be helpful." (Begley (Altria) Tr. 1075).

#### **6. In November 2017, Altria Highlighted To Its Investors Both FDA's Endorsement Of Reduced-Risk Products And The Shift Towards Pods**

332. In November 2017, shortly after acquiring both Elite and Cync, Altria held its Investor Day, a long-form event Altria generally hosts once "every two years" to "communicate with investors." (Willard (Altria) Tr. 1147; *see also* RX0176 (Altria)).

### **Response to Finding No. 332**

Complaint Counsel has no specific response.

333. Willard, who kicked off the harm-reduction section of the event, called attention to FDA's endorsement of the continuum of risk. (RX0176 (Altria) at 089, 94). Altria, he said, was "encouraged" by the distinction FDA drew between combustible and noncombustible products and FDA's stated goal of "encourag[ing] innovative, less harmful and satisfying non-combustible products for adults who need or want nicotine." (RX0176 (Altria) at 094 (internal quotation marks omitted)). In fact, as was discussed elsewhere in the presentation, the U.K.'s Royal College of Physicians estimated that e-vapor products are 95 percent less harmful than combustible cigarettes. (RX0176 (Altria) at 008, 076; *see also* Garnick (Altria) Tr. 1695).



**Response to Finding No. 333**

Complaint Counsel has no specific response.

334. “Successfully converting . . . adult smokers to [Altria’s] companies[’] non-combustible products,” Willard said, “represents a significant opportunity for both harm reduction and our business.” (RX0176 (Altria) at 011).

**Response to Finding No. 334**

Complaint Counsel has no specific response.

335. As Willard explained to Altria’s investors, FDA’s new policy aligned with Altria’s strategic objective regarding reduced-risk products: “We aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products.” (RX0176 (Altria) at 095). But, while this was “a strongly held future goal,” Altria had not yet achieved that aspiration. (Willard (Altria) Tr. 1340-41).

**Response to Finding No. 335**

Complaint Counsel does not disagree with the proposed finding except to clarify that

Willard made the statement quoted in RX0176 (Altria) at 095 in November 2017.

336. Later in the session, Begley – then General Manager of Nu Mark – offered investors an overview of Nu Mark’s position in the e-vapor category. (RX0176 (Altria) at 132).

**Response to Finding No. 336**

Complaint Counsel does not disagree.

337. Begley began by explaining that the market had evolved substantially since Nu Mark’s entry in 2013, thanks to “an influx of new competitors” and “new products,” as well as the “rise and fall of multiple leading brands.” (RX0176 (Altria) at 134). Five years in, he explained, the e-vapor category “consist[ed] of three primary product formats: cig-a[-]likes; closed tank products [Altria’s reference at the time to pod-based products, *see supra* ¶ 304]; and open tank systems.” (RX0176 (Altria) at 134, 137).

**Response to Finding No. 337**

The proposed finding is misleading and unsupported by the cited evidence as to Respondents’ clarification in brackets: “closed tank products [Altria’s reference at the time to pod-based products, *see supra* ¶ 304].” (*See* Response to RPF ¶ 304). The proposed finding is also vague as to the timing regarding Nu Mark’s entry. (*See* Response to RPF ¶ 276).

338. Begley indicated Nu Mark had made “substantial progress in the cig-a-like segment” through new product offerings, including MarkTen Bold, and expanding distribution. (RX0176 (Altria) at 141, 143, 149).

### **Response to Finding No. 338**

Complaint Counsel has no specific response.

339. Begley then addressed the emerging pod-based segment and noted that Nu Mark was seeking to “expand [its] access to additional products” through “strategic partnerships” and “evaluating various acquisition opportunities.” (RX0176 (Altria) at 152-53). Elite, which he described as a “small pod-based product that offers a variety of flavorful liquids in a modern, discrete device format,” was one example of that approach. (RX0176 (Altria) at 152). Cync, he added, was “an additional pod-based product” with “a variety of flavorful liquids.” (RX0176 (Altria) at 153).

### **Response to Finding No. 339**

The first sentence of the proposed finding is misleading. Begley actually said, “Nu Mark has been working to build strategic partnerships to expand our access to additional products and supply chain capabilities.” (RX0176 (Altria) at 152). Respondents failed to include the latter part of the quote about Altria’s efforts to expand its own supply chain capabilities.

340. Recognizing that “innovation can be achieved in multiple ways—through organic product development” and “through strategic partnerships and acquisitions”—Begley assessed that he “fully expect[ed] Nu Mark to achieve [its] long-term goal” of “lead[ing] the U.S. e-vapor category.” (RX0176 (Altria) at 136, 156). At the time, when Nu Mark’s pod acquisitions were in “early days” and not yet been launched on the market, he was “optimistic” that those products “would get some traction” and the company would have “some continued success with [its] cigalike formats.” (Begley (Altria) Tr. 979).

### **Response to Finding No. 340**

Complaint Counsel does not disagree with the proposed finding except to add relevant testimony from the trial that, in fact, Begley testified that he did believe that Nu Mark had a portfolio of products that could potentially compete in the future, though it was early days for a number of those products. (CCFF ¶ 99).

## **7. Meanwhile, Altria And JLI Continued To Explore A Possible Investment As JUUL Surged Toward Category Leadership**

341. By mid-November 2017, Altria’s budget projections for 2018 predicted that the pod/hybrid segment would grow by 55 million units compared to the latest estimate for 2017, while sales of cig-a-like products and open-system products would collectively decline by 25 million units “due to Hybrid growth.” (RX0188 (Altria) at 001, 026).

**Response to Finding No. 341**

The proposed finding is misleading and unsupported by the cited evidence. The proposed finding does not accurately describe the chart in RX0188 (Altria) at 026, which describes the “hybrid growth in MOC” by 55 million units 2018 compared to 2017, and a decrease in 25 million units in 2018 compared to 2017 in “open and closed systems due to growth in hybrid.” The terms “hybrid” and “open and closed system” are not defined in the cited evidence. The proposed finding is also misleading in that the cited evidence does not provide a breakdown of the projected declines in cigalikes versus open systems.

342. “Around this time, JUUL . . . was growing quite rapidly in both volume and market share” and “was the fastest growing product in the e-vapor category.” (Willard (Altria) Tr. 1341-42; *see also* Crozier (Sheetz) Tr. 1487 (explaining that JUUL “really took off” in the fall of 2017)).

**Response to Finding No. 342**

Complaint Counsel does not disagree with the proposed finding except to clarify that Willard was discussing the timeframe “around November 2017.” (Willard (Altria) Tr. 1341).

343. According to Begley, “the market dynamics clearly changed, and there appeared to be one format that was winning in the marketplace, which was pod-based product with nicotine salts, which primarily was JUUL.” (Begley (Altria) Tr. 1055).

**Response to Finding No. 343**

The proposed finding is unreliable because it cites only the self-serving testimony of an Altria executive. The proposed finding is misleading because it fails to note that other manufacturers continue to sell cigalike products in the marketplace. (CCFF ¶¶ 1173-76). The proposed finding is also misleading because it fails to note that other manufacturers continue to sell products without nicotine salts. (CCFF ¶¶ 1166-72).

344. { [REDACTED] }  
 [REDACTED]  
 [REDACTED] ; see also supra Part II.B.1).

**Response to Finding No. 344**

The proposed finding is misleading and unsupported by the cited evidence. (See Responses to RPF 240-49).

The first clause of the proposed finding is misleading because it does not include the entire quote, which explains that { [REDACTED]

[REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] }

The last clause in the proposed finding, { [REDACTED] }, is unsupported by the cited evidence. To the extent that the proposed finding stands for the proposition that Altria tracked the brand positions of the MarkTen and Vuse cigalike products against that of the JUUL pod-product, Complaint Counsel does not disagree.

345. Altria and JLI leadership met again in December 2017, this time at Altria’s offices in Richmond. Nicholas Pritzker joined Valani on behalf of JLI. Willard and Gifford represented Altria. (Pritzker (JLI) Tr. 772; PX1250 (Altria)).

**Response to Finding No. 345**

The proposed finding is misleading and unsupported by the cited evidence.

The proposed finding is misleading because Respondents omit that there were additional meetings between JLI and Altria before the end of 2017. After Valani (JLI) and Gifford (Altria) were introduced in June 2017, Devitre (Altria) met with Valani “quite a few” times in 2017, “maybe two or three times a month.” (CCFF ¶ 634). After JLI’s Valani first met in person with Altria’s Willard and Gifford in July 2017, and Valani met with them two more times before the end of 2017. (CCFF ¶ 635).

The proposed finding is unsupported by Respondents citations as to the specific meeting in December 2017. Pritzker did not testify the meeting occurred in December 2017, (Pritzker (JLI) Tr. 772), and the cited exhibit, PX1250, an internal Altria presentation, does not confirm a meeting between JLI and Altria occurred in December 2017.

However, Complaint Counsel does not disagree that Pritzker testified about a meeting in Q4 2017 with Valani (JLI), Willard (Altria), and Gifford at Altria’s offices. (CCFF ¶ 636). At this meeting in Q4 of 2017, Altria suggested purchasing all of JLI’s domestic business. (CCFF ¶ 637). Complaint Counsel also does not disagree that on December 15, 2017, Willard and Gifford met with Valani and Pritzker. (CCFF ¶ 638). Afterwards, Altria’s PWP adviser Wappler exchanged emails with JLI’s Goldman Sachs adviser Gross regarding continuing discussions. (CCFF ¶ 638).

346. Within Altria, the negotiations for a potential investment in JLI were known by the code-name “Project Tree.” (Begley (Altria) Tr. 1007-08).

#### **Response to Finding No. 346**

Complaint Counsel does not disagree.

347. During the December 2017 meeting, Altria again emphasized the capabilities that it could deploy to promote JLI’s success, including “Regulatory Capabilities” and “Underage Tobacco Prevention.” (PX1250 (Altria) at 005). On the regulatory side, Altria emphasized the “complexity” of a PMTA, sharing its views on the necessary components and studies, and highlighting its experience with product submissions and interfacing with FDA. (PX1250 (Altria) at 026-27).

#### **Response to Finding No. 347**

The proposed finding is misleading and unsupported by the cited evidence as to the December 2017 meeting. (*See* Response to RPF ¶ 345).

348. Pritzker recalls Altria “indicat[ing] that [it] could be helpful to JLI” in these early meetings, including in the PMTA process, “which was an intriguing idea.” (Pritzker (JLI) Tr. 775-76).

#### **Response to Finding No. 348**

The proposed finding is vague as to the timeframe being addressed by the “early meetings.”

349. At the time, Altria was proposing to buy 100 percent of the domestic side of JLI for \$4-5 billion. (Pritzker (JLI) Tr. 773-75).

#### **Response to Finding No. 349**

The proposed finding is vague as to the time frame being addressed. However, Complaint Counsel does not disagree that Pritzker testified about a meeting in Q4 2017 with Valani (JLI), Willard (Altria) and Gifford at Altria’s offices. (CCFF ¶ 636). At this meeting in Q4 of 2017, Altria suggested purchasing all of JLI’s domestic business. (CCFF ¶ 637).

350. Although Pritzker had reservations about splitting the company, the JLI Board “was interested in hearing more” and formed a Strategic Committee, composed of Valani and Pritzker, “to continue conversations.” (Pritzker (JLI) Tr. 775-76).

#### **Response to Finding No. 350**

Complaint Counsel does not disagree.

### **B. In Late 2017, Altria’s Scientists Identified Technical Problems With Nu Mark’s Products**

#### **1. MarkTen Cig-A-Like Dry Puffing**

351. As these conversations with JLI were taking place, Altria was working on the PMTAs for its e-vapor products and to its dismay finding new issues that jeopardized the products’ PMTAs. One of these problems identified by Altria scientists was called “dry puffing.” (Jupe (Altria) Tr. 2303-04, 2237; PX7015 Gogova (Altria) Dep. at 96-97). Dry puffing is a phenomenon that occurs when a closed system’s cartridge begins to run out of e-liquid at the end of its life. The remaining e-liquid overheats, which results in the generation of aldehydes, particularly formaldehyde. (Jupe (Altria) Tr. 2303-04, 2237; PX7015 Gogova (Altria) Dep. at 90-91; PX4149 (Altria) at 033; King (PMI) Tr. 2351).

**Response to Finding No. 351**

The proposed finding is unsupported by the cited evidence, vague, incomplete, and contrary to the weight of the evidence.

To the extent that the first sentence of the proposed finding claims that Altria was “finding new issues that jeopardized the products’ PMTAs,” the sentence is unsupported in that it cites no evidence in the record. The first sentence of the proposed finding is also vague and incomplete because it does not specify what these “new issues” were and does not identify which “e-vapor products” had issues and when those issues were discovered.

To the extent that the proposed finding refers to MarkTen cigalike products having a “dry puffing” issue that “jeopardized the products’ PMTAs”, the proposed finding is contrary to the weight of the evidence because the FDA has not specified a prohibited level of formaldehyde-production for e-cigarette products seeking PMTA approval and assesses toxicological risks holistically, meaning that Altria could not have known what the impact of formaldehyde generation would have been on its PMTA relative to other factors. (CCFF ¶ 1275). Moreover, in June 2018, Altria prepared a JUUL “Book of Knowledge,” which identified JUUL as producing similar amounts of formaldehyde (per puff) as MarkTen in testing. (CCFF ¶ 1231). Dr. Gardner testified that this level of formaldehyde production was “good.” (CCFF ¶ 1231). The proposed finding is also incomplete and misleading because it ignores that Altria developed a replacement battery for its MarkTen cigalike products, the BVR 2.8, which used “dry puff prevention” to address the products’ formaldehyde generation issue and that studies showed the BVR 2.8 was successful in reducing formaldehyde levels in the MarkTen cigalike. (CCFF ¶¶ 1277-78).

To the extent that the proposed finding claims that Altria was “working on the PMTAs for its e-vapor products” in late 2017 “while conversations with JLI were taking place,” Complaint Counsel does not disagree.

To the extent that the proposed finding claims that “[d]ry puffing is a phenomenon that occurs when a closed system’s cartridge begins to run out of e-liquid at the end of its life” and “[t]he remaining e-liquid overheats, which results in the generation of aldehydes, particularly formaldehyde,” Complaint Counsel has no specific response.

352. “Aldehydes” are a class of compounds, with formaldehyde being the most common and the simplest. (Gardner (Altria) Tr. 2574-75). Altria sometimes used the terms “aldehyde” and “formaldehyde” interchangeably. (Gardner (Altria) Tr. 2575).

#### **Response to Finding No. 352**

Complaint Counsel has no specific response.

353. “Formaldehyde” is the particular compound “most likely to increase with thermal decomposition.” (Gardner (Altria) Tr. 2575).

#### **Response to Finding No. 353**

Complaint Counsel has no specific response.

354. Formaldehyde is a carcinogen. (Gardner (Altria) Tr. 2562; Willard (Altria) Tr. 1423).

#### **Response to Finding No. 354**

Complaint Counsel has no specific response.

355. Altria’s scientists discovered that the MarkTen cig-a-like had a dry puffing problem in late 2017, when it “learned how the adult smokers used the MarkTen cigalike product.” (Gardner (Altria) Tr. 2569-70; *see also* RX0817 (Altria) at 003, 012).

#### **Response to Finding No. 355**

The proposed finding is incomplete and unsupported by the cited evidence. To the extent that the proposed finding claims that Altria “learned how the adult smokers used the MarkTen cigalike product,” the finding is incomplete and unsupported by the cited evidence because neither



the finding, nor the cited evidence, explain how adult smokers used the MarkTen cigalike product, how Altria determined the information, who was responsible for determining the information, the reliability of the source of the information, or the methodology used to make the determination. (RX0817 (Altria) at 003, 012). The proposed finding is also incomplete and misleading because it ignores that Altria developed a replacement battery for its MarkTen cigalike products, the BVR 2.8, which had “dry puff prevention” capabilities. (CCFF ¶ 1277).

356. Previously, Altria had tested the MarkTen cig-a-like using an “intense” puffing regime, which it believed to be the “conservative” testing approach. Under “intense” puffing conditions, the MarkTen cig-a-like generated “very low formaldehyde levels.” (PX7000 Garnick (Altria) Dep. at 122-23; *see also* RX0817 (Altria) at 010-11).

#### **Response to Finding No. 356**

Complaint Counsel has no specific response.

357. But once MarkTen cig-a-like was on the market, Altria “started to run tests to study how people actually used the product, and [it] discovered that people actually engaged in moderate puffing. Not intense puffing.” (PX7000 Garnick (Altria) Dep. at 123).

#### **Response to Finding No. 357**

This proposed finding is unreliable because it solely relies on the self-interested testimony of one Altria executive. Moreover, this proposed finding is unreliable because these supposed tests “to study how people actually used the product” are not part of the evidentiary record.

358. Altria accordingly began to re-run “the same kind of tests” using a “moderate puffing” regime rather than intense. (PX7000 Garnick (Altria) Dep. at 123; *see also* RX0817 (Altria) at 004 (noting intense puffing studies were performed “throughout development and stability studies” while non-intense puffing studies were not performed until “PMTA stability studies at 6 months of product age”)).

#### **Response to Finding No. 358**

This proposed finding is unreliable to the extent that it relies on the self-interested testimony of one Altria executive. Moreover, this proposed finding is unreliable because these supposed tests are not part of the evidentiary record.

359. These new studies revealed that under non-intense puffing conditions, MarkTen cig-a-like's formaldehyde yields through the life of the cartridge "were higher than expected and higher than other products in the market," and "were similar to a cigarette." (Gardner (Altria) Tr. 2569-70; *see also* RX0817 (Altria) at 012-13).

### **Response to Finding No. 359**

The proposed finding unsupported by the cited evidence, misleading, and contradicted by the cited exhibit.

To the extent that proposed finding relies on the cited exhibit to support the claim that "MarkTen cig-a-like's formaldehyde yields through the life of the cartridge . . . 'were higher than expected,'" the finding is unsupported because the cited exhibit does not include expected results. (RX0817 (Altria) at 012-13).

To the extent that the proposed finding replies on the cited exhibit to support the claim that "MarkTen cig-a-like's formaldehyde yields through the life of the cartridge . . . 'were similar to a cigarette,'" the proposed finding is misleading and contradicted by the cited exhibit, which depicts the results of a study comparing the formaldehyde yields of an entire cartridge of various MarkTen cigalike flavors to two baselines, "ISO: 16 cigs per day" and "Health Canada Intense: 16 cigs per day," and the data shows that most flavors of MarkTen cigalike yielded less formaldehyde than the more stringent "ISO" baseline and that all flavors of MarkTen yielded less formaldehyde than the "Health Canada" baseline. (RX0817 (Altria) at 012). Even when doubling the formaldehyde by comparing two cartridges per day to each baseline, three flavors of MarkTen yielded less formaldehyde than the more stringent "ISO" baseline and all but one flavor yielded less formaldehyde than the "Health Canada" baseline. (RX0817 (Altria) at 012).

The proposed finding is contradicted by the cited evidence and Respondents' other proposed findings because the cited evidence indicates that formaldehyde yields for MarkTen's menthol flavor under the "Non-Intense" puffing condition were comparable to the formaldehyde

yield for MarkTen’s “Smooth Menthol” flavor under the “Intense” puffing condition, (*compare* RX0817 (Altria) at 010 *with* RX0817 (Altria) at 012), and Respondents’ claim in another proposed finding that the yields for MarkTen’s products under the “Intense” puffing condition represented “very low formaldehyde levels,” (RPF ¶ 356)), so at least one flavor of MarkTen yielded “very low” formaldehyde levels under both conditions.

360. Dry puffing was not an acute health risk, but it was a serious regulatory problem that threatened Altria’s ability to obtain FDA approval. (Jupe (Altria) Tr. 2237-38; *see also* PX7027 Murillo (Altria/JLI) Dep. at 115 (dry puffing represented a “tremendous risk” for the MarkTen cig-a-like PMTA)).

### **Response to Finding No. 360**

The proposed finding is incomplete, misleading, unsupported by the cited evidence, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “[d]ry puffing . . . was a serious regulatory problem that threatened Altria’s ability to obtain FDA approval,” the proposed finding is incomplete, misleading, and unsupported by the cited evidence. When asked whether MarkTen’s dry puffing problem “would jeopardize PMTA approval,” Richard Jupe merely testified that there was “no precedent set” and that based on “the high bar that the agency had already established on other products . . . this was a real concern.” (Jupe (Altria) Tr. 2238).

To the extent that the proposed finding claims that “[d]ry puffing . . . was a serious regulatory problem that threatened Altria’s ability to obtain FDA approval,” the proposed finding is also contrary to the weight of the evidence because the FDA has not specified a prohibited level of formaldehyde-production for e-cigarette products seeking PMTA approval and assesses toxicological risks holistically, meaning that Altria could not have known what the impact of formaldehyde generation would have been on its PMTA relative to other factors. (CCFF ¶ 1275). Moreover, in June 2018, Altria prepared a JUUL “Book of Knowledge,” which identified JUUL

as producing similar amounts of formaldehyde (per puff) as MarkTen in testing. (CCFF ¶ 1231). Dr. Gardner testified that this level of formaldehyde production was “good.” (CCFF ¶ 1231).

The proposed finding is also incomplete and misleading because it ignores that Altria also developed a replacement battery for its MarkTen cigalike products, the BVR 2.8, which used “dry puff prevention” to address the products’ formaldehyde generation issue and that studies showed the BVR 2.8 was successful at reducing formaldehyde in the MarkTen cigalike. (CCFF ¶ 1277).

To the extent that the proposed finding claims that “[d]ry puffing was not an acute health risk,” Complaint Counsel has no specific response.

361. “[T]he only products that seemed to be having issues with aldehyde generation, other than MarkTen, were V2 and Logic.” (PX7007 Murillo (Altria/JLI) IHT at 163-64). Other e-vapor products “including JUUL and [Reynolds’s] products,” (Garnick (Altria) Tr. 1633-64), had “dry puff prevention or temperature control, so their formaldehyde levels stayed low throughout the life of the product,” (Gardner (Altria) Tr. 2567; *see also* PX7026 Gardner (Altria) Dep. at 37-38; PX4149 (Altria) at 034; PX1247 (Altria) at 009; RX0642 (Altria) at 006; RX0631 (Altria) at 006).

### **Response to Finding No. 361**

The proposed finding is unsupported by the cited evidence, incomplete, misleading, and unreliable.

To the extent that the proposed finding claims that “the only products that seemed to be having issues with aldehyde generation, other than MarkTen, were V2 and Logic,” the proposed finding is unsupported, incomplete, and misleading because the cited evidence consists of testimony referring to a slide in a presentation that only depicts study results for six of the fourteen flavors of MarkTen (meaning that data for most MarkTen flavors was omitted) and six competing e-vapor product flavors (meaning that data for most competing products was omitted). (*Compare* PX1407 (Altria) at 007 (cited by PX7007 (Murillo (Altria/JLI) IHT at 163-64)) *with* CCFF ¶ 1179).

To the extent that the proposed finding claims that “Other e-vapor products ‘including JUUL and [Reynolds’s] products,’ . . . had ‘dry puff prevention or temperature control, so their

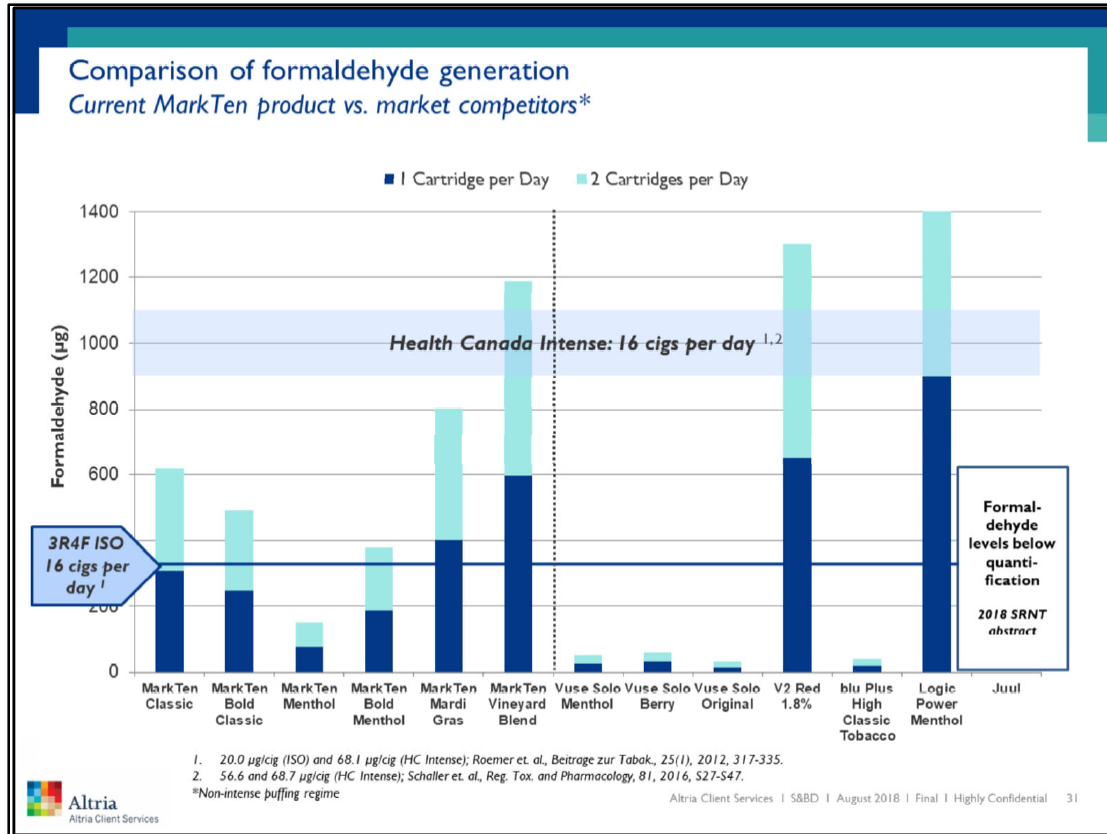
formaldehyde levels stayed low throughout the life of the product,” the finding is incomplete, misleading, and unsupported by the cited exhibits.

The proposed finding is incomplete and thus misleading because it ignores that Altria developed a replacement battery for its MarkTen cigalike products, the BVR 2.8, which used “dry puff prevention” to address the products’ formaldehyde generation issue and that studies showed the BVR 2.8 was successful in reducing formaldehyde levels in the MarkTen cigalike. (CCFF ¶¶ 1277-78).

The proposed finding is incomplete, and thus misleading, because neither the finding, nor the cited testimony, cite formaldehyde generation levels for the referenced e-vapor products or explain the degree to which the “other products” referenced are representative of competing e-vapor products.

The proposed finding is unreliable and unsupported by the cited exhibits (which consist of four copies of the same identical slide) because the cited slide compares test results for only six of fourteen flavors of MarkTen cigalike and only seven competing e-vapor products. (*Compare* PX4149 (Altria) at 034 *with* CCFF ¶ 1179).

362. This chart from an internal Altria presentation demonstrates MarkTen cig-a-like’s elevated formaldehyde levels compared to other e-vapor products as well as cigarettes:



(PX4149 (Altria) at 034; see also PX1247 (Altria) at 009 (same chart)).

**Response to Finding No. 362**

The proposed finding is incomplete, unreliable, misleading, and contradicted by the cited evidence.

The proposed finding is incomplete, and thus unreliable, because the underlying chart compares test results for only six of fourteen flavors of MarkTen cigalike and only seven competing e-vapor products. (Compare PX4149 (Altria) at 034 with CCF ¶ 1179).

The proposed finding is incomplete and thus misleading because the underlying chart fails to note that Altria developed a replacement battery for its MarkTen cigalike products, the BVR 2.8, which used “dry puff prevention” to address the products’ formaldehyde generation issue and

that studies showed the BVR 2.8 was successful in reducing formaldehyde levels in the MarkTen cigalike. (CCFF ¶¶ 1277-78).

To the extent that the proposed finding claims that the cited chart “demonstrates MarkTen cig-a-like’s elevated formaldehyde levels compared to other e-vapor products as well as cigarettes,” the proposed finding is unsupported and contradicted by the cited exhibit, which depicts the results of a study comparing the formaldehyde yields of an entire cartridge of various MarkTen cigalike flavors to two baselines, “ISO: 16 cigs per day” and “Health Canada Intense: 16 cigs per day,” and the data shows that most flavors of MarkTen cigalike yielded less formaldehyde than the more stringent “ISO” baseline and that all flavors of MarkTen yielded less formaldehyde than the “Health Canada” baseline. Even when doubling the formaldehyde yield by comparing two cartridges per day of each MarkTen cigalike flavor to each baseline, one flavor of MarkTen cigalike yielded less formaldehyde than the more stringent “ISO” baseline and all but one flavor yielded less formaldehyde than the “Health Canada” baseline. (RX0817 (Altria) at 012).

363. As this chart makes clear, MarkTen cig-a-like fared poorly in a comparison of its formaldehyde levels through the end of the cartridge to those of other e-vapor products (as would be required as part of FDA’s PMTA review, *see supra* ¶¶ 66-70). (Garnick (Altria) Tr. 1604-05 (discussing PX1247 (Altria) and explaining that in evaluating risk reduction, FDA would compare an e-vapor product both to cigarettes and to “other products of the same category”)).

### **Response to Finding No. 363**

The proposed finding is unreliable, incomplete, misleading, and contradicted by the cited evidence.

To the extent that the proposed finding claims that “[a]s this chart makes clear, MarkTen cig-a-like fared poorly in a comparison of its formaldehyde levels through the end of the cartridge to those of other e-vapor products,” the proposed finding is unreliable, incomplete, misleading,

and contradicted by the cited evidence for the reasons cited above in response to RPPF ¶ 362. (*See* Response to RPPF ¶ 362).

To the extent that the proposed finding relies on testimony from Altria's general counsel, Murray Garnick, "discussing PX1247 (Altria) and explaining that in evaluating risk reduction, FDA would compare an e-vapor product . . . to 'other products of the same category,'" the proposed finding is contradicted by the cited testimony and unsupported by the cited exhibit. The cited testimony indicates that "[Altria] also believed that substantial reduction compared to other products of the same category was also important," not that a comparison to other products was something that the FDA would consider as part of the PMTA process. (Garnick (Altria) Tr. 1604-05). The cited exhibit only refers to the "substantial reduction in individual health risk versus cigarettes," and does not discuss "other products of the same category." (PX1247 (Altria) at 005).

To the extent that the proposed finding claims that it was "required as part of FDA's PMTA review" that "MarkTen cig-a-like fared poorly in a comparison of its formaldehyde levels through the end of the cartridge to those of other e-vapor products," the proposed finding is vague and unsupported by the cited evidence, which concerns the FDA's prohibitions on deemed product modifications, an unrelated topic.

To the extent that the proposed finding claims that "in evaluating risk reduction, FDA would compare an e-vapor product . . . to cigarettes," Complaint counsel has no specific response.

364. As of the end of 2017, Altria's senior management did not understand the full scope of the dry puff problem. (Garnick (Altria) Tr. 1728).

#### **Response to Finding No. 364**

The proposed finding is vague, misleading, and unsupported by the cited evidence.

The proposed finding is vague because the term "senior management" does not identify the Altria executives to which it refers.



The proposed finding is misleading and unsupported by the cited evidence, which merely consists of testimony from Murray Garnick about his own knowledge and awareness of the dry puff problem, not the knowledge and awareness of Altria's senior management generally. (Garnick (Altria) Tr. 1728).

## **2. Elite Dry Puffing**

365. In December 2017, Altria discovered that Elite also had a dry puff problem, similar to that of the MarkTen cig-a-like. (RX0825 (Altria) at 001).

### **Response to Finding No. 365**

The proposed finding is unsupported by the cited evidence and contrary to the weight of the evidence.

To the extent that the proposed finding claims that "Altria discovered that Elite also had a dry puff problem," the proposed finding is unsupported by the cited evidence because the cover email's commentary on the results of the attached analysis indicates that the analysis was inconclusive or preliminary, "The carbonyl results were not reported as I wanted, so it is unclear if the trends in elevated results are over weighted by the puff block of 101-150. I was expecting carbonyl results for three puff blocks per replicate (1-50, 51-100, 101-150+)." (RX0825 (Altria) at 001).

To the extent that the proposed finding claims that "Elite had a dry puff problem, similar to that of the MarkTen cig-a-like," the proposed finding is unsupported by the cited exhibit because, while the exhibit identifies formaldehyde production levels for Nex Elite, it is not clear that the results, methodology, or conditions of the cited analysis are comparable to similar tests done on MarkTen cigalike.

To the extent that the proposed finding implies that the purported formaldehyde generation problem in MarkTen Elite persisted or was incapable of being addressed, the proposed finding is

contrary to the weight of the evidence. In the third quarter of 2018, Altria implemented a new gasket in MarkTen Elite without receiving a marketing order from the FDA, the c1A gasket, which reduced formaldehyde generation in the product. (CCFF ¶¶ 1215-17, 1228-30). Altria was also developing an improved version of MarkTen Elite, MarkTen Elite 2.0, with “limited carbonyl formation” and “a new battery system . . . to address formaldehyde generation.” (CCFF ¶¶ 1289, 1293). Altria planned to seek PMTA approval for MarkTen Elite 2.0 while MarkTen Elite was still in the market. (CCFF ¶¶ 1295-300).

366. When Altria acquired rights to commercialize Elite in the fall of 2017, Elite “didn’t have dry puff [prevention]. So the potential for formaldehyde was the same as it was for [other] e-vapor products” without such technology. (Jupe (Altria) Tr. 2305-06; *see also* PX7017 Magness (Altria) Dep. at 104 (“Elite . . . was missing the temperature control feature that [Altria] had come to deeply appreciate was critical to reducing formation of certain constituents that are of concern, including formaldehyde[.]”); Gardner (Altria) Tr. 2562-63 (similar)).

### **Response to Finding No. 366**

The proposed finding is incomplete and misleading.

To the extent that the proposed finding claims that, because MarkTen Elite did not have dry puff prevention, “the potential for formaldehyde was the same as it was for [other] e-vapor products’ without such technology,” the proposed finding is incomplete and misleading because the finding merely suggests that the product had the “potential for formaldehyde,” not that MarkTen Elite actually generated formaldehyde to any significant degree, let alone to a degree that could impact the product’s PMTA.

In the cited testimony, immediately after stating that “the potential for formaldehyde [in Elite] was the same as it was for e-vapor products,” Jupe testified “[w]e still had not finished all the testing on materials, which needed to be completed.” (Jupe (Altria) Tr. 2306).

Similarly, the cited tested testimony from Magness merely states that “Elite 1.0 was missing the temperature control feature that we had come to deeply appreciate was critical to

reducing formation of . . . formaldehyde,” (PX7017 Magness (Altria) Dep. at 104), and Dr. Gardner testified that “dry puff . . . could lead to the generation of . . . formaldehyde,” (Gardner (Altria) Tr. 2562-63), not that MarkTen Elite actually generated formaldehyde to any significant degree for the purposes of its PMTA.

The proposed finding is also incomplete because Respondents do not cite to any studies or tests showing actual formaldehyde generation in the commercialized version MarkTen Elite under different conditions or relative to cigarettes.

The proposed finding is also incomplete and thus misleading because it fails to mention that Altria was also developing an improved version of MarkTen Elite, MarkTen Elite 2.0, with “limited carbonyl formation” and “a new battery system . . . to address formaldehyde generation.” (CCFF ¶¶ 1289, 1293).

To the extent that the proposed finding claims that “[w]hen Altria acquired rights to commercialize Elite in the fall of 2017, Elite ‘didn’t have dry puff [prevention]. . .’” Complaint Counsel has no specific response.

367. Initial scientific testing of Elite’s formulations conducted soon after the product’s acquisition indicated that some “devices delivered low aerosol mass and high formaldehyde results.” (RX0825 (Altria) at 001).

### **Response to Finding No. 367**

The proposed finding is unsupported by the cited evidence and contrary to the weight of the evidence for the reasons cited in response to RPF ¶ 365. (*See* Response to RPF ¶ 365).

To the extent that the proposed finding implies a relationship between lack of temperature control in MarkTen Elite, dry puffing, and the finding that “some ‘devices delivered low aerosol mass and high formaldehyde results,’” the proposed finding is contradicted by the cited evidence because the cited exhibit attributes that result not to dry puffing, but to “an assembly issue.” (RX0825 (Altria) at 001).

**C. Despite Elite’s Limitations, Nu Mark Rushed The Product To Market Because It Was Desperate For A Pod-Based Offering**

**1. Unable To Modify Elite, Nu Mark Aimed To Launch It Within Four Months**

368. Despite a dawning awareness of Elite’s design flaws, “[m]arketplace and consumer dynamics demonstrate[d] [an] urgent need to compete beyond the cig-a-like category.” (RX1292 (Altria) at 055). As Schwartz explained at trial, “[t]here was a lot of urgency for [Altria] to be able to play in that [pod-based] space.” (Schwartz (Altria) Tr. 1871).

**Response to Finding No. 368**

The proposed finding is vague, incomplete, and misleading. It is vague as to the phrase “dawning awareness of Elite’s design flaws.” Before Altria launched MarkTen Elite, Nu Mark’s operations deemed MarkTen Elite’s level of leaking “unacceptable,” but Altria still launched the product on February 26, 2018. (CCFF ¶ 1207). Moreover, the reference to “Elite’s design flaws” is incomplete and misleading to the extent that it implies leaking pods were unique to MarkTen Elite. In fact, as Schwartz testified, “... All Pods leaked” including the JUUL Pods that Altria looked at. (Schwartz (Altria) Tr. 1885). Schwartz even sent an email to Altria management, including top decision-makers, to inform them that “even the market leader, JUUL, is having issued with leaking pods ....” (CCFF ¶¶ 1203-05, 1222, 1485-88). JLI’s Robbins testified that leaking pods is a problem, and that he was aware of leaking and spitting issues with JUUL products. (CCFF ¶ 1485).

The proposed finding is also incomplete and misleading in that, shortly before withdrawing MarkTen Elite from the market, Altria made a product change to Elite to address the leaking issue, leaving it little time to assess the impact of the improvement on Elite’s sales performance. (CCFF ¶¶ 1149, 1206-18; PX1567 (Altria) at 001 (email dated Oct. 22, 2018) (“As of today, the entire PW network has been converted over to the C1A gasket. Inventory durations are in a healthy position with additional production in transit.”)).

369. Elite still was seen as a better product than Nu Mark’s only other pod-based possibility, Cync, which “had some product issues that [Altria] needed to address before [it] rolled that out.” (Begley (Altria) Tr. 1097). In addition to “many of the same temperature control problems as the other products,” Cync also had nickel components, which created “a risk of acute chronic nickel poisoning.” (Garnick (Altria) Tr. 1743). As a result, Nu Mark “never put it on the market.” (Garnick (Altria) Tr. 1743; *see also* PX4149 (Altria) at 093 (indicating Cync launch was “on [h]old” due to problems like “[a]cute battery hazard,” “[a]cute toxicological risk due to nickel components,” and “[f]ailed child resistance testing”)).

### **Response to Finding No. 369**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence in that it suggests that Elite and CYNC were the only two pod-based products sold by Nu Mark. In fact, Nu Mark also sold APEX, a pod-based product licensed from PMI. (CCFF ¶ 1623). APEX met the FDA’s August 2016 deeming deadline, (CCFF ¶ 1624), and was viewed by Altria as a promising product. (CCFF ¶¶ 1626-35). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

Until October 25, 2018, Altria, through Nu Mark, sold the MarkTen Elite and APEX pod-based products. (CCFF ¶ 129).

In addition, Altria still thought CYNC had some potential to be a viable product. In August 2018, Altria’s Crosthwaite forwarded a presentation to senior executives, including Gifford and Garnick, summarizing Altria’s “Plan B” options in the event that the JLI transaction did not work out. (CCFF ¶ 1719). The presentation noted that “Project Tree is Altria’s top priority for achieving a leadership position in e-vapor,” and that “Altria should have a strong ‘plan B’ in the event that Project Tree is not actionable.” (CCFF ¶ 1719). Some of the “Plan B” options included NJOY with CYNC or other pod-based systems. (CCFF ¶¶ 1719, 1721). Moreover, { [REDACTED]

██████████ } Nu Mark expected to ‘moderate’ their investment in MarkTen in 2018 as focus shifted toward launching other e-vapor products such as CYNC, APEX, and VIM in the future. (CCFF ¶ 565).

More broadly, the proposed finding is also misleading and contrary to the weight of the evidence to the extent that it omits that Altria’s ongoing strategy was to build a portfolio of e-vapor products, and that, prior to the transaction, it was developing a pipeline of products with which it could compete in the future. (CCFF ¶¶ 444-54).

370. With no other hand to play, and no ability to make changes to any predicate product, Nu Mark worked to launch Elite as quickly as possible. (Begley (Altria) Tr. 990; PX7014 Baculis (Altria) Dep. at 133; PX1113 (Altria) at 027 (indicating that Altria had rushed Elite to market with “[e]xceptional speed”).

### **Response to Finding No. 370**

The proposed finding is misleading and contrary to the weight of the evidence. The statement that Altria had “no other hand to play” than Elite is misleading and contrary to the weight of the evidence, because Altria also sold APEX, a pod-based product licensed from PMI, which was a promising product. (*See* Response to RPF ¶ 369). Further, the statement that Nu Mark had “no ability to make changes to any predicate product” is also misleading and contrary to the weight of the evidence. In fact, Altria did design and implement a gasket change in Elite that improved the product’s performance, (CCFF ¶¶ 1206-34), and planned other product improvements. (CCFF ¶¶ 1235-36). Additionally, JLI made changes to its products that were currently on the market, ██████████ } ; *see also* CCFF ¶¶ 1204-05).

371. Normally, commercializing a product can take a year or more. (Schwartz (Altria) Tr. 1870).

### **Response to Finding No. 371**

Complaint Counsel has no specific response, except that the proposed finding is vague as to the meaning of the term “commercializing.”

372. But in light of the urgent need for a pod-based product, Nu Mark resolved to go faster, initially targeting a May/June 2018 launch. (PX1647 (Altria) at 004). Altria’s management was not satisfied with even that accelerated schedule and asked the Nu Mark team if it could “do better.” (PX1647 (Altria) at 004). As a result, the operations team developed plans to accelerate the launch from May to February 2018—fewer than four months after the acquisition. (Schwartz (Altria) Tr. 1870-71; PX1647 (Altria) at 005).

### **Response to Finding No. 372**

The proposed finding is incomplete and misleading to the extent that it fails to acknowledge that Altria had the incentive and the ability to get an e-vapor product on the market quickly. (See CCF ¶¶ 427-32, 447-54, 493-514).

#### **2. In Early 2018, Consumer Research Confirmed That Elite Was Ill-Suited To Delivering The Nicotine Satisfaction Necessary To Convert Cigarette Smokers**

373. While Nu Mark’s operations team was scaling up manufacturing and preparing its distribution network to receive Elite, the consumer research team undertook to learn more about the pod-based products Altria had just bought. (PX4075 (Altria) at 001; RX2015 (Altria) at 001).

### **Response to Finding No. 373**

Complaint Counsel has no specific response.

374. Nu Mark’s “general practice for many of [its] new products” was to conduct an “extended home use study,” in which participants were paid to take the product home, use it for several weeks, and provide feedback. (Begley (Altria) Tr. 1097-98). Nu Mark viewed the results of this study as a potential indication of how a product might perform in the marketplace. (Begley (Altria) Tr. 1098; *see also* PX7014 Baculis (Altria) Dep. at 300-01 (“A home use test could give you an indication that a product might be successful in the market, but it is not really very predictive.”)).

### **Response to Finding No. 374**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable because it relies only on the self-serving testimony of Altria executives. It is also misleading and contrary to the weight of the evidence in that it understates the importance Altria

attached to home use studies, and fails to account for the contemporaneous business documents that show that Altria relied on the home use test for Elite. In fact, the results of the home use test (“HUT”) study were reported to the Altria board, included in strategic planning presentations, and relied upon by senior managers at Altria and Nu Mark. On May 1, 2018, Schwartz wrote that Altria’s HUT study results “confirm[ed] we [Altria] have a good horse in the race that truly merits incenting Trial at all levels / channels.” (CCFF ¶ 1312). Begley, whose trial testimony the proposed finding cites, reported the results of the MarkTen Elite HUT to CEO Willard, writing “Encouraging results!” and promising to send the “full set of data in a separate email.” (PX4075 (Altria) at 001; Begley (Altria) Tr. 987-88). The results of the HUT were also included in Nu Mark’s 2018 Long-Term Strategic Planning Meeting dated February 7, 2018. (PX4033 (Altria) at 017; Begley (Altria) Tr. 988-89). On August 8, 2018, Baculis, whose testimony the proposed finding also cites, wrote in an email that the results of Altria’s Home Use Tests indicate that MarkTen “Elite has a role to play” in that it “should be able to peel off some of the folks that are using Juul, but would rather have something else.” (CCFF ¶ 1315). On September 7, 2018, Schwartz sent several Altria colleagues a presentation titled “MarkTen Elite Potential Investment Justification Information,” which included the results of a HUT study. (CCFF ¶ 1320).

375. Home use tests (also called “HUTs”) have limitations, particularly for predicting purchase intent. (Begley (Altria) Tr. 1098; Jupe (Altria) Tr. 2235, 2247-48; PX7014 Baculis (Altria) Dep. at 297-98). If the HUT is “a disaster,” it is “unlikely to be necessary to even roll [the product] out, because you know what you’re going to get.” (Begley (Altria) Tr. 1098; *see also* PX7014 Baculis (Altria) Dep. at 301-02 (“[I]f the home use test was not positive, we would not recommend something be put in the marketplace.”)). Conversely “positive results in a home use test . . . [do not] necessarily translate to marketplace results that [are] similar to the home use test.” (Begley (Altria) Tr. 1098). But positive results could at least provide “enough confidence that maybe . . . [it is] worth giving it a shot.” (Begley (Altria) Tr. 1098; *see also* PX7014 Baculis (Altria) Dep. at 302 (“If the home use test was positive . . . it would be worth pursuing and doing an in-market sort of test to understand viability in the marketplace.”)).

### **Response to Finding No. 375**



The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable because it relies only on the self-serving testimony of Altria executives. It is also misleading and contrary to the weight of the evidence in that it understates the importance Altria attached to home use studies, and fails to account for the contemporaneous business documents that show that Altria relied on the home use test for Elite. (*See* Response to RPF 374).

376. Because participants are paid and “getting the product for free for an extended period of time,” rather than “go[ing] to a retail store and tak[ing] money out of their pocket,” the HUT is “a bit of an artificial environment.” (Begley (Altria) Tr. 1098; *see also* Jupe (Altria) Tr. 2235, 2247-48 (similar); PX7014 Baculis (Altria) Dep. at 298 (similar); PX7023 Fernandez (Altria) Dep. at 92 (similar)).

#### **Response to Finding No. 376**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable because it relies only on the self-serving testimony of Altria executives. It is also misleading and contrary to the weight of the evidence in that it understates the importance Altria attached to home use studies, and fails to account for the contemporaneous business documents that show that Altria relied on the home use test for Elite. (*See* Response to RPF 374).

377. “[T]he test at the end of the day is what people are buying at retail.” (Jupe (Altria) Tr. 2247-48; *see also* Begley (Altria) Tr. 1098 (observing that the retail environment is where manufacturers “get the best learnings in terms of how appealing [a] product [is] to consumers”); PX7023 Fernandez (Altria) Dep. at 156 (explaining that while HUT results are “indicators,” manufacturers “get the real answer in the marketplace”)).

#### **Response to Finding No. 377**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria executives. It is misleading and contrary to the weight of the evidence in that it understates the importance Altria attached to home use studies, and fails to account for the contemporaneous business documents that show that Altria relied on the home use test for Elite. (*See* Response to RPF 374). It is also misleading and contrary to the weight of the evidence because, even judging by “what people are

buying at retail,” Elite showed signs of success during the short time it was on the market, despite experiencing issues with leaking. (CCFF ¶¶ 1112-31). Further, Altria pulled Elite from the market before it had time to assess the product’s long-term potential. (CCFF ¶¶ 1144-62). Indeed, Nu Mark had only implemented the new gasket in Elite mere days before Altria pulled the product. (CCFF ¶¶ 1149, 1206-18). The new gasket successfully reduced leaking and formaldehyde, and increased aerosol mass. (CCFF ¶¶ 1219-34). And, as Schwartz acknowledged, the new gasket would have “enabled Nu Mark to continue to expand . . . the distribution of MarkTen Elite.” (CCFF ¶ 1218).

378. Beginning in late 2017, Nu Mark ran HUTs on three different products: Elite, Cync, and JUUL. (RX2015 (Altria) at 004). The preliminary results showed that, over a three-week period, the purchase intent for MarkTen Elite remained steady, at 43 percent, and was higher than that of JUUL. (PX4075 (Altria) at 001). Nu Mark viewed this result as an encouraging initial sign. (Begley (Altria) Tr. 986-89; PX4075 (Altria) at 001).

#### **Response to Finding No. 378**

Complaint Counsel does not disagree.

379. But the full results, released in January 2018, showed a more complicated story. (RX2015 (Altria) at 010). Although Nu Mark ran the Elite test for six weeks, it ran JUUL for just three weeks. The reason: It “couldn’t find enough JUUL on the market to conduct the test. They were sold out.” (Jupe (Altria) Tr. 2249). As Jupé observed, “[t]hat’s kind of a good indicator unto itself.” (Jupe (Altria) Tr. 2249; *see also* Begley (Altria) Tr. 1098-99).

#### **Response to Finding No. 379**

The proposed finding is unreliable, incomplete, and misleading. The claim that Altria “couldn’t find enough JUUL on the market to conduct the test” is unreliable because it relies solely on the self-serving testimony of Altria executives. It is also incomplete and misleading in that it fails to address, or cite any evidence showing, how running the JUUL test for three weeks in any way impacted the results as to Elite’s performance. At the time of the test (which took place prior to January 19, 2018), MarkTen Elite was not on the market, and even if it had been, the availability of JUUL products for the home use test tells nothing about how MarkTen Elite performed. In fact,

MarkTen Elite's box top purchase intent stayed consistent from week 3 to week 6. (RX2015 (Altria) at 010).

380. In addition, analysis showed that, for those participants who had not used a vapor product within the last seven days, meaning those who were “predominantly cigarette smokers,” (Jupe (Altria) Tr. 2251), the purchase intent for Elite was *lower* than that for JUUL, (RX2015 (Altria) at 010).

### **Response to Finding No. 380**

This proposed finding is misleading, contrary to the weight of the evidence, and unreliable. It is misleading and contrary to the weight of the evidence to the extent that it suggests that because its purchase intent was lower for those participants who had not used a vapor product within the last seven days, MarkTen Elite would not be a successful product. As Altria CEO Willard observed in February 2018, the month Altria launched Elite: “[T]he e-vapor category continues to evolve, and leadership has changed hands numerous times over the past seven years. Sustained, long-term leadership won’t be achieved overnight. . . . We believe [Nu Mark] is well positioned to achieve long-term leadership in the category . . . .” (CCFF ¶ 103). The proposed finding is also unreliable to the extent that it suggests that MarkTen Elite could not convert adult smokers at a high enough rate, as any claim that Altria’s e-cigarette products did not have sufficient conversion potential is unsupported. (CCFF ¶¶ 1301-09). In fact, Altria never conducted any conversion studies to evaluate the conversion potential of MarkTen Elite. (CCFF ¶ 1307).

381. On a metric where HUT results are more useful—helping understand the “consumer set” that likes a product, (PX7014 Baculis (Altria) Dep. at 300)—the results were no more confidence inspiring. As the January 2018 report prepared by Altria’s Consumer & Marketplace Insights team summarized, “Cync & Elite provide different product experiences than that provided by JUUL[], and therefore the products show strong performance among different [adult smoker and vapor] audiences. JUUL provides a more ‘familiar cigarette-like experience’ and demonstrates immediacy in replacing cigarette usage occasions among . . . those who are still predominantly smoking cigarettes[]. Cync & Elite provide more ‘non-traditional vaping experiences’ and demonstrate higher usage among . . . those who are more familiar with e-vapor product usage.” (RX2015 (Altria) at 007).

**Response to Finding No. 381**

The proposed finding is vague, unreliable, misleading, and contrary to the weight of the evidence. It is vague as to the term “confidence inspiring.” It is unreliable in that it fails to cite any ordinary-course evidence containing that characterization. It is misleading and contrary to the weight of the evidence to the extent that it suggests that because a HUT indicated that MarkTen Elite and CYNC appeal to a slightly different user base than JUUL, they could not be successful in the market or help Altria achieve its long-term goal of market leadership. Baculis testified that Elite 1.0 could appeal to JUUL consumers that “would be willing to trade off a little bit of nicotine satisfaction” for “a better inhale/exhale experience” and “better-tasting flavors.” (CCFF ¶ 1316). On August 8, 2018, Baculis stated in an email that the results of Altria Home Use Tests (“HUTs”) indicate that MarkTen “Elite has a role to play” in that it “should be able to peel off some of the folks that are using Juul but would really rather have something else.” (CCFF ¶ 1315). According to an email written by Schwartz on May 1, 2018, Altria’s HUT study results “confirm[ed] we [Altria] have a good horse in the race that truly merits incenting Trial at all levels / channels.” (CCFF ¶ 1312). Schwartz wrote that the HUT study indicated that MarkTen Elite “could thrive.” (CCFF ¶ 1312). Finally, on September 7, 2018, Craig Schwartz sent several Altria colleagues a presentation titled “MarkTen Elite Potential Investment Justification Information” which included the results of a HUT study that showed that MarkTen Elite produced conversion rates comparable to or better than JUUL under certain circumstances, and he stated that the results “could support a decision to further invest in MarkTen Elite 1.0 – if that’s what we decide to do.” (CCFF ¶ 1320).

In addition, Altria CEO Willard observed in February 2018, the month Altria launched Elite: “[T]he e-vapor category continues to evolve, and leadership has changed hands numerous times over the past seven years. Sustained, long-term leadership won’t be achieved overnight. . . .

We believe [Nu Mark] is well positioned to achieve long-term leadership in the category . . . .” (CCFF ¶ 103). Further, Begley testified that Nu Mark wanted to build a portfolio of e-vapor products because it did not know which product platforms were going to be successful or how the market was going to evolve. (CCFF ¶ 102). As a result, Nu Mark thought it was important to place as many bets as it could in the closed-system e-cigarette market. (CCFF ¶¶ 102, 141; *see also* CCFF ¶¶ 1560-61). To the extent that the proposed finding implies that Elite was not capable of satisfying or converting adult smokers, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPFF ¶¶ 601-37. (*See Responses to RPFF ¶¶ 601-37*).

382. The HUT results also raised independent questions about Elite’s ability to convert smokers. During the course of the test, researchers periodically asked participants about what percentage of the time they were smoking versus using the test product. (PX7023 Fernandez (Altria) Dep. at 93; RX0496 (Altria) at 019; RX2015 (Altria) at 015).

### **Response to Finding No. 382**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. The statement that the “HUT results also raised independent questions” is unreliable because it fails to cite evidence of any kind in support.

In addition, the proposed finding is misleading and contrary to the weight of the evidence. A January 19, 2018, Altria presentation reported the results of a HUT study performed by Altria comparing MarkTen Elite, CYNC, and JUUL, and indicated that “[b]y 3 weeks of testing, Elite begins to demonstrate its propensity to replace cigarette occasions among” adult users of both e-cigarettes and traditional cigarettes. (CCFF ¶ 1311). A July 2018 presentation prepared by employees of Nu Mark’s brand organization identified MarkTen Elite as having “high conversion potential” for certain consumers. (CCFF ¶ 1314). Dr. Gardner testified that Altria’s brand organization viewed MarkTen Elite as having high conversion potential at the time. (CCFF ¶

1314). Dr. Gardner testified that some Altria employees thought that Elite had long-term conversion potential in 2018. (CCFF ¶ 1313). To the extent that the proposed finding implies that Elite was not capable of satisfying or converting adult smokers, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-37. (See Responses to RPF ¶¶ 601-37).

383. The data showed a marked difference in the products' performance. (Jupe (Altria) Tr. 2252). For those participants who had not used a vapor product in the last seven days—meaning those who were “predominantly cigarette smokers”—JUUL immediately began replacing cigarette smoking occasions in numbers that were statistically significant. (Jupe (Altria) Tr. 2251-52).

### **Response to Finding No. 383**

The proposed finding is vague, unreliable, misleading, and contrary to the weight of the evidence. It is vague as to the term “marked difference.” It is also unreliable in that it relies solely on the self-serving testimony of an Altria executive.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that a difference in performance with one subset of e-cigarette customers meant that Elite would not be successful in the marketplace. (See Response to RPF ¶ 381). It is also unreliable to the extent that it suggests that MarkTen Elite cannot convert adult smokers at a high enough rate, as any claim that Altria's e-cigarette products did not have sufficient conversion potential is unsupported. (CCFF ¶¶ 1301-09). In fact, Altria had evidence that its e-cigarette products did have conversion potential. (CCFF ¶¶ 1310-22).

Finally, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that Juul faced a greater likelihood of PMTA success than Elite. Altria still does not know exactly how much weight the FDA will put on the PMTA factors “adult smoker conversion” and “no unintended consequences.” (CCFF ¶ 1913). To the extent that the proposed finding claims that Elite was not capable of satisfying or converting adult smokers, the proposed

finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-37. (*See Responses to RPF 601-37*).

384. By contrast, Elite did not start to show any impact until weeks five or six into the study, and even then, it was not statistically meaningful. (Jupe (Altria) Tr. 2252). As Jup explained, that time lag is important. A pack-a-day smoker “would have to buy 35 pods and continue using them for five weeks to figure out that you could put your cigarettes down,” which is “really unlikely” to happen in the marketplace. (Jupe (Altria) Tr. 2253). Consumers “don’t go and buy 35 new products. The first one is going to tell you what you are going to need to know.” (Jupe (Altria) Tr. 2253).

#### **Response to Finding No. 384**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is also misleading and contrary to the weight of the evidence to the extent that it suggests that a difference in performance with one subset of e-cigarette customers meant that Elite would not be successful in the marketplace. (*See Responses to RPF 381, 383*). To the extent that the proposed finding claims that Elite was not capable of satisfying or converting adult smokers, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-37. (*See Responses to RPF 601-37*).

385. Pascal Fernandez, the head of Altria’s consumer research division, confirmed that the HUT “was [an] indication that [Elite] didn’t perform as well towards th[o]se consumers who were looking for [the] smoking sensation”; that demographic was “not converting” to the extent that it needed to. (PX7023 Fernandez (Altria) Dep. at 25-26, 154-55).

#### **Response to Finding No. 385**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is also vague as to its claim that Elite was not converting a particular demographic “to the extent that it needed to,” which it fails to define.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that a difference in performance with one subset of e-cigarette customers meant that Elite would not be successful in the marketplace. (*See Responses to RPF 381, 383*). It is also unreliable to the extent that it suggests that MarkTen Elite cannot convert adult smokers at a high enough rate, as any claim that Altria's e-cigarette products did not have sufficient conversion potential is unsupported. (CCFF 1301-09). To the extent that the proposed finding claims that Elite was not capable of satisfying or converting adult smokers, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-37. (*See Responses to RPF 601-37*).

386. The other pod-based product in Nu Mark's portfolio, Cync, showed the lowest propensity to replace cigarettes, with cigarette usage occasions remaining at roughly the same level throughout the study. (RX0496 (Altria) at 019).

#### **Response to Finding No. 386**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence. It is vague as to the phrase "roughly the same level," which is undefined. It is also unreliable to the extent that it suggests that Altria's e-vapor products cannot convert adult smokers at a high enough rate, as any claim that Altria's e-cigarette products did not have sufficient conversion potential is unsupported. (CCFF 1301-09). It is also incomplete and misleading to the extent that it suggests that CYN C was the only other pod-based product in Altria's portfolio. Altria also sold the APEX product. (*See Response to RPF 369*). In fact, acquiring Elite was just one of the multiple bets Altria was placing. (CCFF 141). The proposed finding makes no mention of APEX's propensity to replace cigarettes.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the ability to replace cigarettes is the only measure of whether a product will be successful. (*See Responses to RPF 381, 383*).



Finally, to the extent that the proposed finding claims that Elite was not capable of satisfying or converting adult smokers, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-37. (*See Responses to RPF 601-37*).

387. These were troubling signs for Nu Mark’s newly acquired pod products because, from the perspective of the PMTA standard, “if adult smokers don’t convert to the product, you’re not reducing harm to the population and to the adult smokers, so . . . the product [would have] no reason for being in the market.” (Gardner (Altria) Tr. 2586; *see also* Murillo (Altria/JLI) Tr. 2907).

### **Response to Finding No. 387**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria executives. Moreover, the FDA’s assessment of conversion potential in PMTAs is not an area of Dr. Gardner’s expertise, and he was not responsible for assessing the conversion potential of Altria’s e-vapor products. (CCFF ¶ 2000). The proposed finding is also vague as to the term “troubling signs.” Dr. Gardner, whose testimony the proposed finding cites, also testified that he was “not aware of the [e-vapor] industry getting a consensus together on e-vapor conversion.” (CCFF ¶ 1302). He also testified that the FDA has not specified a particular level of sales or particular trend in market share that a product must demonstrate in order to show conversion potential or achieve PMTA approval. (CCFF ¶ 1302).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that MarkTen Elite had trouble converting smokers. (*See Responses to RPF ¶¶ 381, 383*). To the extent that the proposed finding claims that Elite was not capable of satisfying or converting adult smokers, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-37. (*See Responses to RPF ¶¶ 601-37*).

**3. In February 2018, Nu Mark Informed The Altria Board That Pods Were Driving The E-Vapor Industry And Offered A Measured Assessment Of Elite**

388. In February 2018, when Begley presented the Board with Nu Mark's annual three-year plan, the e-vapor category had started growing again, both in terms of consumers and unit volume. (Begley (Altria) Tr. 1084-85; PX4012 (Altria) at 004-05).

**Response to Finding No. 388**

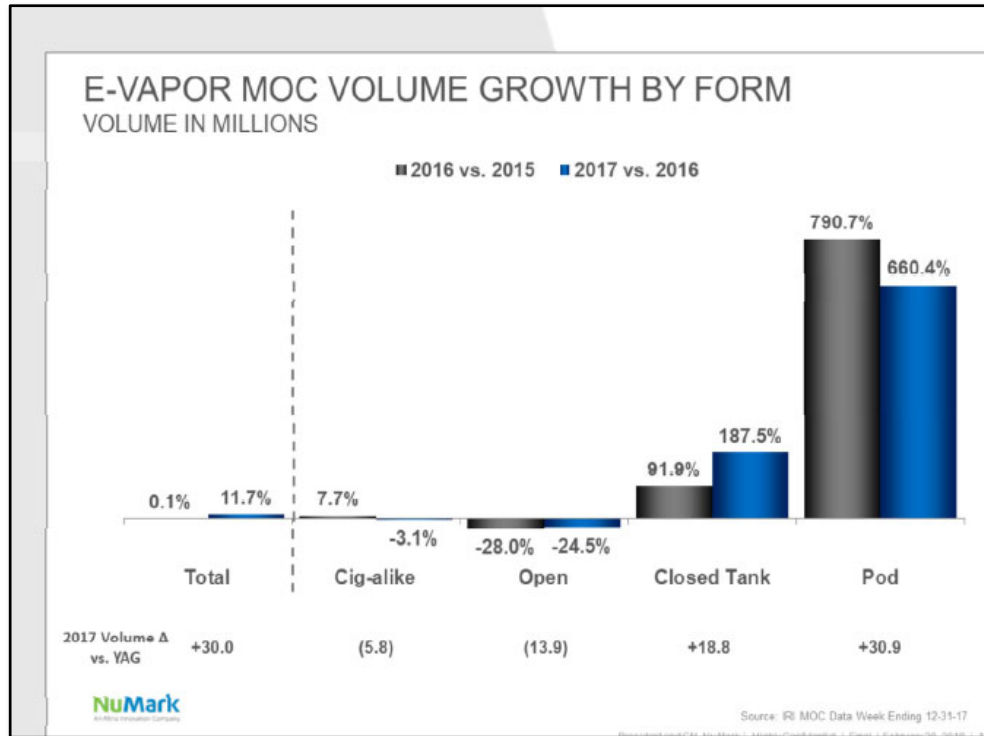
The proposed finding is misleading and contrary to the weight of the evidence to the extent that it implies that the closed-system e-cigarette market was not consistently growing. (CCFF ¶¶ 60-68).

389. That growth was driven primarily by "the success of pod-based products," which included "more satisfying products" that had prompted adult smokers to "re-engage with e-vapor." (Begley (Altria) Tr. 1084-85).

**Response to Finding No. 389**

The proposed finding is unreliable and vague. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive, and offers nothing more than his subjective opinion that pod-based products included "more satisfying products." In fact, the document about which Begley was testifying nowhere mentions the phrase. (PX4012 (Altria); Begley (Altria) Tr. 1084-85). Furthermore, the phrase "more satisfying products" is itself vague. The proposed finding is misleading and contrary to the weight of the evidence to the extent that it implies that the closed-system e-cigarette market was not consistently growing. (CCFF ¶¶ 60-68).

390. The data Begley presented to the Board through the chart below showed that in 2017, pod sales volume had grown by 660 percent. What Altria then called closed tanks (a variant of pod-based products, (RX0865 (Altria) at 008)) had grown by 187 percent. Meanwhile, cig-a-like volume had declined by 3 percent, a contraction of some 5.8 million units:



(PX4012 (Altria) at 014).

### **Response to Finding No. 390**

The proposed finding is incomplete and misleading to the extent that it suggests that Altria’s cigalike business was declining in the period leading up to Altria’s decision to shut down Nu Mark. In fact, Quigley testified that, as of August 2018, “the cig-a-like platform was growing. Not declining,” that Altria’s cigalike business was “actually growing 3-1/2 million units.” (PX7003 (Quigley (Altria), IHT at 152)).

391. Nu Mark had been able to grow its volume somewhat by expanding distribution. (PX4012 (Altria) at 013; RX0746 (Altria) at 017). But it was continuing to incur substantial financial losses: It lost \$71 million in 2017. (PX4012 (Altria) at 010; Gifford (Altria) Tr. 2737; *see also infra* Part IX.F.1).

### **Response to Finding No. 391**

The proposed finding is vague, unreliable, incomplete, and misleading. The first sentence is vague as to the characterization “somewhat.” It is also unreliable and misleading to the extent

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that it suggests that Nu Mark had only grown its volume in 2017 by expanding distribution: PX4012 does not identify expanded distribution as the reason for Nu Mark's increase in sales volume (PX4012 (Altria) at 013), and RX0746 is only from the first quarter of 2017. (RX0746 (Altria) at 001).

The second sentence is vague in characterizing Nu Mark's financial losses in 2017 as "substantial." It is also incomplete and misleading in that {

{

Moreover, it ignores that Altria, {

{

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{ }; CCFE ¶¶ 163-82). {

{

{

Indeed, all of the tobacco companies, except for Altria, continue to invest and compete in the e-vapor segment today. (CCFE ¶¶ 132, 169, 178, 185).

392. Nu Mark also revised its forward-looking projections. In the prior year's strategic plan, Nu Mark had predicted that it would likely lose \$33 million in 2018 and then break even in 2019. (RX0746 at 007; Gifford (Altria) Tr. 2728; *see also infra* Part IX.F.1). By February of 2018, Nu Mark was estimating that it would lose \$70 million in 2018, followed

by a \$24 million loss in 2019, before hopefully turning a profit in 2020. (PX4012 (Altria) at 010; Gifford (Altria) Tr. 2737; *see also infra* Part IX.F.1). But those numbers assumed “substantial volume growth in the cigalike form”; “without [that] growth,” Altria was “going to continue to lose \$70 million a year on the cigalike platform.” (PX7022 Begley (Altria) Dep. at 225).

**Response to Finding No. 392**

The proposed finding incomplete, misleading, unreliable, vague, and contrary to the weight of the evidence. It is incomplete and misleading in that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } The statement that “those numbers assumed ‘substantial volume growth in the cigalike form’” is vague as to the meaning of “substantial.” Moreover, that statement, along with the statement that Altria was “going to continue to lose \$70 million a year on the cigalike platform,” is unreliable in that it relies solely on the self-serving testimony of an Altria executive.

Finally, the proposed finding is misleading and contrary to the weight of the evidence because it ignores that Altria, { [REDACTED] }, [REDACTED]

[REDACTED]

[REDACTED] { [REDACTED]

[REDACTED]

[REDACTED] }

393. By this point, the sustained losses and continued delays in projected profitability had become “troubl[ing]” to senior management, including Gifford, then the CFO. (Gifford (Altria) Tr. 2738).

**Response to Finding No. 393**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable because it relies only on the self-serving testimony of an Altria executive. It is misleading and contrary to the weight of the evidence in that { [REDACTED]

[REDACTED] } Further, Willard testified that while he was COO and CEO of Altria, one of Altria’s strategic initiatives was to attain a leading position in the U.S. e-vapor market. (CCFF ¶ 96). { [REDACTED]

[REDACTED] } Willard knew that sustained long-term leadership in the e-vapor space would not be achieved overnight. (CCFF ¶ 103). It was Altria’s strategy to use part of the income generated from its traditional businesses in innovation and harm reduction, which included e-vapor products. (CCFF ¶ 104).

Other tobacco companies also understood the importance of e-vapor and committed significant long-term investments in e-vapor products. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

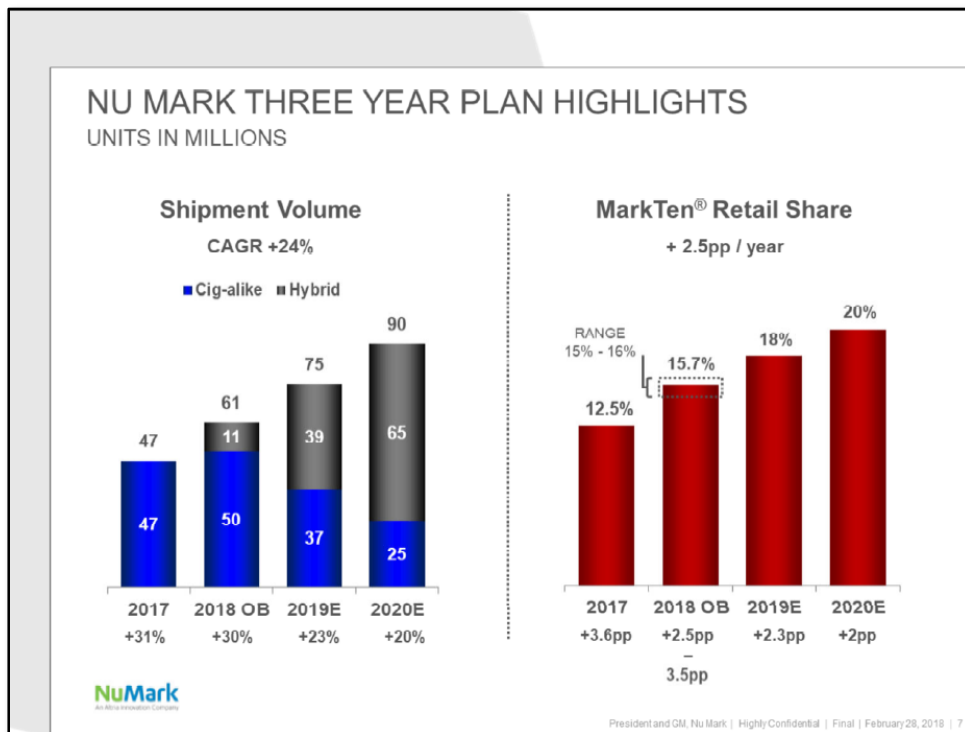
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Altria continues to sell, distribute, and market IQOS in the United States. (CCFF ¶¶ 1082).

394. Although “the plans thus far hadn’t worked,” Nu Mark came forward with a “new plan[.]” (Gifford (Altria) Tr. 2738). The 2018 plan centered on pod-based products. Begley told the Board that Nu Mark hoped to sell 11 million units of pod products in 2018 and that, by 2019, pod products would account for the majority of its volume, while cig-a-like volume rapidly declined. The plan further assumed that, driven by strong pod sales, Nu Mark’s overall sales volume would grow by between 20 to 30 percent year over year. (PX4012 (Altria) at 009; *see also* Gifford (Altria) Tr. 2739 (explaining that the 2018 projections included Nu Mark’s hopes that the launch of Elite would bolster the company’s financial viability)). Begley presented the following chart to the Board to demonstrate this plan:



(PX4012 (Altria) at 009).

**Response to Finding No. 394**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. The statement that Nu Mark’s plans “thus far hadn’t worked” is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is also vague in that it fails to specify the “plans” to which it refers or what it means that they “hadn’t worked.” The proposed finding is also misleading and contrary to the weight of the evidence. Investing in e-cigarettes is a long-term play. (See Response to RPF ¶ 395). In 2016 and 2017, Altria was well aware Nu Mark was not going to be profitable. (CCFF ¶¶ 1069, 1072). Meanwhile, [REDACTED]

[REDACTED] } In fact, Nu Mark’s financial performance was improving. (CCFF ¶¶ 1088-1111). [REDACTED]

[REDACTED] } Further, other competitors in the closed-system e-cigarette market experienced commercial challenges as well but remained committed to the market. (CCFF ¶¶ 1132-43; see Response to RPF ¶ 393).

395. In short, for Nu Mark to meet its sales and share projections, it would “need to be successful with pod-based products.” (Begley (Altria) Tr. 1085-86).

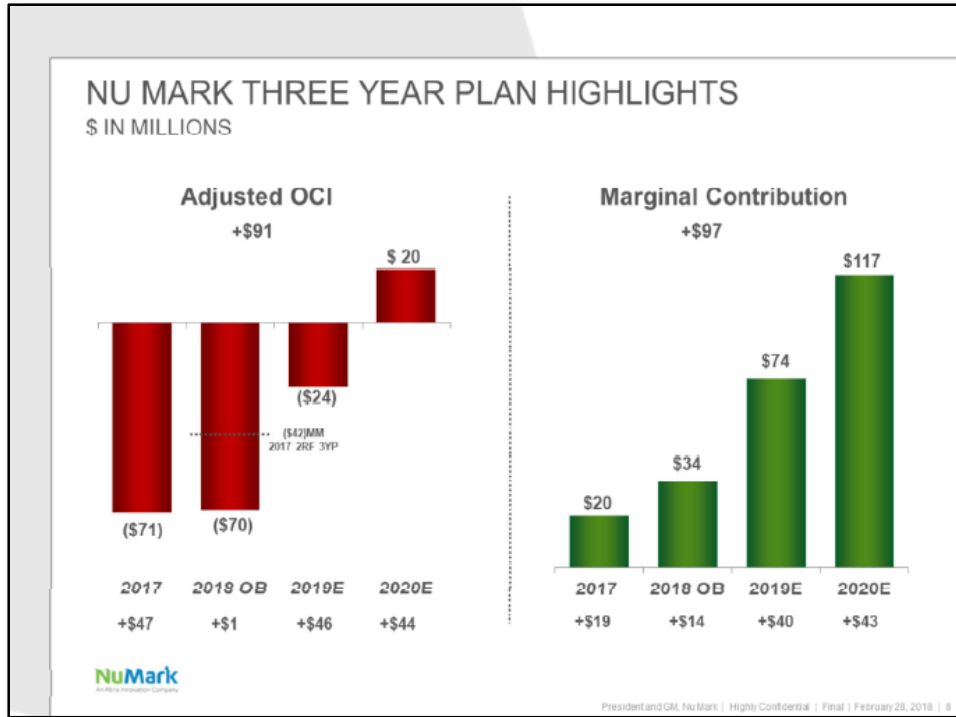
**Response to Finding No. 395**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is also vague as to the term “successful,” which it fails to define.



In addition, the proposed finding is misleading and contrary to the weight of the evidence. The record shows that Altria defined success in terms of a long-term goal to lead the e-vapor category. (CCFF ¶¶ 93-108). As Willard told investors in February 2018, “the e-vapor category continues to evolve and leadership has changed hands numerous times over the past seven year,” and the key to long-term leadership, which would not be achieved overnight, was a diverse portfolio of promising products. (CCFF ¶ 103). In fact, Nu Mark wanted to build a portfolio of e-vapor products because it did not know which product platforms were going to be successful or how the market was going to evolve. (CCFF ¶ 102). As a result, Nu Mark thought it was important to place as many bets as it could in the closed-system e-cigarette market. (CCFF ¶ 102). Acquiring Elite was just one of the multiple bets it was placing. (CCFF ¶ 141). Therefore, while pod revenue and share was important in the short term, Altria was far from certain that pods would be the winning bet long-term. Thus, “success” in pod-based systems in 2018 was not necessarily tied to long-term market leadership, which was Altria’s ultimate goal. (*See* Response to RPFF ¶ 393).

396. This was also true of Nu Mark’s revenue targets, shown in the chart below, which were contingent on hitting sales projections:



(PX4012 (Altria) at 010).

### **Response to Finding No. 396**

The proposed finding is misleading and contrary to the weight of the evidence in that it purports to focus only on Nu Mark’s short-term plan, not its stated long-term goal of achieving market leadership. (See Response to RPF ¶ 395).

397. As Begley explained, “[g]iven the reliance on the [volume] numbers you see [in the three-year plan], if we weren’t successful with a pod-based product, we were not going to achieve those numbers.” (Begley (Altria) Tr. 1086).

### **Response to Finding No. 397**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is also vague as to the term “successful,” which it fails to define.

In addition, the proposed finding is misleading in that it only focuses on Nu Mark’s short-term plan, not its long-term goal of achieving market leadership. (See Response to RPF ¶ 395).

Moreover, Nu Mark looked at its overall sales and share of the e-cigarette market, not just pod-based products. In its original budget, Nu Mark based its retail market share, as well as its share target, on the entire closed-system e-cigarette market. (PX4012 (Altria) at 009; Begley (Altria) Tr. 1122). Share targets in the Nu Mark incentive compensation memos were also based on the entire closed-system e-cigarette market. (Begley (Altria) Tr. 1123). In fact, acquiring Elite was just one of the multiple bets it was placing within this market. (CCFF ¶ 141).

398. Begley informed the Board that “the winning product proposition in the market that was really driving the growth of the category were pod-based products, and specifically pod-based products with nicotine salts, and even more specifically, JUUL.” (Begley (Altria) Tr. 1091).

### **Response to Finding No. 398**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is also vague as to the term “winning.”

The proposed finding is also misleading and contrary to the weight of the evidence in that it only focuses on Nu Mark’s short-term plan, not its long-term goal of achieving market leadership. (*See* Response to RPF ¶ 395).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that an e-vapor product cannot succeed without nicotine salts or that all customers desire higher nicotine levels. The evidence shows that nicotine salts are one way to provide a satisfying experience, but not necessarily the only way. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Moreover, as ordinary-course documents and testimony confirm, the claim that the characteristics of Altria’s e-cigarette products made them commercially unviable is implausible. (CCFF ¶¶ 1166-91).

Finally, the proposed finding is misleading and contrary to the weight of the evidence because it ignores that e-vapor customers have varying preferences in terms of nicotine strength. In 2018, JLI “had three strengths that were offered in the US . . . 5 percent, 3 percent and 1 and a half percent.” (CCFF ¶ 1181). Burns, JLI’s former CEO, testified that “The intent of the company [in offering a variety of nicotine strengths], which we could not certainly talk about because of the FDA limitations, was to allow people the ability to taper down their nicotine consumption by going to a lower strength and/or allowing people to enter into the product category that might have thought that a 5 percent, for example, was too strong, but they would have an alternative that was a lower nicotine strength.” (CCFF ¶ 1182). [REDACTED]

[REDACTED] }

399. By the end of 2017, JUUL accounted for roughly one in three e-vapor sales nationally and held a roughly 68 percent share in stores in which it was sold. (RX0979 (Altria) at 014).

**Response to Finding No. 399**

Complaint Counsel has no specific response.

400. According to the consumer research results that Begley shared in his February 2018 presentation to the Board, JUUL was successful because it “had a nicotine satisfaction that, in essence, mirrored that of a cigarette, that adult smokers found satisfying. It was a simple, intuitive, easy-to-use product in design,” and “it resolved for at least many adult smokers . . . the social friction of being viewed as a smoker” because it did not look like a cigarette. (Begley (Altria) Tr. 1094-95; *see also* PX4012 (Altria) at 016 (concluding JUUL is

successful due to its “[f]amiliar nicotine satisfaction,” “[d]iscreet size and appearance,” and “[s]imple, modern aesthetic design”).

**Response to Finding No. 400**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that the cited presentation to Altria’s Board does not support the statement that JUUL “had a nicotine satisfaction that, in essence, mirrored that of a cigarette, that adult smokers found satisfying.” Thus, that portion of the proposed finding appears to rely on the self-serving testimony of an Altria executive. Moreover, the proposed finding is vague in that it fails to specify the nature or purpose of the “consumer research” that it claims formed the basis of the cited Board presentation.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that a certain level of nicotine is needed to create “nicotine satisfaction.” In fact, there are different ways to create a satisfying nicotine experience. (CCFF ¶¶ 1171-72). In addition, customers have varying preferences in terms of nicotine strength. In 2018, JLI “had three strengths that were offered in the US . . . 5 percent, 3 percent and 1 and a half percent.” (CCFF ¶ 1181.) Burns, JLI’s former CEO, testified that “The intent of the company [in offering a variety of nicotine strengths], which we could not certainly talk about because of the FDA limitations, was to allow people the ability to taper down their nicotine consumption by going to a lower strength and/or allowing people to enter into the product category that might have thought that a 5 percent, for example, was too strong, but they would have an alternative that was a lower nicotine strength.” (CCFF ¶ 1182.) { [REDACTED]

401. Begley also informed the Board of what Nu Mark was doing to respond to JUUL, highlighting the two “closed pod-based products” the company had acquired—Elite and Cync. (PX4012 (Altria) at 021).

**Response to Finding No. 401**

The proposed finding is incomplete and misleading in that it suggests that Altria had no other hand to play besides Elite and CYNCR. In fact, Nu Mark also sold APEX, a pod-based product licensed from PMI, which was a promising product. (CCFF ¶ 16; *see* Response to RPF ¶ 369). Moreover, the statement that “Begley also informed the Board of what Nu Mark was doing to respond to JUUL” is not supported by the evidence cited, because the page cited only shows pictures of two pod-based products and provides no other context. (PX4012 (Altria) at 021).

402. In discussing the consumer research results for those products, Begley was measured. For Cync, Begley’s slide presentation conveyed that its “primary benefits were ease of inhale and good vapor volume.” (PX4012 (Altria) at 023). But the presentation also referenced some of Cync’s design problems that had prompted Nu Mark to hold off on commercializing it, explaining that the drawbacks included “latency of draw” and “popping.” (PX4012 (Altria) at 023; *see also* Begley (Altria) Tr. 1097 (explaining that Nu Mark did not launch Cync because of “product issues”)).

**Response to Finding No. 402**

The proposed finding is vague, unreliable, incomplete, and misleading. It is vague as to terms such as “latency of draw” and “popping.” It is also unreliable because the document cited nowhere refers to CYNCR’s “design problems” as a basis for “hold[ing] off on commercializing it.” Further, the phrase “Begley was measured” is a characterization not contained in the document cited. (PX4012 (Altria) at 023). In addition, the proposed finding is incomplete and misleading because it does not include the APEX product, which Nu Mark also commercialized. (*See* Response to RFF ¶ 369).

403. Similarly, Begley’s slides shared that “Elite’s primary benefit [was a] feeling of vapor fullness on the inhale/exhale combined with good tasting flavors.” (PX4012 (Altria) at 023). But although he was “hopeful” that Elite would prove popular, (Begley (Altria) Tr. 1124), he also cautioned that the “[p]rimary drawbacks for some include lack of nicotine satisfaction,” (PX4012 (Altria) at 023).

**Response to Finding No. 403**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. It is misleading in that the same slide identifies additional Elite benefits, including the “high quality [of the] device” and “that it is discreet and fits well in hand and mouth.” (PX4012 (Altria) at 023). The proposed finding also fails to take into account the positive reviews Elite received in the HUT study. (CCFF ¶¶ 1311-12; *see* Response to RPF ¶ 374).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that because MarkTen Elite and CYN C appealed to a slightly different user base than JUUL, those products could not have been successful in the market or help Altria achieve its goal of market leadership. (*See* Responses to RPF ¶¶ 381, 383).

404. As Begley explained at trial, he “thought it was important to note [to the Board] that although [Elite] was a pod-based product that [the company] had access to, it still didn’t deliver the nicotine satisfaction that adult smokers were looking for to lead to conversion.” (Begley (Altria) Tr. 1096-97).

#### **Response to Finding No. 404**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. Nowhere in the board presentation that Begley was testifying about does it mention that Elite would not “deliver the nicotine satisfaction that adult smokers were looking for to lead to conversion.” In fact, the HUT study highlighted Elite’s conversion potential. (*See* Response to RPF ¶ 374). The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that because MarkTen Elite and CYN C appealed to a slightly different user base than JUUL, those products could not have been successful in the market or help Altria achieve its goal of market leadership. (*See* Responses to RPF ¶¶ 381, 383).

405. Nu Mark launched Elite notwithstanding that satisfaction deficit because Elite was “the only thing [Nu Mark] had to compete with, or at least hopefully compete with at the time” and the company was “hopeful that [the satisfaction deficit] wasn’t going to be [an] impediment.” (Begley (Altria) Tr. 1097).

#### **Response to Finding No. 405**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any nicotine “satisfaction deficit” as compared to JUUL would mean that Elite would not be successful or help Altria achieve its long-term goal of market leadership. (*See* Response to RPF ¶ 381). The statement that Elite was the only thing Nu Mark had to compete with is also misleading and unsupported by the evidence. In fact, Nu Mark also had the APEX product, which it planned to put on the market later that year. (*See* Response to RPF ¶ 369).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that Elite was the only e-vapor product with which Altria could compete. In fact, Altria had available a portfolio of products that included CYNC, APEX, and MarkTen Bold. (*See* Response to RPF ¶ 369). As of the summer of 2018, if a deal with JLI did not ultimately occur, {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

} More broadly, the proposed finding ignores that Altria’s ongoing strategy was to build a portfolio of e-vapor products, and, prior to the transaction, it was developing a pipeline of products with which it could compete in the future. (CCFF ¶¶ 444-54).

406. Summarizing the thinking at the time, Gifford explained, “cigalike’s fallen off [a] cliff, pods [are] growing greatly, you know the consumer has shifted to that. Now [Nu Mark has] a pod product in [its] portfolio. So your hopes are that [Nu Mark is] going to grow and compete in that space.” (Gifford (Altria) Tr. 2739).

#### **Response to Finding No. 406**

The proposed finding is unreliable, inaccurate, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely upon the self-serving testimony of Altria executive Gifford. Gifford’s statement that as of February 2018 “cigalikes had fallen off [a] cliff”



is contrary to the weight of the evidence and not supported by the document to which his testimony refers. That document shows that cigalike volume, far from “fall[ing] off [a] cliff,” was expected to fall 6% between 2017 and 2020. (PX4012 (Altria) at 006).

Moreover, the proposed finding is misleading and contrary to the evidence. The same presentation to the Board also discussed continuing to invest in the MarkTen cigalike product by filing a PMTA and continuing to invest in MarkTen Bold. (PX4012 (Altria) at 042-44). Further, despite any downward trend, Altria’s competitors continue to sell cigalike products. (CCFF ¶¶ 190, 276-77). Moreover, Nu Mark was slated to receive an additional \$9 million for marketing support for its cigalike products in 2018, the same time period covered by Gifford’s statement. (CCFF ¶ 439). Finally, as late as September 2018, Altria was still planning to submit a PMTA for its MarkTen cigalike, an expensive process, in order to keep the product on the market. (CCFF ¶ 460).

#### **D. Altria Heavily Marketed And Promoted Elite In 2018**

407. Altria invested heavily in Elite’s launch. As Willard testified, Elite’s launch was “well-funded” because the company “wanted to get [the product] out there as quickly as possible and . . . effectively.” (Willard (Altria) Tr. 1356-57; *see also* Begley (Altria) Tr. 990 (Elite’s “rapid launch” was a “significant achievement” requiring “a lot of hard work” by “a lot of people”)). Among other things discussed in more depth in the sections that follow, Altria “put in place marketing offers to get lots of people to try the product” and built a supply chain to get the product into thousands of stores. (Willard (Altria) Tr. 1357).

#### **Response to Finding No. 407**

Complaint Counsel agrees that Altria had the incentives, resources, and ability to invest in and market e-vapor products.

##### **1. Altria Invested In A Strong Rollout With Wide Initial Distribution And Placement In Leading Retailers**

408. The Elite launch was “the number one priority for [Altria’s] sales force.” (Willard (Altria) Tr. 1356-57). AGDC never took its “foot off the gas,” getting Elite to “all the targeted stores” and ensuring consumers “knew MarkTen Elite was in the store.” (Myers (Altria) Tr. 3323).

**Response to Finding No. 408**

The proposed finding is misleading and contrary to the weight of the evidence in that it ignores that, while at the launch Altria did not slow down its efforts to roll Elite out to new store locations, after the initial launch it did slow down its launch activities as it successfully worked to fix Elite's leaking gasket. Altria did indeed take its "foot of the gas," which had a negative impact on Elite's sales and subsequent market share. Nu Mark's 2018 3-year Strategic Plan set MarkTen Elite retail launch goals of 13,000 stores by May 2018, between 23,000-28,000 stores by June or July 2018, and 44,000 stores by September 2018. (PX4012 (Altria) at 028). While the new gasket was being developed, there was a delay in MarkTen Elite's expansion and the next waves of expansion were set to begin on October 8, October 29, and November 19, 2018, along with two waves in Q1 2019. (CCFF ¶ 1147). That expansion never happened because Altria management had other ideas. The new gasket was developed by Nu Mark Israel by June 8, 2018, (CCFF ¶ 1210), and not approved by the change management committee until August 10, 2018. (CCFF ¶ 1215). Schwartz testified that MarkTen Elite's leaking problem "impacted [Altria's] expansion plans for MarkTen Elite", and agreed that as long as Elite's pods were leaking it was hard for Altria to expand the product. (CCFF ¶ 1208). He further testified that he believed that this delay in approval from the change management team affected Nu Mark's expansion plans for Elite, explaining, "You need a pipeline product, and we did not want to continue to commercialize a product that we knew was inferior from a quality point of view by our standards. And so we put further expansion on hold until we had a fix for the gasket that was leaking." (PX7018 (Schwartz (Altria), Dep. at 121)). Putting further expansion on hold meant not adding MarkTen Elite to new stores. (PX7018 (Schwartz (Altria), Dep. at 121)). Schwartz also included this information in an email to Nu Mark's contract manufacturer SMOORE, writing, "As you can see MarkTen Elite

continues to trend upwards. However, we have decided to delay further expansion until we can have the new gasket, fin seal pouch and ACL e-liquid all together which is looking to be possible with production in November, which would mean expansion could resume in December.” (PX1147 (Altria) at 003-04; PX7018 (Schwartz (Altria), Dep. at 122-27)).

409. [REDACTED]

**Response to Finding No. 409**

The proposed finding is incomplete and misleading because it ignores that, while at the launch Altria did not slow down its efforts to roll Elite out to new store locations, after the initial launch it did slow down its launch activities as it successfully worked to fix Elite’s leaking gasket. (See Response to RPF ¶ 408). Complaint Counsel agrees that [REDACTED]

410. The sales force was able to get Elite into over 90 percent of the stores that it targeted. (Myers (Altria) Tr. 3323).

**Response to Finding No. 410**

The proposed finding is incomplete and misleading because it ignores that, while at the launch Altria did not slow down its efforts to roll Elite out to new store locations, after the initial launch it did slow down its launch activities as it successfully worked to fix Elite’s leaking gasket. (See Response to RPF ¶ 408). Complaint Counsel agrees that [REDACTED]

411. “Nu Mark expanded MarkTen Elite from over 6,000 stores in the first quarter [of 2018] to more than 23,000 stores by the end of the second quarter.” (PX9047 (Altria) at 003). [REDACTED]

**Response to Finding No. 411**

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The proposed finding is incomplete and misleading because it ignores that, while at the launch Altria did not slow down its efforts to roll Elite out to new store locations, after the initial launch it did slow down its launch activities as it successfully worked to fix Elite's leaking gasket. (See Response to RPF ¶ 408). Complaint Counsel agrees that [REDACTED]

412. In attempting to expand distribution, Altria faced retailer pushback about the quality of Nu Mark's products. For example, Nu Mark wanted to launch Elite in 7-Eleven, because 7-Eleven is Altria's largest retailer "both from a business contribution and from a total retail store standpoint," it has a national footprint, and it does well "creating awareness in trial" using its loyalty program and digital capabilities. (Myers (Altria) Tr. 3307, 3315). But 7-Eleven did not "feel great about MarkTen as a brand," and only agreed to be one of the first retailers to roll out Elite once Altria agreed to cover restocking fees in case Elite did not sell and to be aggressive with promotions. (Myers (Altria) Tr. 3315-16).

### **Response to Finding No. 412**

The proposed finding is unreliable, vague, incomplete, and misleading. The statement by Myers that 7-Eleven did not "feel great about MarkTen as a brand" is unreliable in that it relies solely on the self-serving and hearsay testimony of an Altria executive. It is also vague as to the phrase "feel great." In addition, the proposed finding is incomplete and misleading to the extent that it attempts to use unsupported testimony about one retailer to characterize Elite's overall expansion. Despite any quality concerns, by mid-2018 "Nu Mark was able to expand MarkTen Elite from over 6,000 stores in the first quarter to more than 23,000 stores by the end of the second quarter." (CCFF ¶ 1113). Altria only slowed its efforts to expand Elite as it successfully worked to fix the leaking gasket. (See Response to RPF ¶ 408).

### **2. Altria Secured Prime Shelf Space For Nu Mark's Innovative Tobacco Products, Including MarkTen Elite**

413. Shortly after Elite's launch, Altria also launched its Innovative Tobacco Products ("ITP") program, which consolidated e-vapor products in a designated location at retail stores and provided Altria with shelf space at the top of retail fixtures. (Begley (Altria) Tr. 1005-07; RX1240 (Altria) at 001; see also [REDACTED]).

**Response to Finding No. 413**

The proposed finding is incomplete because it fails to state that Altria spent roughly \$100 million on ITP for its e-vapor products. (CCFF ¶¶ 431, 1448). Further, Nu Mark's 2019 budget anticipated an additional \$57 million in expenditures for a second wave of ITP. (CCFF ¶ 431).

414. Many “important retailers” participated in the program, including Speedway, 7-Eleven, and Circle K. (Huckabee (Reynolds) Tr. 485; PX8008 Huckabee (Reynolds) Decl. at 025 ¶ 50).

**Response to Finding No. 414**

Complaint Counsel agrees that Altria had the incentive, resources, and ability to successfully market and obtain shelf space for its e-vapor products.

415. Products do not necessarily require premium shelf space to succeed; for example, “JUUL was able to grow their brand, particularly regionally, early on without national shelf space,” (Huckabee (Reynolds) Tr. 474), as was JTI's Logic product, (PX7037 Huckabee (Reynolds) Dep. at 115). (See also PX7022 Begley (Altria) Dep. at 215-16 (“Think about JUUL. JUUL's visibility was mixed in different stores. And even though JUUL didn't have, you know, the visibility that [Altria] enjoyed in these stores, they somehow found a way, because of the quality of their product, to do very well.”); PX7009 Burns (JLI) IHT at 191-92 (noting JUUL went from “less than 1 percent of the combined cigarette/e-cig market to 7 to 8 percent, and [it was] doing that with less than optimal space”); PX7038 Myers (Altria) Dep. at 146-47 (noting that ZYN is another example of a product that “generally doesn't have a home” at retail—i.e., is “not merchandised in a category”—but is the “largest [tobacco derived nicotine] product in the marketplace”)).

**Response to Finding No. 415**

The proposed finding is misleading and contrary to the weight of the evidence. Notwithstanding JUUL's initial success, favorable shelf space is a critical factor in growing market share and sales for e-cigarette brands, especially given the advertising restrictions that were put in place in an attempt to combat youth vaping. (CCFF ¶¶ 1805-17). As Willard testified, “I think over the last many years, I think, given the harm caused by tobacco products, there has been a series of rules that have been created that limit the advertising vehicles that tobacco companies can use to reach customers...,” and because of restrictions on mass media, advertising shelf space is even

more important. (CCFF ¶ 1805). Dr. Rothman also reached the conclusion that because advertising of nicotine products is restricted in the U.S., shelf space is an important way for e-cigarette suppliers to reach customers. (CCFF ¶ 1805).

Shelf space was so critical to Altria that it launched its Innovative Tobacco Products program in order to display its e-vapor products to generate both trial awareness and repeat purchases by gaining better visibility for its brands and the promotions they were offering. (CCFF ¶ 1447). In 2018, Altria dedicated approximately \$100 million to its ITP program over a 3-year period to obtain premium shelf space. (CCFF ¶ 1448). Other e-cigarette manufacturers, including PMI, NJOY, and JLI, similarly agree that prime shelf space is a significant advantage in selling e-vapor products. (CCFF ¶¶ 499, 502, 1444, 1811, 1812). In fact, even JLI (who the proposed finding of fact claims succeeded without access to premium shelf space) perceived Altria's access to shelf space as a threat, with an executive warning JLI's then-CEO and CFO, "we will have a plan to address the Altria 3 year contracts that are being pitched. This is urgent. If we can't find a strategy around this, we will be severely restricted on shelf in a considerable part of the c-store universe for the next 3 years." (CCFF ¶ 503). A week later, JLI had crafted a presentation entitled "Altria Threat Competitive Response," the executive summary of which concludes that Altria's new shelf space agreements are "likely the first bid to foreclose shelf-space for their vapor products at the expense of JUUL. Initial analysis indicates that these competitor moves could cost our business ~\$0.5B in sales per year." (CCFF ¶¶ 504-05, 1450-51). In response to this threat, JLI considered a multi-pronged approach that included, among other things, the possibility of additional incentives to retailers, increased marketing spend, and even legal remedies to "challenge anticompetitive shelf-space foreclosure." (CCFF ¶ 506). At the same time Altria was entering into

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ITP contracts with retailers, JLI was also competing aggressively for shelf space at convenience stores. (CCFF ¶ 1449).

Finally, Altria concluded that its ITP program had in fact resulted in “Improved Velocity.” (CCFF ¶ 1452). Altria also expected that its ITP investment would { [REDACTED] }  
[REDACTED] }

416. But shelf space at the top of retail fixtures is considered desirable because it improves product visibility in retail stores. (Begley (Altria) Tr. 1007 (“It is certainly beneficial to have the best space you can at retail stores to communicate your brand messaging.”); Farrell (NJOY) Tr. 254-56 (explaining that higher shelving is preferable because it provides better visibility, which allows for better communication with the customer)).

#### **Response to Finding No. 416**

The proposed finding is incomplete and misleading because top shelf space is more than just “desirable,” it is a critical factor in growing market share and sales for e-cigarette brands by improving product visibility in retail stores. (See Response to RPF No. 415).

417. [REDACTED]

#### **Response to Finding No. 417**

The proposed finding is incomplete and misleading to the extent that it implies that sales are the sole factor retailers use in allocating the most visible shelf space. In fact, as Respondents acknowledge in RPF No. 418, { [REDACTED]

[REDACTED] }; see Response to RPF No. 415).

418. [REDACTED]

[REDACTED]

### **Response to Finding No. 418**

Complaint Counsel does not disagree that [REDACTED]

[REDACTED]

[REDACTED] } However, the proposed finding is incomplete and misleading to the extent that it suggests [REDACTED]

[REDACTED]. (See Responses to RPF 415, 417).

419. [REDACTED]

[REDACTED]; PX1232 (Altria) at 008-10 (projecting in May 2018 that total investment would be between \$82.2-99.8 million). This was a significant investment for Nu Mark. (Quigley (Altria) Tr. 1951).

### **Response to Finding No. 419**

The proposed finding is incomplete and misleading to the extent that it implies that Nu Mark was the only company that had to pay for top shelf space or favorable shelf space in general.

In fact, [REDACTED]

[REDACTED]; see Responses to RPF 415, 417).

420. But visibility alone, while helpful, is not sufficient to make a product competitive. (Begley (Altria) Tr. 1114). As Begley explained, “if you don’t have a product that consumers like, it doesn’t really matter how visible it is.” (Begley (Altria) Tr. 1114; see also [REDACTED]; Myers (Altria) Tr. 3312-13 (describing failed rollout of Marlboro MST, which was unsuccessful despite visibility because “the product just wasn’t good, and the consumer didn’t adopt it”)).

### **Response to Finding No. 420**



The proposed finding is misleading and contrary to the weight of the evidence in that it understates the importance of favorable shelf space, which is a critical factor in growing market share and sales for e-cigarette brands by improving product visibility in retail stores. (*See* Response to RPF 415). Altria was well positioned to secure premium shelf space for its e-vapor products. (CCFF ¶¶ 500-01, 1821).

421. Ultimately, as will be described in greater depth below, the ITP program’s top shelf space was not enough to make the MarkTen cig-a-like or MarkTen Elite successful. (*See infra* Part III.E).

### **Response to Finding No. 421**

The proposed finding is unreliable in that it cites no evidence of any kind. To the extent that it means to point to the proposed findings set forth in Part III.E, below, Complaint Counsel points to its responses to those proposed findings. (*See* Responses to RPF ¶¶ 422-30).

### **3. Altria Heavily And Aggressively Discounted Elite**

422. Altria also invested heavily in significant promotions for Elite. (Gifford (Altria) Tr. 2753; Myers (Altria) Tr. 3331 (“[W]e wanted to give it every chance to be successful . . . .”); Myers (Altria) Tr. 3336-37 (describing how the sales team “went all out” to promote Elite); PX7023 Fernandez (Altria) Dep. at 78-79 (“[Altria had] very attractive promotional offers to give really good value to the -- low price to the consumer.”)).

### **Response to Finding No. 422**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria executives. It is also vague in that it fails to specify a relevant timeframe.

In addition, although Complaint Counsel does not disagree that Altria initially invested in promotions for Elite, the notion that Altria gave it “every chance to be successful” is misleading and contrary to the weight of the evidence. In fact, Altria delayed subsequent expansions of Elite’s distribution while it was working to implement its—ultimately successful—fix for the product’s leaking issue. (*See* Response to RPF ¶ 408). More broadly, the notion that Altria gave Elite “every

chance” fails to square with the fact that it pulled the product from the market less than eight months after launching it, (CCFF ¶¶ 1144-45), and only days after completing its implementation of the new gasket. (CCFF ¶ 1217). The totality of the record makes clear that such a limited timeframe prevented Altria from assessing Elite’s long-term potential for success. (CCFF ¶¶ 1144-62).

423. As Gifford explained, Altria provided “pretty much whatever [promotional support] we were asked for. . . . [A]ctually sometimes the prodding went the other way, like [we asked] can’t you do more?” (Gifford (Altria) Tr. 2753; *see also* [REDACTED]). Altria has “the best sales force in the space,” (King (PMI) Tr. 2360), and Altria’s sales force “put[] any resource [it] could” into the rollout of Elite, (Myers (Altria) Tr. 3316).

### **Response to Finding No. 423**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. Gifford’s unreliable testimony that Altria provided “pretty much whatever” was asked for is incomplete and misleading, as is Myers’ unreliable testimony that Altria “put[] any resource [it] could” into Elite’s rollout. In fact, their testimony is at odds with that of Schwartz, a former Nu Mark executive who no longer works at Altria. Schwartz testified at his Investigational Hearing that Nu Mark had “limited resources” and “budget constraints” and had to be more careful when adding stores to the Elite distribution. (PX7002 (Schwartz (Altria), IHT at 51-52)). Further, Schwartz testified that “there was a lot of scrutiny in terms of how [Nu Mark] was investing” and how it was “managing through our loss position to be wise with spending and not exacerbate the red that [Nu Mark] was generating.” (PX7002 (Schwartz (Altria), IHT at 52)).

In addition, although Complaint Counsel does not disagree that Altria initially invested in promotions for Elite, the notion that Altria provided “pretty much whatever” promotional support asked for is misleading and contrary to the weight of the evidence. (*See* Response to RPF ¶ 408).

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424. Among the many promotions that Nu Mark ran for Elite was a “Buy a Device, Get a Pod for Free” promotion. (Myers (Altria) Tr. 3319; RX2052 (Altria) at 003). Because the Elite device’s Manufacturer Suggested Retail Price (“MSRP”) was \$19.99 and a pod pack’s MSRP was \$8.99, the consumer got roughly \$30 of value for just \$19.99. (Myers (Altria) Tr. 3319-20). This was “a pretty aggressive offer -- to get the initial trial for the product.” (Myers (Altria) Tr. 3320).

**Response to Finding No. 424**

To the extent that the proposed finding stands for the proposition that Altria competed aggressively on price in the closed-system e-cigarette market, Complaint Counsel does not disagree.

To the extent that the proposed finding stands for the proposition that price discounting is not a common dimension of competition in the closed-system e-cigarette market, the proposed finding is misleading and contrary to the weight of the evidence. In fact, prior to the transaction both Altria and JLI routinely engaged in head-to-head price competition. (CCFF ¶¶ 1419-40).

425. But the “\$19.99 [promotion] wasn’t seeming to get people to purchase,” (Myers (Altria) Tr. 3324), so Nu Mark “decided to try to expand that and take it down to \$8.99,” (Myers (Altria) Tr. 3331; *see also* Gifford (Altria) Tr. 2753-56 (describing promotions, including \$8.99 trial offer, clerk incentive program, signage, direct mailings, retail intercepts, and events in Las Vegas)). The \$8.99 bundle included a battery kit plus any pod pack and so was “in essence a battery for free.” (Begley (Altria) Tr. 1115; *see also* Myers (Altria) Tr. 3333 (“[W]e were basically giving the device away for free . . . .”); PX1229 (Altria) at 021)).

**Response to Finding No. 425**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that Nu Mark’s promotions for Elite were ineffective. Instead, between May and July 2018, MarkTen Elite’s volume increased by 450% in the multi-outlet convenience store channel, and average weekly volume in stores carrying Elite increased by 56%. (CCFF ¶ 477). In fact, { [REDACTED]

[REDACTED]

[REDACTED] } Nor did Altria's promotions for Elite go unnoticed by JLI. (CCFF ¶ 1438; *see* Response to RPF ¶ 408).

426. The \$8.99 trial offer was “an aggressive offer.” (Quigley (Altria) Tr. 2055; *see also* [REDACTED]; Myers (Altria) Tr. 3332 (characterizing the \$8.99 offer as “even more aggressive” than the \$19.99 promotion)). It was more aggressive than the 99-cent promotions offered by other competitors, (*see infra* Parts XII.A.1-2, XII.A.4): Free is “as aggressive as you can get.” (Myers (Altria) Tr. 3333).

### **Response to Finding No. 426**

To the extent that the proposed finding stands for the proposition that Altria competed aggressively on price in the closed-system e-cigarette market, Complaint Counsel does not disagree.

To the extent that the proposed finding stands for the proposition that price discounting is not a common dimension of competition in the closed-system e-cigarette market, the proposed finding is misleading and contrary to the weight of the evidence. In fact, prior to the transaction both Altria and JLI routinely engaged in head-to-head price competition. (CCFF ¶¶ 1419-40).

427. Nu Mark also offered \$10-off coupons, (Myers (Altria) Tr. 3333-34; PX1229 (Altria) at 021), and instituted a store intercept program where Altria employees physically went to stores and handed out coupons to consumers, (Myers (Altria) Tr. 3336). Because the coupons could be used together with the device bundle promotion, a consumer using both could get both the pod and the device for free. (Myers (Altria) Tr. 3334; PX1229 (Altria) at 021). The fact that Nu Mark allowed consumers to “stack the deals” showed “that [it was] willing to try anything to get a trial.” (Myers (Altria) Tr. 3334-35).

### **Response to Finding No. 427**

Complaint Counsel agrees that Altria had the incentives, resources, and ability to engage in price competition with e-vapor competitors.

428. Nu Mark also instituted a clerk incentive program. (Myers (Altria) Tr. 3335; PX1229 (Altria) at 021). If a clerk sold 25 devices, they could get \$500 for the employees at the store, which was “a big deal.” (Myers (Altria) Tr. 3335-36). Unfortunately, given Elite's

poor performance, Nu Mark did not pay out the reward very often. (Myers (Altria) Tr. 3336).

### **Response to Finding No. 428**

The proposed finding is vague, unreliable, misleading, and contrary to the weight of the evidence. It is vague in that it fails to define the term “poor performance” or the meaning of not paying out a reward “very often.” For both bare characterizations, the proposed finding relies solely on the self-serving testimony of an Altria executive. The reference to “Elite’s poor performance” is also misleading and contrary to the weight of the evidence. (*See* Response to RPF ¶ 425).

429. {

[REDACTED]

[REDACTED]; *see also* Myers (Altria) Tr. 3335 (confirming the operating company bears the cost of the promotions)).

### **Response to Finding No. 429**

Complaint Counsel agrees that Altria had the incentives, resources, and ability to engage in price competition with e-vapor competitors.

430. As a result, the promotions did not come cheap: On top of the approximately \$100 million that it spent on the ITP program, Nu Mark spent \$76 million in marketing and sales expenditures in 2018. (PX1072 (Altria) at 010; Quigley (Altria) Tr. 1982 (explaining that this expenditure was separate from the ITP program)).

### **Response to Finding No. 430**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that Nu Mark was unique as an e-vapor company incurring losses in order to participate in the strategically important e-vapor category long-term. (*See* Response to RPF ¶ 393).

## **E. Elite Nonetheless Stumbled Out Of The Gates**

**1. Despite Aggressive Promotions And Wide Distribution, Sales Were Dismal**

431. Even with significant investments in shelf space, promotions, and expanded distribution, Elite was not a success. (Gifford (Altria) Tr. 2715 (“[E]ven with the investment behind it -- [we just weren’t able to] get the consumer to uptake it to any great extent.”)).

**Response to Finding No. 431**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies only on self-serving testimony.

To the extent that the proposed finding claims that Altria made “significant investments in shelf space, promotions, and expanded distribution” in connection with MarkTen Elite, Complaint Counsel refers generally to its responses to RPPF Section III.D, which discusses Altria’s marketing and promotion of MarkTen Elite. (*See* Responses to RPPF ¶¶ 407-30).

To the extent that the proposed finding claims that MarkTen Elite was “not a success” and “even with the investment behind it -- [we just weren’t able to] get the consumer to uptake it to any great extent,” the proposed finding is contrary to the weight of the evidence. Altria launched MarkTen Elite on February 26, 2018. (CCFF ¶ 1144). Altria announced that it would withdraw Elite from the U.S. market on October 25, 2018. (CCFF ¶ 1145). MarkTen Elite experienced robust sales growth from its launch to its withdrawal. (CCFF ¶¶ 1112-31).

Nu Mark was able to take Elite from zero retail stores to 25,000 retail stores between February and September of 2018. (CCFF ¶ 1124). Altria executives consistently testified that MarkTen Elite sales were growing in 2018. (CCFF ¶ 1112). On July 26, 2018, Willard stated to investors on an earnings call that “Nu Mark grew volume by approximately 16% in the quarter and 23% for the first half, primarily driven by expanded distribution” and that MarkTen Elite and MarkTen Bold were “[t]he drivers of the growth in second quarter and first half” and were “getting traction with consumers.” (CCFF ¶ 1113).

MarkTen Elite’s unit sales in the first 21 weeks following its launch were in a similar range as those of its competitors—6.8 pods per store per week on average compared to 4.6 pods per store per week for blu and 8.8 pods per store per week for JUUL. (CCFF ¶ 1114). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

MarkTen Elite’s average sales per store also grew from May to July in major retail chains including Walgreens, 7-Eleven, Wawa, Speedway, and Sheetz. (CCFF ¶ 1117).

According to IRI data, from the week of May 20, 2018, to the week of June 24, 2018, MarkTen Elite’s sales increased from \$135K to \$445K (or by 230 percent), and in one week alone in June 2018, MarkTen Elite’s sales increased by 77.9 percent. (CCFF ¶ 1118). From the four weeks ending May 27, 2018, to the four weeks ending July 1, 2018, MarkTen Elite’s sales volume grew 210 percent. (CCFF ¶ 1119). As of July 1, 2018, Nu Mark reported that MarkTen Elite was “continuing to show week-over-week growth” with a marginal contribution of \$1.5 million through June 2018. (CCFF ¶ 1120). MarkTen Elite was profitable as of July 2018, when it had a 38 percent year-to-date positive marginal contribution, excluding one-time marketing costs. (CCFF ¶ 1121). Between May 2018 and July 2018, MarkTen Elite’s sales volume increased by 450 percent in the multioutlet convenience store channel, with average weekly volume in stores carrying Elite increasing by 56 percent over this period. (CCFF ¶ 1122).

Schwartz stated in an August 4, 2018 email to Altria’s former Chairman that MarkTen Elite was “[s]tarting to gain traction” and was “showing promise,” with “the best yet to come,” including

plans for marketing the product in casinos, on social media, and through affiliate programs later in the month. (CCFF ¶ 1125). By August 11, 2018, MarkTen Elite had expanded to around 20,000 stores with a planned expansion to more than 20,000 “additional stores by December 2018.” (CCFF ¶ 1126). In an August 15, 2018, email to Altria’s former Chairman, Craig Schwartz stated that by July 2018, MarkTen Elite had generated \$5 million in positive marginal contribution on \$20 million in sales, despite the fact that it “took us 4 years to be Margin positive with our MarkTen cig-a-like franchise.” (CCFF ¶ 1127). An August 2018 “Nu Mark Brand Update” showed that MarkTen Elite average weekly volume sales increased steadily from the product’s launch in March 2018 through July 2018. (CCFF ¶ 1128).

Altria expected MarkTen Elite to be even more successful in the future: An Altria presentation attached to an August 27, 2018 email projected positive and growing margins and sales volume for MarkTen Elite for 2019 and 2020, as well as declining promotional spending. (CCFF ¶ 1130).

The proposed finding is also misleading because Altria withdrew MarkTen Elite from the market before it had an opportunity to assess the product’s long-term commercial prospects. (CCFF ¶¶ 1144-62). Altria planned a phased rollout of Elite, with 55 percent of volume coverage of accounts/stores not scheduled to occur until September 2018. (CCFF ¶ 1146). As of September 28, 2018, Altria was planning new waves of MarkTen Elite expansion for October 8, October 29, and November 19, 2018, and two waves in Q1 2019. (CCFF ¶ 1147). Quigley testified that Altria planned to expand MarkTen Elite to 37,000 stores by the end of 2018, and that Altria would have been able to do so if not for the discontinuation of the product. (CCFF ¶ 1148). Moreover, shortly before withdrawing MarkTen Elite from the market, Altria implemented a new gasket, the C1A gasket, on MarkTen Elite to address a leaking issue, leaving it little time to assess the impact of



the change on Elite's sales performance. (CCFF ¶¶ 1149, 1206-18 (referencing an email dated October 22, 2018, as follows: "As of today, the entire PW network has been converted over to the C1A gasket.")). In the weeks after Altria began to implement the C1A gasket, e-commerce leakage complaints regarding MarkTen Elite plummeted while MarkTen Elite e-commerce sales grew from about 3,000 per day on October 1, 2018 to over 10,000 per day on October 25, 2018, when Altria announced the discontinuation of Elite. (CCFF ¶ 1221).

432. Expanded distribution could grow volume, but it was not sustainable. (Quigley (Altria) Tr. 1945; PX7013 Brace (Altria) Dep. at 84). Over the course of 2018, Elite's sales "plateaued," (Willard (Altria) Tr. 1388), and despite the growth of the pod market, Elite's volume never took off, (Willard (Altria) Tr. 1368). Though Elite was able to "get[] initial traction with consumers[,] largely because of expanded distribution and promotional offers," this "limited success . . . was substantially less than [JUUL,] the leading product in the marketplace." (Willard (Altria) Tr. 1386-87). Similarly, Nu Mark's promotions were "not financially sustainable." (PX7013 Brace (Altria) Dep. at 84).

### **Response to Finding No. 432**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable in that it relies solely on the self-serving testimony of Altria executives.

To the extent that the proposed finding stands for the proposition that Elite's sales performance within individual convenience stores was not comparable to or better than competitive brands at the time of their respective initial launches, the proposed finding is misleading and contrary to the weight of the evidence. In fact, Elite's unit sales in the first 21 weeks following its launch were in a similar range as those of its competitors. (CCFF ¶ 1114).

To the extent that the proposed finding claims, with respect to MarkTen Elite, "[e]xpanded distribution could grow volume, but it was not sustainable," the proposed finding is misleading and contrary to the weight of the evidence. MarkTen Elite was profitable as of July 2018, when it had a 38 percent year-to-date positive marginal contribution, excluding one-time marketing costs.

(CCFF ¶ 1121; Response to RPF ¶ 431). Nu Mark continued to meet budget and performance expectations in 2017 and 2018. (CCFF ¶¶ 1088-111; *see* Response to RPF ¶ 393). Altria expected Nu Mark to grow in revenue and profitability in future years. (CCFF ¶¶ 1083-87).

To the extent that the proposed finding stands for the proposition that Elite was gaining traction with consumers, Complaint Counsel does not disagree.

433. [REDACTED] }; *see also* Myers (Altria) Tr. 3331). But in many stores, the promotions failed to generate any sales at all. (PX7038 Myers (Altria) Dep. at 102 (“[In] 7-Eleven, the [\$]8.99 [promotion] was still only getting half the stores to get someone to even purchase the product.”)).

### **Response to Finding No. 433**

The proposed finding is unreliable, unsupported, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies only on self-serving testimony.

The first sentence of the proposed finding is unsupported in that it cites no evidence in the record.

To the extent that the proposed finding claims that Nu Mark’s promotions were not [REDACTED] } the proposed finding is misleading and contrary to the weight of the evidence. MarkTen Elite had robust sales growth throughout 2018 and was profitable as of July 2018, when it had a 38 percent year-to-date positive marginal contribution, excluding one-time marketing costs. (*See* Responses to RPF ¶¶ 431-32).

To the extent that the proposed finding claims that “in many stores, the promotions failed to generate any sales at all” and “[In] 7-Eleven, the [\$]8.99 [promotion] was still only getting half the stores to get someone to even purchase the product,” the proposed finding is misleading and contrary to the weight of the evidence. MarkTen Elite’s unit sales in the first 21 weeks following

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its launch were in a similar range as those of its competitors—6.8 pods per store per week on average compared to 4.6 pods per store per week for blu and 8.8 pods per store per week for JUUL.

(CCFF ¶ 1114). [REDACTED]

[REDACTED] MarkTen Elite’s average sales per store also grew from May to July in major retail chains including Walgreens, 7-Eleven, Wawa, Speedway, and Sheetz.

(CCFF ¶ 1117).

434. And even where promotions worked to incent some sales, those sales would cease as soon as the promotion ended. (Myers (Altria) Tr. 3352 (relaying comment from the senior category manager of Other Tobacco Products at 7-Eleven: “You should never turn this [\$8.99 bundle promotion] off[,] [y]ou killed the momentum”); RX2051 (Altria) 001 (“Killed the momentum...on batteries and thus PODs[.]”); PX7038 Myers (Altria) Dep. at 184 (“[T]here was never really a period that [the promotion] was off more than a couple of weeks because it was just . . . not performing well, even when it was on.”); PX7038 Myers (Altria) Dep. at 184 (noting that as soon as a promotion was “turned . . . off, the sales dropped and [Nu Mark was] quickly scrambling to try to get it turned back on”); *see also* [REDACTED] }).

#### **Response to Finding No. 434**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on the self-serving testimony of Altria executives.

To the extent that, in claiming “even where promotions worked to incent some sales, those sales would cease as soon as the promotion ended,” the proposed finding implies that MarkTen Elite’s reliance on promotions justified Altria’s withdrawal of the product, the proposed finding is

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misleading because other competitors in the closed-system e-cigarette market remained in the market and continued to discount their products. (CCFF ¶¶ 1132-43). For example, NJOY continues to run its 99-cent device promotion in both new accounts and accounts that it has been in for over a year. (PX7029 (Farrell (NJOY), Dep. at 115-16)). NJOY has no plan to stop doing those promotions. (PX7029 (Farrell (NJOY), Dep. at 121)). Nowhere in their proposed findings of fact have Respondents suggested NJOY products are not successful. NJOY has also observed that its e-vapor competitors, including JUUL, VUSE, *myblu*, and Logic, also run promotions from time to time and do not back off those promotions. (PX7029 (Farrell (NJOY), Dep. at 119-20)).

{ [REDACTED] } Reynolds has been running its 99-cent promotion on its Alto device. (CCFF ¶¶ 109-11, 1031, 1133-34 (*in camera*); PX7037 (Huckabee (Reynolds), Dep. at 86)). Moreover, Altria expected Nu Mark to grow in revenue and profitability in future years. (CCFF ¶¶ 1083-87).

To the extent that the proposed finding claims that “even where promotions worked to incent some sales, those sales would cease as soon as the promotion ended,” the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 431-33. (*See Responses to RPF ¶¶ 431-33*).

435. [REDACTED]  
[REDACTED] ; *see also* Quigley (Altria) Tr. 2056 (explaining that while using promotions to drive trial “made everybody feel good, . . . it was not solving the problem” because it was “not changing [Nu Mark’s] position or [its] ability to achieve leadership”); Willard (Altria) Tr. 1367; PX9047 (Altria) at 003, 009-10).

### **Response to Finding No. 435**

The proposed finding overstates the evidence and is unreliable, misleading, and contrary to the weight of the evidence.

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To the extent that the proposed finding claims { [REDACTED] } the proposed finding overstates the evidence and is misleading because { [REDACTED] } The proposed finding is also misleading and contrary to the weight of the evidence, which shows that MarkTen Elite had robust sales growth throughout 2018 and was commercially successful. (See Responses to RPF 431-34).

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

To the extent that the proposed finding claims { [REDACTED] } Complaint Counsel does not disagree.

436. [REDACTED]; *see also* PX7019 Crozier (Sheetz) Dep. at 58 (“Cartridge sales are important because it shows there’s through-put with the consumer. So they buy the device and then keep coming back to, you know, buy the pods together with the device, as opposed to just buying the device once and whether it came with pods or not, the pods show that the person is still using the device.”)).

#### **Response to Finding No. 436**

Complaint Counsel has no specific response.

437. [REDACTED]; *see also* PX7038 Myers (Altria) Dep. at 176 (“[W]e see it getting some initial trial, but we’re not seeing it convert into pod sales. Maybe pods grew a pod a week or something like that, but that is not where they would set the bar at for a successful new product launch. They were looking for a really strong growth line on the pod side of it.”); PX7038 Myers (Altria) Dep. at 106-07 (explaining that though a 7-Eleven \$8.99 promotion and coupon “really drove device sales, . . . it didn’t drive what they were really looking for, which was cartridge sales or pod sales after the initial trial”); PX7019 Crozier (Sheetz) Dep. at 77-78 (discussing the “pretty big drop-off” in sales when Elite promotion was stopped); PX4214 (Altria) at 001 (7-Eleven observing that the device promotion was not leading to new trial; people who already were buying the pods were just taking the device for free); PX4569 (Altria) at 001 (explaining that promotion extension came too late, after 7-Eleven turned off promotion and the momentum was killed)).

#### **Response to Finding No. 437**

The proposed finding overstates the evidence and is unreliable, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims { [REDACTED] } the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (See Responses to RPF 431-32).

To the extent that the proposed finding relies on testimony from Crozier regarding PX1135 to support the claim that MarkTen Elite experienced a “pretty big drop-off” in sales when Elite promotion was stopped,” the proposed finding overstates the evidence and is misleading. The proposed finding overstates the cited evidence because the cited exhibit consists of anecdotal sales data regarding a short time-period. (PX1135 (Altria) at 035-36). The proposed finding is also misleading because { [REDACTED]

To the extent that the proposed finding relies on PX4214 to support the claim that MarkTen Elite “device promotion was not leading to new trial,” the proposed finding overstates the evidence and is misleading. The cover email of the cited exhibit states “I was looking at this today . . . its early I know. My thoughts are that we are not getting new customers buying the PODs . . . only the same people buying PODs and then getting the battery, bigger uptick on the battery the last 2 weeks smaller uptick on the PODs. Your thoughts?” (PX4212 (Altria) at 001). Another 7-Eleven employee responded, “looks like [Elite] has doubled trial with battery sales in two weeks.” (PX4212 (Altria) at 001). The proposed finding overstates the evidence because the 7-Eleven employee was expressing a possible view relying on anecdotal sales data from a two-week period and the cited data set does not include information for subsequent weeks. (PX4212 (Altria) at 001). Moreover, a later 7-Eleven email revealed that the dataset in PX4214 contained errors. (Myers

(Altria) Tr. 3384-85 (discussing PX4368 (Altria) at 001)). 7-Eleven personnel circulated a corrected data set, and in the cover email a 7-Eleven employee noted: “[MarkTen Elite] Pod growth is outpacing battery growth which suggests that customers are returning just for pods.” (Myers (Altria) Tr. 3384-3385 (discussing PX4368 (Altria) at 001)).

To the extent that the proposed finding relies on PX4569 to support the claim that “promotion extension came too late, after 7-Eleven turned off promotion and the momentum was killed,” the proposed finding overstates the evidence and is misleading because the cited email consists of anecdotal evidence concerning 7-Eleven employees’ opinions about a single week of MarkTen Elite sales. (PX4569 (Altria) at 001-02). In the cited email, which has the subject line “MarkTen Elite,” a 7-Eleven employee states, “Killed the momentum . . . on batteries and thus pods,” and another employee states, “expecting a pickup over the next few weeks as \$8.99 gets ramped up, POS is replaced, etc.,” to which a third employee replies “[w]hat is he referring to that killed the momentum,” to which the second employee replied “[s]hort lead time on the extension of \$8.99 caused 7-Eleven to have to set new promotions for each market. Ultimately ~1 week lapse in the offer running, pending stores re-accepting the promotion, POS removal, etc.” (PX4569 (Altria) at 001-02).

The proposed finding is unreliable to the extent that it relies on the self-serving testimony of Altria executives and anecdotal evidence.

438. Altria found that due to its promotions and distribution pushes, Elite was generating some trial by consumers. (Willard (Altria) Tr. 1367, 1386; PX9047 (Altria) at 003, 009). But consumers buying a two-pack of pods on a trial offer does not generate the volume needed to develop a sustainable business. (Willard (Altria) Tr. 1367). Altria was “hoping [consumers would] try it and they say this great, and [then] go out and buy a pack a couple of times a week. That drives volume. [But Altria] never convinced the consumer, after their initial trial, to become a repeat purchaser.” (Willard (Altria) Tr. 1367).

### **Response to Finding No. 438**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on the self-serving testimony of an Altria executive.

The proposed finding is vague because the phrases “the volume needed to develop a sustainable business” and “convinced the consumer, after their initial trial, to become a repeat purchaser” are ambiguous.

To the extent that the proposed finding claims that “consumers buying a two-pack of pods on a trial offer does not generate the volume needed to develop a sustainable business” and “[Altria] never convinced the consumer, after their initial trial, to become a repeat purchaser,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

To the extent that the proposed finding claims that “Altria found that due to its promotions and distribution pushes, Elite was generating some trial by consumers” and “Altria was ‘hoping [consumers would] try it and they say this great, and [then] go out and buy a pack a couple of times a week. That drives volume,’ Complaint Counsel does not disagree.

439. { [REDACTED] }; *infra* Part XII.A.1-2).

### **Response to Finding No. 439**

The proposed finding is vague, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because the phrase [REDACTED]

To the extent that the proposed finding claims { [REDACTED]



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the proposed finding is misleading because { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

To the extent that, in claiming { [REDACTED]

[REDACTED] } the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (See Responses to RPF 431-32).

440. As numerous third parties testified, “[i]f people don’t like the product, they’re not going to buy the product,” no matter what you do. (PX7030 Wexler (Turning Point Brands) Dep. at 105).

#### **Response to Finding No. 440**

The proposed finding overstates the cited evidence and is vague and contrary to the weight of the evidence.

To the extent that the proposed finding attributes the phrase “[i]f people don’t like the product, they’re not going to buy the product,” no matter what you do,” to “numerous third parties,” the proposed finding overstates the cited evidence because it cites to testimony from only one third party.

The proposed finding is vague because the phrase “[i]f people don’t like the product, they’re not going to buy the product” is ambiguous.

To the extent that, in claiming “[i]f people don’t like the product, they’re not going to buy the product,” the proposed finding implies that people did not “like” MarkTen Elite or were “not

going to buy the product,” the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

441. As Jefferson Eldridge, Vice President of Area Central at ITG Brands agreed, “to be successful in the e-vapor marketplace, it’s not enough just to have the resources of a large tobacco company, you also have to have a product that’s attractive to consumers and that can clear the regulatory hurdles.” (PX7012 Eldridge (ITG Brands) Dep. at 161; *see also* [REDACTED]; PX7014 Baculis (Altria) Dep. at 62-63 (explaining that Altria’s distribution network, marketing team, and sales network simply could not make an undesirable product succeed); PX7037 Huckabee (Reynolds) Dep. at 82 (agreeing that if a product is “suboptimal” that will “impact the repurchase of the product for consumers”)).

### **Response to Finding No. 441**

The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “to be successful in the e-vapor marketplace” a market participant must “have to have a product that’s attractive to consumers and that can clear the regulatory hurdles,” the proposed finding is misleading because, before September 2020, a manufacturer could keep a product that was introduced to the U.S. market before August 2016 on the market and could continue to market such a product after September 2020 as long as they submitted a PMTA. (*See Responses to RPF 44-121*).

To the extent that, in quoting testimony from Baculis and Huckabee claiming “Altria’s distribution network, marketing team, and sales network simply could not make an undesirable product succeed” and “if a product is ‘suboptimal’ that will ‘impact the repurchase of the product for consumers,’” the proposed finding implies that MarkTen Elite was “undesirable” or “suboptimal,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

Moreover, in an email dated August 8, 2018, Baculis stated that the results of Altria’s Home Use Tests indicated that MarkTen “Elite has a role to play” in that it “should be able to peel off some of the folks that are using JUUL but would really rather have something else.” (CCFF ¶

1315). Baculis also testified that Elite could appeal to JUUL customers that “would be willing to trade off a little bit of nicotine satisfaction” for “a better inhale/exhale experience” and “better tasting flavors.” (CCFF ¶ 1316).

To the extent that the proposed finding claims that “to be successful in the e-vapor marketplace” a market participant must “have the resources of a large tobacco company,” Complaint Counsel does not disagree.

442. Ultimately, despite Altria’s heavy promotional efforts, Elite never achieved more than a one percent share of e-vapor cartridge unit sales. (RX1217 Murphy Report ¶ 12). Elite’s performance was “nothing compared to what you would expect when you’re trying to disrupt the consumer and trying to get a consolidated group of consumers to engage with the brand.” (Gifford (Altria) Tr. 2755).

#### **Response to Finding No. 442**

The proposed finding is misleading, contrary to the weight of the evidence, and unreliable.

To the extent that the proposed finding claims that “despite Altria’s heavy promotional efforts, Elite never achieved more than a one percent share of e-vapor cartridge unit sales,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 431-32. (See Responses to RPF ¶¶ 431-32).

To the extent that the proposed finding relies on the Murphy’s report, the proposed finding is unreliable for the reasons set forth in CCFF ¶¶ 2078-2136. (CCFF ¶¶ 2078-2136).

The second sentence of the proposed finding is unreliable to the extent that it only cites the self-serving testimony of an Altria executive.

443. As a senior manager at JLI said bluntly: Elite’s “US sales [were] absolutely terrible, no traction whatsoever.” (RX1165 (JLI) at 004). [REDACTED]

#### **Response to Finding No. 443**

The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “Elite’s ‘US sales [were] absolutely terrible, no traction whatsoever,’” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 408, 431-32. (See Responses to RPF 408, 431-32).

To the extent that the proposed finding compares JUUL sales over the first half of 2018 to MarkTen Elite’s sales, the proposed finding is misleading because Elite’s performance was comparable to other products then in the market, such as *myblu* and *Logic*, which are still in the market. (See Responses to RPF 431-32; CCF 1132-43). The proposed finding is also misleading because Altria knew that JUUL’s growth in the first half of 2018 was attributable in part to youth initiation, which was both unsustainable and undesirable: Schwartz stated in an August 15, 2018 email to Altria’s former chairman that “40%” of Juul’s sales were to consumers aged between the legal age at the time and 21, with a “significant initiation component” which he anticipated would “present problems with the FDA when it seeks Market Authorization to continue selling beyond 2022.” (CCF 1249). Schwartz added that the “big issue” for JLI was “clearing FDA by 2022,” adding that “cleaning [Juul] up to do so would be dilutive.” (CCF 1249). Magness testified: “At the time of the transaction, I remember being concerned about, based on my understanding of PMTAs, that the youth usage issue would be very difficult for JUUL in a PMTA context.” (CCF 1250). Willard testified that the JUUL product’s ability to convert adult smokers “came with a negative in that as more adults chose e-vapor, more youth were choosing e-vapor,” and that around October 25, 2018, “the evidence pointed to the fact that it [JUUL] was also the number one product that was being utilized by youth.” (CCF 1251).

444. This assessment was true measured by any metric, at any given point in time while Elite was on the market: After its first eight weeks, Elite was selling 7.2 pods per week per store and, with two pods to a pack, that translates to “roughly a pack sold every other day.” (Begley (Altria) Tr. 1113 (discussing PX1229 (Altria) at 019)). In May 2018, Nu Mark

was selling just one Elite pack every other day in Sheetz. (PX1229 (Altria) at 019; *see also* Begley (Altria) Tr. 1113; PX7022 Begley (Altria) Dep. at 249).

**Response to Finding No. 444**

The proposed finding is misleading, contrary to the weight of the evidence, and unreliable.

To the extent that, in claiming “Elite was selling 7.2 pods per week per store and, with two pods to a pack, that translates to ‘roughly a pack sold every other day’” and “[i]n May 2018, Nu Mark was selling just one Elite pack every other day in Sheetz,” the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

The proposed finding is unreliable in that it cites anecdotal evidence from narrow time ranges at individual retailers.

To the extent that the proposed finding compares JUUL sales over the first half of 2018 to MarkTen Elite’s sales, the proposed finding is misleading for the reasons cited in response to RPF 443. (*See Response to RPF 443*).

445. Sales data showed that in roughly 6000 7-Eleven stores, initially “only a couple of hundred stores within the chain [were] actually selling one of the [Elite] SKUs.” (Myers (Altria) Tr. 3339-40).

**Response to Finding No. 445**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding relies on PX4214, the proposed finding is unreliable and misleading for the reasons cited in response to RPF 437. (*See Response to RPF 437*).

To the extent that, in claiming “[s]ales data showed that in roughly 6000 7-Eleven stores, initially ‘only a couple of hundred stores within the chain [were] actually selling one of the [Elite] SKUs,’” the proposed finding implies that MarkTen Elite was not commercially successful, the

proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

Specifically, the proposed finding is misleading because the data set underlying the cited testimony contains data for MarkTen Elite at 7-Eleven stores from March 2018 to June 2018, and so consists of anecdotal evidence from one customer over a short time period without any comparison to competing products. (Myers (Altria) Tr. 3339-40 (discussing PX4214 (7-Eleven) at 001-05)). In the cover email to the data set, a 7-Eleven employee begins his analysis of the data by stating, “its early, I know.” (PX4214 (Altria) at 001). Altria launched MarkTen Elite on February 26, 2018. (CCFF ¶ 1144). Altria planned a phased rollout of Elite, with 55 percent of volume coverage of accounts/stores not scheduled to occur until September 2018. (CCFF ¶ 1146). As of September 28, 2018, Altria was planning new waves of MarkTen Elite expansion for October 8, October 29, and November 19, 2018, and two waves in Q1 2019. (CCFF ¶ 1147). Quigley testified that Altria planned to expand MarkTen Elite to 37,000 stores by the end of 2018, and that Altria would have been able to do so if not for the discontinuation of the product. (CCFF ¶ 1148).

446. “More troubling” was that “even the battery, which you have to have to buy the pods, you only have about a thousand stores out of the 6000 stores” with “initial distribution selling a battery on a given week.” (Myers (Altria) Tr. 3340). In the week of June 4, 2018, just 4600 battery units were sold across 6000 stores, an average of less than one battery per store. (Myers (Altria) Tr. 3343; PX4214 (Altria) at 004). The following week, 11,645 pods in approximately 5000 two-pod packs were sold in about “seven, eight thousand stores,” which is “less than one pack per store in a given week.” (Myers (Altria) Tr. 3344; PX4214 (Altria) at 004; *see also* [REDACTED]). As Myers testified at trial, that data shows “it’s not working. Consumers aren’t interested.” (Myers (Altria) Tr. 3344).

#### **Response to Finding No. 446**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32, 437, 445. (*See Responses to RPF 431-32, 437, 445*).

In analyzing MarkTen Elite's performance with a more robust data set over a longer period of time and with the proper context of comparing Elite's performance to that of other market participants like *myblu* and Logic, Elite performed better than or comparable to those products, which are still on the market. (*See Responses to RPF* ¶¶ 431-32, 437, 445).

447. By the week of July 16, following the aggressive promotion offering a free device, just 8109 battery units were sold across the roughly 8000 7-Eleven stores then selling the product, an average of just one device per store per week—still well off the mark. (Myers (Altria) Tr. 3354-55).

#### **Response to Finding No. 447**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 431-32, 437, 445. (*See Responses to RPF* ¶¶ 431-32, 437, 445).

In analyzing MarkTen Elite's performance with a more robust data set over a longer period of time and with the proper context of comparing Elite's performance to that of other market participants like *myblu* and Logic, Elite performed better than or comparable to those products, which are still on the market. (*See Responses to RPF* ¶¶ 431-32, 437, 445).

448. In the first week of August, of those 7-Eleven stores that were selling Elite, the average sale was 0.2 units, generating \$2.91, all while tying up \$600–\$700 in inventory. (Myers (Altria) Tr. 3359).

#### **Response to Finding No. 448**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 431-32, 437, 445. (*See Responses to RPF* ¶¶ 431-32, 437, 445).

In analyzing MarkTen Elite's performance with a more robust data set over a longer period of time and with the proper context of comparing Elite's performance to that of other market

participants like *myblu* and Logic, Elite performed better than or comparable to those products, which are still on the market. (See Responses to RPF 431-32, 437, 445).

449. Elite frequently was falling out of carried status at 7-Eleven, which happened if products had not sold in four to six weeks. The chain's inventory management system automatically would stop reordering Elite for failure to reach the preset selling threshold. A product losing carried status is "a really early indicator that . . . it's not selling." (Myers (Altria) Tr. 3321-22, 3336, 3345-46).

#### **Response to Finding No. 449**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32, 437, 445. (See Responses to RPF 431-32, 437, 445).

In analyzing MarkTen Elite's performance with a more robust data set over a longer period of time and with the proper context of comparing Elite's performance to that of other market participants like *myblu* and Logic, Elite performed better than or comparable to those products, which are still on the market. (See Responses to RPF 431-32, 437, 445).

450. Only about 20 percent of stores were reordering the product after the first four to six weeks, and the rest would not reorder until "sometime after that, . . . which was atypical for what [Altria] would see in a new product launch." (PX7038 Myers (Altria) Dep. at 207).

#### **Response to Finding No. 450**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it cites only the self-serving testimony of an Altria executive.

The proposed finding is vague to the extent that the phrases "sometime after that" and "atypical" are ambiguous.



To the extent that the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

451. Indeed, Elite's sales volume was so low that Altria ended up with "55 weeks of inventory, . . . over a year of inventory" sitting in warehouses. (Myers (Altria) Tr. 3364; PX4239 (Altria) at 004). This was "very -- it's sad. It's a bad sign." (Myers (Altria) Tr. 3365).

#### **Response to Finding No. 451**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it cites the self-serving testimony of an Altria executive, and because Myers had no role in determining the initial selling quantities of MarkTen Elite. (Myers (Altria) Tr. 3379).

The proposed finding is vague to the extent that Myers did not explain how much inventory Altria would typically want on hand, and because the phrase "a bad sign" is ambiguous.

To the extent that the proposed finding attributes significance to MarkTen Elite's inventory on hand in August 2018, the proposed finding is misleading because Altria planned a phased rollout of Elite, with 55 percent of volume coverage of accounts/stores not scheduled to occur until September 2018. (CCFF ¶ 1146). As of September 28, 2018, Altria was planning new waves of MarkTen Elite expansion for October 8, October 29, and November 19, 2018, and two waves in Q1 2019. (CCFF ¶ 1147). Quigley testified that Altria planned to expand MarkTen Elite to 37,000 stores by the end of 2018, and that Altria would have been able to do so if not for the discontinuation of the product. (CCFF ¶ 1148). The proposed finding is also misleading because Altria implemented a gasket change to fix MarkTen Elite's leaking problems after August 2018, and the cited data is not clearly indicative of how MarkTen Elite would have performed after the leaking problems were resolved. (*See Responses to RPF 431-32*).

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

452. Such poor sales, despite extensive promotions and other efforts, left retailers feeling “frustrated that [Altria] couldn’t seem to get the innovative products right.” (PX7038 Myers (Altria) Dep. at 52).

### **Response to Finding No. 452**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it cites the self-serving testimony of an Altria executive and consists of hearsay testimony concerning the views of an undefined class of retailers. Moreover, Myers was only responsible for certain retailers in Altria’s Western region and was thus not in a position to make a general hearsay statement about what retailers believed. (*See Response to RPF 456*). At another point, Myers testified that during a meeting with retailers at Altria’s Ranch in July 2018, no retailer stated that they were going to stop carrying MarkTen Elite. (Myers (Altria) Tr. 3397).

The proposed finding is vague to the extent that the phrase “couldn’t seem to get the innovative products right” is ambiguous.

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful or had “poor sales,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

453. Retailers can judge the success of a promotion within a few weeks, and for Elite, it became clear within that time that the \$8.99 promotion was not sufficiently generating trial and that those who did try were not coming back for repeat purchases. (Myers (Altria) Tr. 3345; *see also* Myers (Altria) Tr. 3313-14 (explaining that the Altria sales force often is at the forefront of detecting problems with products because retailers quickly know how a

product is performing based on “the data they’re seeing” and “what they’re hearing from their store managers”).

### **Response to Finding No. 453**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable for the reasons cited in response to RPF 452. (*See* Response to RPF 452).

The proposed finding is vague to the extent that the phrase “not sufficiently generating trial” is ambiguous.

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See* Responses to RPF 431-32).

454. Altria was frustrated too. By the summer of 2018, the company found itself having “to do things that [it] never had to do before for new product launches.” It had to “guarantee the product so that if it went out of date or [stores] didn’t sell it,” Altria “would take it back.” It “had to cover things like restocking fees [for] their wholesaler if they did have to sell it back or return it back.” It had to have salespeople “stand in a store and intercept consumers to show [its] commitment to try to gain trial.” It had to keep promotions running in perpetuity, and to show retailers that it “would at least get them trials so they didn’t have any real risk around the inventory investment they were going to make to carry [the] product.” (PX7038 Myers (Altria) Dep. at 130-31; *see also* Myers (Altria) Tr. 3316, 3330-31).

### **Response to Finding No. 454**

The proposed finding is unsupported, unreliable, vague, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies only on the self-serving testimony of an Altria executive.

The first sentence of the proposed finding is unsupported in that it cites no evidence in the record.

The proposed finding is vague to the extent that the phrases “frustrated too” and “things that [it] never had to do before for new product launches” are ambiguous.

To the extent that the proposed finding attributes significance to the claim that, in 2018, Altria had to “keep promotions running in perpetuity,” the proposed finding is misleading. Since 2018, JLI, Reynolds, and NJOY have all continued to offer “significantly discounted prices on devices,” yet they remain in the market. (PX7033 (O’Hara (JLI), Dep. at 121-22).

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

455. As Scott Myers, now the President and CEO of AGDC, testified at trial, Elite was the “worst” performing product rollout he worked on in his 24 years with Altria. (Myers (Altria) Tr. 3297, 3366; PX7038 Myers (Altria) Dep. at 12).

#### **Response to Finding No. 455**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies only on the self-serving testimony of an Altria executive.

The proposed finding is vague because it does not explain how many rollouts Myers was involved in or why he thought Elite’s rollout was the “worst.”

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

The proposed finding is also misleading because Altria implemented a gasket change to fix MarkTen Elite’s leaking problems after August 2018, so Myers’ views on the initial rollout of the

product is not clearly indicative of how MarkTen Elite would have performed in the future. (*See* Responses to RPF 431-32).

456. At the time of Elite’s roll-out, Myers was the senior executive responsible in AGDC for the western region of the United States and some of Altria’s largest trade partners. (Myers (Altria) Tr. 3314-15).

#### **Response to Finding No. 456**

Complaint Counsel does not disagree, and adds that, in his role in Altria’s western region, Myers did not develop any trade programs for Nu Mark, did not approve any trade programs for Nu Mark, (PX7038 (Myers (Altria), Dep. at 16)), and measured the success of Elite based largely on the feedback he received from the few trade partners for which he was responsible. (Myers (Altria) Tr. 3376-77). Myers was also never asked to attend Altria’s board of director meetings where e-vapor products were discussed, nor was he ever asked to provide input into presentations given to the Altria board of directors regarding e-vapor products. (Myers (Altria) Tr. 3380-81).

457. Myers explained that consumers face two moments of truth—when they see the product in the store and decide whether to make a purchase, and then “when they take it out of the package and use the product.” (Myers (Altria) Tr. 3329). Altria’s sales force could “roll it out and get it everywhere in position,” i.e., “create good conditions for the first moment, but [it did not] own the second.” (Myers (Altria) Tr. 3329-30). Though the sales force did everything it could, Elite “didn’t win in the second moment of truth, that part where the consumer took it home and used the product.” (Myers (Altria) Tr. 3366-67).

#### **Response to Finding No. 457**

The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “the sales force did everything it could” with respect to MarkTen Elite, the proposed finding is contrary to the weight of the evidence. Altria withdrew MarkTen Elite from the market before it had time to assess the product’s long-term potential. (CCFF ¶¶ 1144-62).

To the extent that, in claiming “Elite ‘didn’t win in the second moment of truth, that part where the consumer took it home and used the product,” the proposed finding implies that

MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

458. Thus, by the summer of 2018, AGDC had concluded based on the product's sales that Elite "wasn't working. We were not winning in this space." (Myers (Altria) Tr. 3337).

#### **Response to Finding No. 458**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies only on the self-serving testimony of an Altria executive, and because Myers only represented one of Altria's regions and cannot speak to the experiences of the other regions at the time. (*See Response to RPF 456*).

The proposed finding is vague because the phrase "winning in this space" is ambiguous.

To the extent that the proposed finding claims, "by the summer of 2018, AGDC had concluded based on the product's sales that Elite 'wasn't working,'" the proposed finding is contrary to the weight of the evidence. Altria withdrew MarkTen Elite from the market before it had time to assess the product's long-term potential. (CCF 1144-62).

To the extent that, in claiming "[w]e were not winning in this space," the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*). While MarkTen Elite was not the market leader, it was outperforming other pod-based products. (*See Responses to RPF 408, 431-32*).

459. Elite's performance by that point was sufficient for Altria to assess Elite's prospects. (Jupe (Altria) Tr. 2323 ("I think we learned everything we needed to know, that we knew everything that we needed to know early in the year, that this product was not going to do what we expected it to do.")).

#### **Response to Finding No. 459**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies only on the self-serving testimony of an Altria executive.

The proposed finding is misleading and contrary to the weight of the evidence, because Altria withdrew MarkTen Elite from the market before it had time to assess the product's long-term potential. (CCFF ¶¶ 1144-62).

## 2. Excessive Leaking Damaged The Elite Brand With Retailers And Consumers

460. Elite also had a significant leaking problem at its launch, which impaired its commercialization. (Myers (Altria) Tr. 3323-24 (identifying the fact that Elite “had a lot of leaking” as a “real concern” affecting the roll out, in addition to the promotions’ lack of traction)).

### Response to Finding No. 460

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding attributes significance to the claim that “Elite also had a significant leaking problem at its launch, which impaired its commercialization,” the proposed finding is misleading and contrary to the weight of the evidence. {

[REDACTED]

[REDACTED]

[REDACTED]}

Leaking was a common problem for pod-based e-cigarettes. (CCFF ¶ 1222). Altria was aware of a problem with MarkTen Elite pods leaking when Altria launched the product. (CCFF ¶¶ 1206-07). Even while MarkTen Elite had leaking issues, its sales increased. (CCFF ¶¶ 1112, 1114-28). The leaking issue led Altria to decide to slow down the expansion of Elite while it fixed the leaking issue. (CCFF ¶ 1208).

Altria addressed MarkTen Elite’s leaking problem by introducing a new gasket for MarkTen Elite, the C1A gasket. (CCFF ¶¶ 1206-34). Altria completed development and testing of the C1A gasket by June 8, 2018, but it was not approved by Altria’s change management team until August 10, 2018. (CCFF ¶¶ 1210, 1215). In October 2018, after Altria introduced the C1A gasket, e-commerce leakage complaints for MarkTen Elite plummeted while MarkTen Elite e-commerce sales grew from about 3,000 per day on October 1, 2018 to over 10,000 per day on October 25, 2018, when Altria announced the discontinuation of Elite. (CCFF ¶¶ 1220-21).

As of September 28, 2018, Altria was planning new waves of MarkTen Elite expansion for October 8, October 29, and November 19, 2018, and two waves in Q1 2019. (CCFF ¶¶ 1147-48). By withdrawing MarkTen Elite from the market shortly after making the product change, Altria had little time to assess the impact of the change on Elite’s sales performance. (CCFF ¶ 1149; *see generally* CCFF ¶¶ 1144-62).

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05). In fact, JUUL had a leaking problem that JLI addressed with a product change in 2018. (CCFF ¶¶ 1203-05). JUUL’s leaking problem did not prevent it from achieving commercial success. (CCFF ¶¶ 546-77).

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful or that MarkTen Elite’s leaking problem prevented it from being successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 431-32. (*See* Responses to RPF ¶¶ 431-32).

461. Although many pod products leaked to some extent, { [REDACTED] }; Schwartz (Altria) Tr. 1881 (discussing PX4129 (Altria) and describing Elite’s level of leaking as “unacceptable”); Schwartz (Altria) Tr. 1909 (discussing PX1560 (Altria) at



002); PX7016 Jupe (Altria) Dep. at 248 (“[Elite] was leaking like a sieve.”)). At times over 40 percent of Elite’s pods leaked. (RX0547 (Altria) at 007).

### **Response to Finding No. 461**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague to the extent that the phrases { [REDACTED] } and “leaking like a sieve” are ambiguous.

The proposed finding is incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶ 460. (*See* Response to RPF ¶ 460).

462. Nu Mark viewed Elite’s leaking as “worse than any other pod product” and a “real impediment.” (Begley (Altria) Tr. 1103; *see also* Myers (Altria) Tr. 3324 (describing Elite’s leaking as “much more pervasive,” especially based on the perspective of trade partners)).

### **Response to Finding No. 462**

The proposed finding is vague, unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is vague to the extent that the phrases “real impediment” and “much more pervasive” are ambiguous.

The proposed finding is unreliable in that it relies solely on the self-serving testimony of Altria executives.

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶ 460. (*See* Response to RPF ¶ 460).

463. The company had not anticipated a leaking problem of such magnitude. (Begley (Altria) Tr. 1126; PX7022 Begley (Altria) Dep. at 231).

**Response to Finding No. 463**

To the extent that the proposed finding implies that MarkTen Elite's leaking problem damaged the product's long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460. (*See* Response to RPF 460).

464. Witness testimony and contemporaneous documents from both Altria and JLI capture the gravity of the leaking problem at the launch: JLI's Joseph O'Hara, director of regulatory strategy, recalled that, the same day Elite launched, he ordered "a large number of samples and when those samples arrived to [him], every single one of those samples was leaking in the packaging, as well as whenever [he] tried to use them, they would then leak . . . in [his] mouth." (PX7033 O'Hara (JLI) Dep. at 192). "The overall product quality was also very poor. There was a lot of leaking of the pods in the packaging, in the device, out of the pods while you were consuming it." (PX7033 O'Hara (JLI) Dep. at 78).

**Response to Finding No. 464**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on the self-serving, anecdotal testimony of a JLI executive.

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05). The proposed finding is misleading because O'Hara testified that he only used Elite around five times and did not use Elite after August 2018, (O'Hara (JLI) Tr. 649-50), so he did not use MarkTen Elite after Altria addressed its leaking problem. (CCFF ¶¶ 1206-34).

To the extent that the proposed finding implies that MarkTen Elite's leaking problem damaged the product's long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460. (*See* Response to RPF 460).

465. “Any time [O’Hara] saw somebody online talking about MarkTen Elite, it was only -- it was almost always talking about how leaky the product was.” (O’Hara (JLI) Tr. 639).

**Response to Finding No. 465**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on the self-serving, anecdotal testimony of a JLI executive.

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

To the extent that the proposed finding implies that MarkTen Elite’s leaking problem damaged the product’s long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶ 460. (*See* Response to RPF ¶ 460).

466. In JLI’s consumer studies, leaking was “a top feature of MarkTen Elite.” (O’Hara (JLI) Tr. 639).

**Response to Finding No. 466**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on the self-serving testimony of a JLI executive. To the extent that the proposed finding refers to “JLI’s consumer studies,” those studies are not in the record and therefore the statement is unreliable.

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

To the extent that the proposed finding implies that MarkTen Elite's leaking problem damaged the product's long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460. (*See* Response to RPF 460).

467. A JLI regional vice president reported that he visited a 7-Eleven store and "bought a MarkTen [Elite] device and 4 refill pods. When we opened them all to test and see the product, they were all leaking over our hands. You could actually take the pod fresh out of the package and run [it] against the palm of your hands and it would be full of juice. I don't think we have much to worry about with this one." (RX1611 (JLI) at 001).

#### **Response to Finding No. 467**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on anecdotal evidence.

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

To the extent that the proposed finding implies that MarkTen Elite's leaking problem damaged the product's long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460. (*See* Response to RPF 460).

468. Myers testified that "[w]hen you opened the package, you would see literally fluid inside the pod in the package. So when a consumer would purchase it and open it up, they would see it. And in some cases, the leaking was so bad you could see it on the outside of the carton that it shipped in into the retail store." (Myers (Altria) Tr. 3324).

#### **Response to Finding No. 468**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving, anecdotal testimony.

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

To the extent that the proposed finding implies that MarkTen Elite's leaking problem damaged the product's long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460. (See Response to RPF 460).

469. Gifford recalled that Elite's pods would leak, "so as the consumer [was] opening the product -- the [product's blister pack would leak] and they [would] see basically e-liquid all loose." (Gifford (Altria) Tr. 2757).

#### **Response to Finding No. 469**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on the self-serving, anecdotal testimony of an Altria executive.

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

To the extent that the proposed finding implies that MarkTen Elite's leaking problem damaged the product's long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460. (See Response to RPF 460).

470. And one contemporaneous Altria document reported that in March 2018, two employees purchased 11 packs of Elite products, seven of which leaked, and leaked more than a couple of drops. “Three of the people that purchased also reported liquid dripping into their mouths when using the product.” (PX4083 (Altria) at 003).

**Response to Finding No. 470**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on anecdotal evidence.

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

To the extent that the proposed finding implies that MarkTen Elite’s leaking problem damaged the product’s long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶ 460. (*See* Response to RPF ¶ 460).

471.

[REDACTED]; *see also infra* Part V.C.1.c).

**Response to Finding No. 471**

The proposed finding is incomplete and misleading. Schwartz testified that “the C1A gasket was a success in reducing minimal and excessive leakage rate in the MarkTen Elite product,” based on a report from Charles Epps, “a quality technician that worked within the quality team at Nu Mark.” (Schwartz (Altria) Tr. 1907-10 (discussing PX1560 (Altria) at 001-02)).

In an email dated October 22, 2018, and titled “MarkTen Elite Complaint Summary (October 2018),” Epps reported that MarkTen Elite pods produced before the gasket change had “~35% Minimal Leakage Rate” and “~6% Excessive Leakage Rate,” while MarkTen Elite pods

produced after the C1A gasket change had “~0.6% Minimal Leakage Rate” and “~0.2% Excessive Leakage Rate.” (CCFF ¶ 1220). In October 2018, after Altria implemented the gasket fix, e-commerce leakage complaints for MarkTen Elite plummeted while MarkTen Elite e-commerce sales grew significantly from about 3,000 per day on October 1, 2018 to over 10,000 per day on October 25, 2018 when Altria announced the discontinuation of Elite. (CCFF ¶¶ 1220-21).

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

472. But the excessive leaking out of the gate cost Elite the only opportunity it would get to make a good first impression. (PX7012 Eldridge (ITG Brands) Dep. at 147; PX7022 Begley (Altria) Dep. at 232 (“[Y]ou don’t get many bites at the apple. And so to have [leaking] as a prevalent issue in the marketplace is terribly unhelpful as you’re trying to get a new brand off the ground.”)). { [REDACTED] }; *see also* PX7037 Huckabee (Reynolds) Dep. at 83 (noting that if a consumer purchases a product that “leaks heavily . . . they aren’t likely to repurchase that product”).

### **Response to Finding No. 472**

The proposed finding overstates the evidence and is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “the excessive leaking out of the gate cost Elite the only opportunity it would get to make a good first impression” and attributes that claim to testimony from Eldridge, the proposed finding overstates the cited evidence. In the cited testimony, Eldridge merely agreed that when a pod product tends to leak a lot, that can negatively affect its performance in the marketplace. (PX7012 (Eldridge (ITG)), Dep. at 147)).

The proposed finding is unreliable to the extent that it relies on the self-serving testimony of Altria executives.

The proposed finding is vague because the phrases “many bites at the apple,” “terribly unhelpful,” { [REDACTED] } and “aren’t likely to repurchase” are ambiguous.

The proposed finding is incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

To the extent that the proposed finding implies that MarkTen Elite’s leaking problem damaged the product’s long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460. (*See* Response to RPF ¶ 460).

473. Once consumers have a bad first experience, “it’s hard to undo their first perception of the brand.” (Begley (Altria) Tr. 1104; *see also* Myers (Altria) Tr. 3328-29 (“[I]t wasn’t that great of a brand to begin with, and then to launch a new product and then have this initially for those first moments of truth or second moment of truth when the consumer uses the product for the first time and find it had leakage in it, you know, [retailers] were really concerned that we were -- you know, big misstep here.”); PX7037 Huckabee (Reynolds) Dep. at 81 (“[P]od leakage [is] a very primary constraint. If the pods aren’t themselves functioning properly, you won’t have promotional effectiveness . . . .”)).

### **Response to Finding No. 473**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony and hearsay testimony concerning the views of an undefined class of retailers.

The proposed finding is vague because the phrases “hard to undo,” “really concerned,” “functioning properly,” and “promotional effectiveness” are ambiguous.

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).



To the extent that the proposed finding implies that MarkTen Elite’s leaking problem damaged the product’s long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460. (*See* Response to RPF 460).

474. This was damning particularly for Elite because it was a relatively late entrant to the pod-based e-vapor category. As Schwartz explained, Elite needed not only to be a good product, but to be “that much better than the competition to dislodge them from their choice” product. (PX7018 Schwartz (Altria) Dep. at 153). And it simply was not possible for Altria to “dislodge” consumers who were “very content with JUUL” and “achiev[e] market leadership” “with a product that ha[d] a leaking pod.” (Schwartz (Altria) Tr. 1889-90 (discussing PX1590 (Altria)); *see also* PX7018 Schwartz (Altria) Dep. at 153 (“[B]y having a leaking product, you weren’t helping yourself . . .”).

#### **Response to Finding No. 474**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on the self-serving testimony of an Altria executive.

The proposed finding is vague because the phrases “relatively late entrant” and “much better than the competition” are ambiguous.

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

To the extent that the proposed finding claims MarkTen Elite “was a relatively late entrant to the pod-based e-vapor category,” the proposed finding is misleading and contrary to the weight of the evidence. In 2018, Vuse, NJOY, and blu commercialized pod-based products with a variety of flavors and nicotine strengths. (CCFF ¶ 1198). NJOY launched the NJOY Ace, a pod-based product, { [REDACTED]

█ } In 2018, Reynolds launched Vuse Alto, a pod-based product. (CCFF ¶ 1200). Both of those late entrants remained on the market and have seen their share increase. (CCFF ¶¶ 1132-33).

In 2017, ITG introduced the *myblu* pod-based product. (CCFF ¶¶ 179, 1201). After its launch, MarkTen Elite performed well █. (CCFF ¶¶ 1114-16). A September 7, 2018, Altria presentation circulated by Schwartz included a chart showing that MarkTen Elite’s average pod sales volume per store selling the product was comparable to JUUL’s and *myblu*’s at similar stages after their respective launches. (CCFF ¶ 1161).

To the extent that the proposed finding implies that MarkTen Elite’s leaking problem damaged the product’s long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460. (*See* Response to RPF 460).

475. Indeed, by July 12, 2018, JLI concluded that Elite’s “[e]xcessive leakage ha[d] significantly (perhaps irreparably) damaged the brand.” (RX1165 (JLI) at 004; *see also* Myers (Altria) Tr. 3328-29 (agreeing he “certainly felt [the leaking] had” damaged the brand); Begley (Altria) Tr. 1104 (agreeing that there was merit to the observation that Elite’s brand was “significantly (perhaps irreparably) damaged” by the leaking)).

#### **Response to Finding No. 475**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on the self-serving testimony of Altria executives.

The proposed finding is vague because the phrases “significantly (perhaps irreparably) damaged the brand” and “damaged the brand” are ambiguous.

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

To the extent that the proposed finding implies that MarkTen Elite's leaking problem damaged the product's long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶ 460. (*See* Response to RPF ¶ 460).

476. Complaints from retailers and consumers confirmed Altria's fears were realized. [REDACTED]  
[REDACTED]; *see also* PX7014 Baculis (Altria) Dep. at 179-80; Schwartz (Altria) Tr. 1881 (discussing PX4129 (Altria)).

#### **Response to Finding No. 476**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on the self-serving testimony of Altria executives, and on hearsay testimony regarding an undefined class of retailers.

The proposed finding is vague because the phrases "fears were realized" and [REDACTED]  
[REDACTED] are ambiguous.

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

To the extent that the proposed finding implies that MarkTen Elite's leaking problem damaged the product's long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶ 460. (*See* Response to RPF ¶ 460).

Significantly, in October 2018, after Altria introduced the C1A gasket, e-commerce leakage complaints for MarkTen Elite plummeted while MarkTen Elite e-commerce sales grew from about 3,000 per day on October 1, 2018 to over 10,000 per day on October 25, 2018, when Altria announced the discontinuation of Elite. (CCFF ¶¶ 1220-21). As of September 28, 2018, Altria was planning new waves of MarkTen Elite expansion for October 8, October 29, and November 19, 2018, and two waves in Q1 2019. (CCFF ¶¶ 1147-48). By withdrawing MarkTen Elite from the market shortly after making the product change, Altria had little time to assess the impact of the change on Elite’s sales performance. (CCFF ¶ 1149; *see generally* CCFF ¶¶ 1144-62).

477. Retailers also were upset, because “customers were taking their frustration out on them when it was really [Nu Mark’s] problem.” (Begley (Altria) Tr. 1104; *see also* Myers (Altria) Tr. 3324-25). Wholesalers and retailers like McLane and 7-Eleven, which had gone to great lengths to get the product into stores, were especially upset “to have [Elite] be defective out of the gate,” and were “really concerned that Altria would launch a product that was defective.” (Myers (Altria) Tr. 3324, 3327; *see also* PX4083 (Altria) at 001 (Myers promising to “keep McLane and 7-Eleven calm” regarding the leaking)).

#### **Response to Finding No. 477**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on the self-serving testimony of Altria executives, and on hearsay testimony regarding an undefined class of retailers.

The proposed finding is vague because the phrases “upset,” “great lengths,” “really concerned,” and “defective” are ambiguous.

The proposed finding is also incomplete and misleading in that it fails to acknowledge that other competitors, including JLI, had leaking issues with their products. (CCFF ¶¶ 1222, 1203-05).

To the extent that the proposed finding implies that MarkTen Elite's leaking problem damaged the product's long-term commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460. (*See* Response to RPF 460).

### **3. Competitors Recognized That Without Salts, Elite Was A "Non-Starter" And "Inferior Product"**

478. Elite's poor performance was no surprise to Altria's competitors, who predicted Elite's failure as soon as it hit the market. Competitors repeatedly predicted that Elite would be a flop because, among other things, it did not have the nicotine salts required to provide a satisfying nicotine experience and convert adult smokers. (PX2086 (JLI) at 001; RX1420 (JLI) at 001; PX2269 (JLI) at 001; *see also* RX1421 (JLI) at 001; *supra* Part II.A.2.b.ii).

#### **Response to Finding No. 478**

The proposed finding is unsupported, misleading, and contrary to the weight of the evidence.

The first sentence of the proposed finding is unsupported in that it cites no evidence in the record. To the extent that the proposed finding claims that "[c]ompetitors [other than JLI] repeatedly predicted that Elite would be a flop," the proposed finding is unsupported because it does not cite any testimony or exhibits from competitors other than JLI.

To the extent that the proposed finding claims that "nicotine salts [were] required to provide a satisfying nicotine experience and convert adult smokers" and implies that Elite was not capable of satisfying or converting adult smokers, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-37. (*See* Responses to RPF 601-37).

To the extent that the proposed finding claims that JLI "predicted that Elite would be a flop," the proposed finding is contrary to the weight of the evidence. Notwithstanding the initial predictions cited by Respondents, in May 2018, O'Hara, JLI's competitive intelligence expert,

concluded that MarkTen Elite had “long-term viability.” (CCFF ¶ 1129). In addition, a May 2018 JLI slide deck titled “Flavor Competitive Landscape” includes a slide comparing JUUL’s flavor offerings to those of “top competitors,” including MarkTen Elite. (CCFF ¶ 316). A JLI draft competitor product performance evaluation from December 2018 covered a range of products, including MarkTen Elite. (CCFF ¶ 321). More generally, JLI perceived Altria as a competitive threat in light of its resources and access to retailer shelf space. (CCFF ¶¶ 503-06).

To the extent that the proposed finding suggests that JLI viewed Altria’s e-cigarette products as uniquely flawed, the proposed finding is misleading and contrary to the weight of the evidence. As JLI’s Pritzker explained: “JLI was gaining revenue very quickly and beginning to dominate market share, and numerous other brands, including [MarkTen and MarkTen Elite], were all kind of in a pack.” (Pritzker (JLI) Tr. 794). In addition, JLI’s Valani explained that MarkTen Elite was “the most directly [] similar product to JUUL, similar to many other products that were on the market from the same contract manufacturer [Smooore].” (Valani (JLI) Tr. 906-07; *see also* CCFF ¶¶ 1516-22).

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See* Responses to RPF 431-32).

To the extent that the proposed finding relies on Part II.A.2.b.ii, “JUUL was designed to mimic the nicotine experience of a cigarette,” for support, Complaint Counsel incorporates its responses to those findings herein. (*See* Responses to RPF 224-36).

**a. JLI’s Reaction To Elite’s Inability To Provide Nicotine Satisfaction**

479. The day Elite was launched, Joseph O’Hara, JLI’s director of regulatory strategy, wrote: “Net takeaway is that we believe that the MarkTen Elite is a meaningful positive for us relative to expectations based on (1) low nicotine content pods, (2) no salts, and (3) lack of marketing roll-out.” (PX2086 (JLI) at 001). O’Hara explained at trial that based on these

shortcomings, from Elite’s inception, he “did not expect that [it] would be a particularly strong competitor,” “especially [because of] the first two points”—it had “low nicotine content” and “no salts.” (O’Hara (JLI) Tr. 632).

### **Response to Finding No. 479**

The proposed finding is misleading, contradicted by the cited evidence, and contrary to the weight of the evidence.

To the extent that the proposed finding relies on PX2086 to support the claim that JLI did not perceive MarkTen Elite as “strong competitor,” the proposed finding is misleading and contradicted by the cited evidence because in that same email chain, in response to O’Hara, JLI’s CEO wrote that he still wanted to track MarkTen Elite and was worried about JUUL brand equity and differentiation from MarkTen Elite and *myblu*. (PX2086 (JLI) at 001).

To the extent that the proposed finding implies that JLI did not perceive MarkTen Elite as a “strong competitor,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 478. (*See* Response to RPF 478).

To the extent that the proposed finding implies that “salts” are necessary to compete in the e-cigarette category, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 601-37. (*See* Responses to RPF ¶¶ 601-37).

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 431-32. (*See* Responses to RPF ¶¶ 431-32).

480. When Bowen, one of JLI’s cofounders, realized Elite was not using salts, he too concluded that Elite could not “provide cig-like nicotine satisfaction” and thus was “not a threat.” (RX1420 (JLI) at 001; *see also* RX1421 (JLI) at 001). This defect made Elite “an absolute nonstarter” in his view. (PX2269 (JLI) at 001).

### **Response to Finding No. 480**

The proposed finding overstates the cited evidence and is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding claims Bowen “concluded that Elite could not ‘provide cig-like nicotine satisfaction’ and thus was ‘not a threat,’” the proposed finding overstates the evidence because in the same email, Bowen speaks of the need to gain more information on Elite by running a number of lab tests. (PX2269 (JLI) at 001).

To the extent that the proposed finding implies that JLI did not perceive MarkTen Elite as a significant competitor, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 478. (*See* Response to RPF 478).

To the extent that the proposed finding implies that “salts” are necessary to compete in the e-cigarette category or that MarkTen Elite did not provide “nicotine satisfaction,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 601-37. (*See* Responses to RPF ¶¶ 601-37).

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 431-32. (*See* Responses to RPF ¶¶ 431-32).

#### **b. Reactions Of Other Competitors And Retailers**

481. [REDACTED] ; *see also* PX7020 King (PMI) Dep. at 169, 226 (explaining PMI had concluded Elite was “not achieving success in the marketplace,” nor was it “successful at converting adult smokers”). [REDACTED]

#### **Response to Finding No. 481**

The proposed finding is misleading and contrary to the weight of the evidence.



To the extent that the proposed finding claims { [REDACTED] }  
 [REDACTED]  
 [REDACTED] } the proposed finding is misleading and contrary to the weight of the evidence because Altria’s consistently maintained one of the leading market shares in the closed-system e-cigarette market until it discontinued its products. (CCFF ¶¶ 480-92, 1737-48).

To the extent that the proposed finding implies that MarkTen’s product were { [REDACTED] }  
 [REDACTED] } the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-37. (*See Responses to RPF 601-37*).

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

482. For this reason, PMI turned down an opportunity to sell the MarkTen products in foreign markets. PMI commercialized MarkTen cig-a-like in a test market under the brand name Solaris but discontinued it based on low market share. (King (PMI) Tr. 2532). { [REDACTED] }  
 [REDACTED] }

### **Response to Finding No. 482**

The proposed finding is unsupported, misleading, and contrary to the weight of the evidence.

The first sentence of the proposed finding is unsupported in that it cites no evidence in the record.

To the extent that, in claiming “PMI . . . discontinued it based on low market share” and { [REDACTED] } the proposed finding implies that Nu Mark’s products were not commercially successful in the United States, the proposed finding is contrary

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to the weight of the evidence for the reasons cited in response to RPF 431-32. (See Responses to RPF 431-32).

To the extent that the proposed finding claims that “PMI commercialized MarkTen cig-a-like in a test market under the brand name Solaris” and { [REDACTED] } Complaint Counsel does not disagree.

483. Reynolds’s e-vapor subsidiary also determined that “the quality of the MarkTen Elite product was . . . inferior to that of competing products at that time.” (PX8008 Huckabee (Reynolds) Decl. at 025 ¶ 48). Reynolds conducted “consumer research that rated the products on a variety of metrics,” and concluded that Nu Mark’s small sales were a result of Altria’s retail execution and marketing. (Huckabee (Reynolds) Tr. 475-76). [REDACTED] }.

### **Response to Finding No. 483**

The proposed finding is misleading and contrary to the weight of the evidence.

The proposed finding is misleading because { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]

{ [REDACTED] } Altria was planning new waves of MarkTen Elite expansion for October 8, October 29, and November 19, 2018, and two waves in Q1 2019. (CCFF ¶¶ 1147-48).

To the extent that, in claiming “the quality of the MarkTen Elite product was . . . inferior to that of competing products at that time,” “Nu Mark’s small sales were a result of Altria’s retail execution and marketing,” and { [REDACTED] } the proposed finding implies that MarkTen Elite was not commercially successful, the proposed

finding is contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

484. Retailers also were “confused” by and “more than a little skeptical” of Altria’s decision to promote Elite on the basis of its flavors. Nu Mark was very “focused on flavors,” but retailers were seeing the growth in pods “being driven by nicotine satisfaction, not by flavors.” (Myers (Altria) Tr. 3349-50). Retailers did not understand why Altria “didn’t have something with a higher nicotine level and with the nicotine salts that certainly many of them are seeing success with in their stores.” (Myers (Altria) Tr. 3349-50).

#### **Response to Finding No. 484**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it cites only the self-serving testimony of an Altria executive and hearsay testimony concerning the views of an undefined class of retailers. Myers also acknowledged that the feedback he received from retailers was qualitative feedback. (Myers (Altria) Tr. 3391). Myers was only responsible for certain retailers in Altria’s Western region and was thus not in a position to make a general hearsay statement about what retailers believed. (*See Response to RPF 456*).

To the extent that the proposed finding implies that MarkTen Elite did not provide “nicotine satisfaction” or could not convert smokers, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-37. (*See Responses to RPF 601-37*).

To the extent that the proposed finding implies that Altria’s products did not have high nicotine levels, the proposed finding is misleading and contrary to the weight of the evidence. Some MarkTen products had high nicotine strength. (CCFF 1189-91). Dr. Gardner testified that “MarkTen Elite delivered more aerosol than JUUL. MarkTen Elite had lower nicotine percentage compared to JUUL but lower -- Elite had more aerosol mass, so it delivered more nicotine per puff under machine puffing conditions than JUUL.” (CCFF 1189). An Altria board presentation,

dated February 28, 2018, and titled “Nu Mark 2018 Three Year Strategic Plan,” identified MarkTen Elite as having higher nicotine per puff than JUUL, “~0.17 mg/puff” compared to “~0.16 mg/puff”, even though Elite had lower nicotine by volume compared to JUUL, “1.8% NBV” compared to “5% NBV.” (CCFF ¶ 1190). A JUUL “Book of Knowledge” prepared by Altria in June 2018 for competitive intelligence purposes also identified MarkTen Elite as having higher nicotine per puff than JUUL. (CCFF ¶ 1191). Dr. Gardner testified that this presentation was prepared before Altria implemented the C1A gasket, which doubled MarkTen Elite’s aerosol delivery in “machine puffing conditions.” (CCFF ¶ 1191).

Altria’s MarkTen cigalike products came in nicotine strengths (NBW) of 4.0 percent (MarkTen Bold Classic and Menthol), 3.5 percent (MarkTen Classic, Menthol, and Winter Mint), 2.5 percent (MarkTen Smooth Classic, Caribbean Oasis, Summer Fusion, Mardi Gras, Vineyard Blend, Harvest Blend, and Bourbon Blend), and 2.4 percent (MarkTen Smooth Cream and Smooth Menthol). (CCFF ¶ 1179).

Moreover, in 2018, JLI “had three strengths that were offered in the US . . . 5 percent, 3 percent, and 1 and a half percent.” (CCFF ¶ 1181).

To the extent that the proposed finding implies that Altria did not have any products with nicotine salts, the proposed finding is contrary to the weight of the evidence. MarkTen Bold had nicotine salts. (CCFF ¶ 1196). In November 2017, Altria told investors that its pharmacokinetic (or PK) studies showed that MarkTen Bold offered nicotine delivery at levels approaching that of cigarettes. (CCFF ¶ 1197).

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPFF ¶¶ 431-32. (*See Responses to RPFF ¶¶ 431-32*).

485. Once Elite launched, retailers shared with Altria “that they didn’t feel like [Altria] had it right from a nicotine satisfaction standpoint,” and that’s why it “ w[as]n’t getting repeat pod purchases.” (Myers (Altria) Tr. 3389).

**Response to Finding No. 485**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it cites only the self-serving testimony of an Altria executive and hearsay testimony concerning the views of an undefined class of retailers. Myers also acknowledged that the feedback he received from retailers was qualitative feedback. (Myers (Altria) Tr. 3391). Myers was only responsible for certain retailers in Altria’s Western region and was thus not in a position to make a general hearsay statement about what retailers believed. (*See* Response RPF 456).

To the extent that the proposed finding implies that MarkTen’s products did not provide nicotine satisfaction, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-37. (*See* Responses to RPF 601-37).

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See* Responses to RPF 431-32).

**F. By March 2018, Altria’s Scientists Identified Significant Regulatory Hurdles For Both MarkTen And Elite**

486. In the spring of 2018, Altria was “rushing” to market “products in the [e-vapor] category.” (Murillo (Altria/JLI) Tr. 2932). But “it felt like every day [it] had either a new product or a new product issue that [it was] contending with.” (Murillo (Altria/JLI) Tr. 2932).

**Response to Finding No. 486**

The proposed finding is incomplete and misleading.

To the extent that the proposed finding claims that “it felt like every day [it] had either a new product or a new product issue that [it was] contending with,” the proposed finding is

incomplete and misleading because the cited testimony does not specify the product issues referred to, the kind of product issues, the significance of the product issues to the product's PMTAs, whether the product issues were addressed, the time and resources necessary to address the issues, or the frequency of product issues relative to new products.

To the extent that the proposed finding claims that "In the spring of 2018, Altria was 'rushing' to market 'products in the [e-vapor] category,'" Complaint Counsel has no specific response.

487. These emerging product issues required Altria to overhaul nearly all of its PMTA plans for its e-vapor products. Joe Murillo, at the time Altria's Senior Vice President of Regulatory Affairs, testified at trial that by the end of this process he "couldn't think of one product and filing plan that still bore resemblance to the original plan." (Murillo (Altria/JLI) Tr. 2949).

#### **Response to Finding No. 487**

The proposed finding is incomplete, misleading, and unsupported by the cited evidence.

The first sentence of the proposed finding should be disregarded because it contains no citations to the record.

To the extent that the proposed finding refers to "[t]hese emerging product issues. . ." the proposed finding is incomplete and misleading for the reasons cited in response to RPF 486. (See Response to RPF 486 (noting that the proposed finding does not specifically reference any product issues)).

To the extent that the proposed finding attributes significance to the fact that Joe Murillo testified that he "couldn't think of one product and filing plan that still bore resemblance to the original plan," the proposed finding is incomplete because it does not explain what the changes were or when they occurred.

The proposed finding is incomplete and misleading because it fails to note that in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years

later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is incomplete and misleading because it also fails to note that Altria made significant progress on the PMTA for the MarkTen cigalike products. (CCFF ¶¶ 1258-66).

488. And Murray Garnick, Altria's General Counsel and Head of Regulatory Affairs, was concerned at the time that this pattern would continue to repeat itself: “[U]nless we changed the way we were scheduling and prioritized products, we [were] going to continue to miss schedules over and over again as each product [went] forward, and [that] was no way to operate regulatory affairs[.] . . . [W]e needed to prioritize and we needed to have a realistic schedule that we could meet.” (Garnick (Altria) Tr. 1705; *see also* RX0716 (Altria) at 001 (“No way do I want to have a schedule that we miss each product deadline, one at a time, like a thousand cuts, or a schedule which does not reflect what could be our most important product.”)).

#### **Response to Finding No. 488**

The proposed finding is incomplete and misleading.

To the extent that the proposed finding attributes significance to Murray Garnick's testimony that “[U]nless we changed the way we were scheduling and prioritized products, we [were] going to continue to miss schedules over and over again as each product [went] forward, and [that] was no way to operate regulatory affairs,” the proposed finding is incomplete and misleading because it does not explain what schedules were changed, why they were changed, and what the significance of each change was.

The proposed finding is incomplete and misleading because it fails to note that in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is incomplete and misleading because it also fails to note that Altria made significant progress on the PMTA for the MarkTen cigalike products. (CCFF ¶¶ 1258-66).

489. For example, by March 2018, the regulatory group sent word to senior management that the PMTA filing for the MarkTen cig-a-like was “delayed—date TBD.” (RX0630 (Altria) at 019).

#### **Response to Finding No. 489**

The proposed finding is incomplete and misleading.

To the extent that the proposed finding claims that “by March 2018, the regulatory group sent word to senior management that the PMTA filing for the MarkTen cig-a-like was “delayed—date TBD,” the proposed finding is incomplete and misleading because Altria subsequently rescheduled the MarkTen cigalike PMTA filing date: A presentation sent on August 21, 2018, by Paige Magness to Joe Murillo entitled, “MarkTen E-Vapor PMTA Project Status,” and updated as of August 15, 2018, indicates that at that time Altria planned to submit a PMTA for MarkTen cigalike by June 17, 2020. (PX4136 (Altria) at 003).

The proposed finding is incomplete and misleading because it fails to note that, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (RX0272 (Altria) at 043; CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is incomplete and misleading because it fails to note that Altria made significant progress on the PMTA for the MarkTen cigalike products. (CCFF ¶¶ 1258-66).

490. And once the MarkTen cig-a-like PMTA was delayed, the regulatory team was unsure “when [it was] going to be able to catch up.” (Murillo (Altria/JLI) Tr. 2937-38).

#### **Response to Finding No. 490**



The proposed finding is incomplete and misleading.

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 489. (*See* Response to RPF 489).

To the extent that the proposed finding claims that “the regulatory team was unsure ‘when [it was] going to be able to catch up,’” the proposed finding is incomplete and misleading because Altria subsequently rescheduled its MarkTen cigalike PMTA filing date to June 17, 2020. (*See* Response to RPF 489).

The proposed finding is also incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is incomplete and misleading because it also fails to note that Altria made significant progress on the PMTA for the MarkTen cigalike products. (CCFF 1258-66).

491. This was in part because each new issue that arose not only took time to fix, but also required Altria to restart the one-year stability studies required for the MarkTen PMTA, which only could be performed on the final product after resolution of the product issues. (Gardner (Altria) Tr. 2585; Murillo (Altria/JLI) Tr. 3072).

#### **Response to Finding No. 491**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “each new issue that arose not only took time to fix, but also required Altria to restart the one-year stability studies required for the MarkTen PMTA, which only could be performed on the final product after resolution of the product issues,” the proposed finding is incomplete and misleading because it does not specifically identify any problems with MarkTen cigalike that required Altria to reschedule stability studies, when the

product's tests were rescheduled, or whether and to what extent the scheduling change impacted Altria's likelihood of achieving PMTA approval for the products.

The proposed finding is contrary to the weight of the evidence because a presentation sent on August 21, 2018, by Magness to Murillo entitled, "MarkTen E-Vapor PMTA Project Status," indicates that at that time Altria planned to submit a PMTA for MarkTen cigalike by June 17, 2020. (PX4136 (Altria) at 003).

The proposed finding is incomplete and misleading because it fails to note that for some portions of a PMTA, a manufacturer may file interim data with its initial filing and then file completed data in a supplemental filing, suggesting that the need to re-run some studies need not have significantly delayed Altria's PMTA. (Gardner (Altria) Tr. 2692-93).

The proposed finding is also incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is incomplete and misleading because it also fails to note that Altria made significant progress on the PMTA for the MarkTen cigalike products. (CCFF ¶¶ 1258-66).

**1. The MarkTen Cig-A-Like Required A Redesigned Battery, BVR 2.8, And A New PMTA**

492. Altria had determined that fixing the MarkTen cig-a-like's dry puff problem (discussed *supra* Part III.B.1) required "fairly significant . . . changes," which delayed the PMTA. (Murillo (Altria/JLI) Tr. 2937-38; *see* RX0630 (Altria) at 019).

**Response to Finding No. 492**

The proposed finding is incomplete and misleading.

To the extent that the proposed finding attributes significance to the fact that “fixing the MarkTen cig-a-like’s dry puff problem . . . required ‘fairly significant . . . changes,’ which delayed the PMTA,” the proposed finding is incomplete and misleading because Altria subsequently rescheduled its MarkTen cigalike PMTA filing date to June 17, 2020. (*See* Response to RPF ¶ 489).

The proposed finding is also incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

493. Specifically, Altria’s scientists had developed an electronic component for dry puff prevention that shut off the battery once it reached a certain temperature. (Gardner (Altria) Tr. 2570-71, 2576-77; PX7000 Garnick (Altria) IHT at 122-23).

#### **Response to Finding No. 493**

Complaint Counsel does not disagree, and adds that studies showed that the BVR 2.8 was successful at reducing formaldehyde production in the MarkTen cigalike. (CCFF ¶¶ 1277-78).

494. The revised MarkTen battery containing this technology was known as BVR 2.8. (Gardner (Altria) Tr. 2571).

#### **Response to Finding No. 494**

Complaint Counsel does not disagree.

495. As Dr. Bill Gardner, Altria’s Senior Principal Scientist, explained, Altria’s fix was a crude one, especially as compared to JLI’s approach to dry puff prevention in its on-market product. Gardner analogized Altria’s approach to an old computer’s heat regulation system—when the computer processor overheated, it would just turn off. JUUL’s approach was like a modern computer—when the processor gets too hot, it slows down but continues to work. (Gardner (Altria) Tr. 2576-77).

#### **Response to Finding No. 495**

The proposed finding overstates the cited evidence and is incomplete and misleading.

To the extent that the proposed finding characterizes Altria's approach to addressing dry puff in its MarkTen cigalike as "crude," the proposed finding overstates the cited evidence and is thus misleading. The cited testimony does not characterize Altria's approach as "crude" or express a view on the relative sophistication of Altria's approach, but instead merely states that "[t]he JUUL product had an even better form of dry puff prevention than what we were working on." (Gardner (Altria) Tr. 2576).

The proposed finding is incomplete and misleading because it only compares Altria's approach to addressing dry puff to JLI's approach, rather than addressing the question of whether Altria's approach addressed the dry puff problem or any other issue in this case.

The proposed finding is also misleading because Altria studies showed that Altria's approach to dry puff prevention was successful at reducing formaldehyde production in the MarkTen cigalike. (CCFF ¶¶ 1277-78).

To the extent that the proposed finding merely highlights the fact that Altria and JLI pursued competing innovation pathways to address the dry puffing issue, Complaint Counsel does not disagree.

496. The crudity of Altria's fix reflected the gaps in its technological expertise. The problem was "an electronic thing," and Altria is "a tobacco company," so it was "having difficulty proving the solution and actually making the alternative product work." (PX7000 Garnick (Altria) Dep. at 123).

#### **Response to Finding No. 496**

The proposed finding overstates the cited evidence and is incomplete, misleading, vague, and contrary to the weight of the evidence.

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The proposed finding overstates the cited evidence and is irrelevant,

incomplete, and misleading for the reasons given in response to RPF 495. (See Response to RPF 495).

To the extent that the proposed finding claims that “[t]he problem was ‘an electronic thing,’ and Altria is ‘a tobacco company,’ so it was ‘having difficulty proving the solution and actually making the alternative product work,’” the proposed finding is vague and contrary to the weight of the evidence, including Respondents own findings. Specifically with respect to the “dry puff” fix for MarkTen cigalike, Altria studies showed that Altria’s approach to dry puff prevention was successful at reducing formaldehyde production in the MarkTen cigalike. (CCFF ¶¶ 1277-78).

To the extent that the proposed finding implies that Altria had difficulty addressing “electronic” problems because it was a “tobacco company,” it is contrary to the weight of the evidence because Altria had access to NMI’s in-house technology scouting and prototyping capabilities as well as a number of sophisticated third-party technology partners. (CCFF ¶¶ 15-16, 1582, 1728). The proposed finding is incomplete and misleading because it ignores Altria’s significant scientific and regulatory experience in the e-vapor space. (CCFF ¶¶ 507-514). Indeed, Respondents’ own proposed findings characterize Altria’s regulatory support team in 2018 as “the best in the country,” (RPF 1070), and claim that Altria’s assistance after the transaction enabled JLI to file a timely PMTA and substantially increased the quality of that PMTA. (See RPF ¶¶ 1247-64).

The proposed finding is also incomplete and misleading because it fails to mention that other established tobacco companies, such as Reynolds, ITG, and JTI, developed and maintain e-cigarette businesses. (CCFF ¶¶ 163-87).

497. Ultimately, early studies showed that BVR 2.8 successfully reduced formaldehyde levels. (Gardner (Altria) Tr. 2571-72).

#### **Response to Finding No. 497**

Complaint Counsel does not disagree and adds that Altria continued to work on developing the BVR 2.8 until Altria announced that it would discontinue its cigalike products in December 2018. (CCFF ¶ 1280).

498. But this potentially promising solution only engendered further problems. For one thing, “[e]veryone agreed” that Nu Mark would need to go through the PMTA process before it could sell MarkTen cig-a-like with the BVR 2.8 battery. (Garnick (Altria) Tr. 1726; *see also* Gardner (Altria) Tr. 2570; Garnick (Altria) Tr. 1719-20). “Changing the electronics would be a product change, [which] required premarket approval from the agency.” (Gardner (Altria) Tr. 2570; Garnick (Altria) Tr. 1726 (“There was no doubt that that would require preapproval by the FDA.”); *see also* Garnick (Altria) Tr. 1719-20).

### **Response to Finding No. 498**

The proposed finding is unsupported and misleading.

The first sentence of the proposed finding should be disregarded because it contains no citations to the record.

To the extent that the proposed finding characterizes Altria’s need to achieve PMTA approval “before it could sell MarkTen cig-a-like with the BVR 2.8 battery” as a “problem,” the proposed finding is misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA denied the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

To the extent that the proposed finding claims that “[e]veryone agreed’ that Nu Mark would need to go through the PMTA process before it could sell MarkTen cig-a-like with the BVR 2.8 battery” and “[c]hanging the electronics would be a product change, [which] required premarket approval from the agency,” Complaint Counsel has no response.

499. Because the battery could not be changed pre-PMTA, “[n]one of the scientists thought [Altria] could get a PMTA on the MarkTen [cig-a-like] product on the market,” which did not have dry-puff prevention. (Garnick (Altria) Tr. 1726-27; *see also* Gardner (Altria) Tr.

2593-95; Jupe (Altria) Tr. 2236-38 (listing dry puff among the “problems with [the cig-a-like] that compromised [Altria’s] ability to get it through” FDA’s PMTA process); PX1890 (Altria) at 001-02; PX1028 (Altria) at 005-06).

### **Response to Finding No. 499**

The proposed finding is contrary to the weight of the evidence, misleading, and irrelevant.

To the extent that the proposed finding claims that “[n]one of the scientists thought [Altria] could get a PMTA on the MarkTen [cig-a-like] product on the market,” the proposed finding is contrary to the weight of the evidence. The FDA has not specified a prohibited level of formaldehyde-production for e-cigarette products seeking PMTA approval and assesses toxicological risks holistically, meaning that Altria could not have known what the impact of formaldehyde generation would have been on its PMTA relative to other factors. (CCFF ¶ 1275). In June 2018, Altria prepared a JUUL “Book of Knowledge,” which identified JUUL as producing similar amounts of formaldehyde (per puff) as MarkTen in testing. (CCFF ¶ 1231). Dr. Gardner testified that this level of formaldehyde production was “good.” (CCFF ¶ 1231).

The proposed finding is incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is incomplete and misleading because it also fails to note that studies indicated that the BVR 2.8 was successful in reducing formaldehyde in the MarkTen cigalike and that Altria continued to work on the BVR 2.8 until December 2018. (CCFF ¶¶ 1278, 1280).

500. Additionally, Altria “encountered technical problems throughout the entire process of BVR 2.8.” (Gardner (Altria) Tr. 2571).

### **Response to Finding No. 500**

The proposed finding is vague, incomplete, and misleading.

To the extent that the proposed finding claims that “Altria ‘encountered technical problems throughout the entire process of BVR 2.8,’” the proposed finding is vague, incomplete, and misleading because it does not identify what the purported problems were, the significance of the problems to Altria’s PMTA, whether and when the problems were solved, or the resources devoted to solving the problems.

The proposed finding is incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is incomplete and misleading because it also fails to note that studies indicated that the BVR 2.8 was successful in reducing formaldehyde in the MarkTen cigalike and that Altria continued to work on the BVR 2.8 until December 2018. (CCFF ¶¶ 1278, 1280).

501. For example, Altria discovered that “[w]ith the dry puff prevention electronics, . . . the cartridges needed to be heat-treated”—a process called “annealing”—“for the dry puff prevention technology to work appropriately.” (Gardner (Altria) Tr. 2573-74).

### **Response to Finding No. 501**

The proposed finding is incomplete and misleading.

To the extent that the proposed finding claims that “Altria discovered that “[w]ith the dry puff prevention electronics, . . . the cartridges needed to be heat-treated’—a process called ‘annealing’—‘for the dry puff prevention technology to work appropriately,’” the proposed finding is incomplete and misleading because it does not identify when the problem was discovered, the significance of the problem to Altria’s PMTA, whether and when the problem was solved, or the resources devoted to solving the problem.



The proposed finding is incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is incomplete and misleading because it also fails to note that studies indicated that the BVR 2.8 was successful in reducing formaldehyde in the MarkTen cigalike and that Altria continued to work on the BVR 2.8 until December 2018. (CCFF ¶¶ 1278, 1280).

502. And later in the process, scientists learned that “the liquid wicking -- so the rate at which the liquid reached the heater -- had decreased.” (Gardner (Altria) Tr. 2574).

#### **Response to Finding No. 502**

The proposed finding is incomplete and misleading.

To the extent that the proposed finding claims that “later in the process, scientists learned that ‘the liquid wicking -- so the rate at which the liquid reached the heater -- had decreased.’” the proposed finding is incomplete and misleading because it does not identify when the problem was discovered, the significance of the problem to Altria’s PMTA, whether and when the problem was solved, or the resources devoted to solving the problem.

The proposed finding is also incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is incomplete and misleading because it also fails to note that studies indicated that the BVR 2.8 was successful in reducing formaldehyde in the MarkTen cigalike and that Altria continued to work on the BVR 2.8 until December 2018. (CCFF ¶¶ 1278, 1280).

503. As a result of these technical issues, throughout the rest of 2018, Altria's PMTA process for the MarkTen cig-a-like was "continuously delayed." (Gardner (Altria) Tr. 2577; Jupe (Altria) Tr. 2321; *see also* Gardner (Altria) Tr. 2585 (explaining that design issues required the company to restart the stability studies required for the PMTA)).

### **Response to Finding No. 503**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is also incomplete and misleading because Dr. Gardner testified that for some portions of a PMTA, a manufacturer may file interim data with its initial filing and then file completed data in a supplemental filing, suggesting that the need to re-run some studies need not have significantly delayed Altria's PMTA. (Gardner (Altria) Tr. 2692-93).

To the extent that the proposed finding claims that "throughout the rest of 2018, Altria's PMTA process for the MarkTen cig-a-like was 'continuously delayed,'" and "design issues required the company to restart the stability studies required for the PMTA," the proposed finding is contrary to the weight of the evidence. A presentation sent on August 21, 2018, by Paige Magness to Joe Murillo entitled, "MarkTen E-Vapor PMTA Project Status," and updated as of August 15, 2018, indicates that at that time Altria planned to submit a PMTA for MarkTen cigalike by June 17, 2020. (PX4136 (Altria) at 003). An August 10, 2018, presentation entitled "MarkTen

Regulatory Strategy Update,” which was submitted by Quigley to Willard, Gifford, Garnick, and Crosthwaite ahead of a meeting on Nu Mark’s regulatory strategy stated “MarkTen PMTA application is 75% complete.” (CCFF ¶ 1264).

504. These technical issues also prevented Altria from starting new PMTA studies on the modified product with BVR 2.8. To save time on the new PMTA, Altria wanted to use the PMTA research already done on the old, pre-BVR 2.8 version of MarkTen by bridging—“building a bridge from the prior data to the new product.” (Gardner (Altria) Tr. 2572; *see also supra* Part I.D.3.b).

#### **Response to Finding No. 504**

The proposed finding is unsupported by the cited evidence, incomplete, and misleading.

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. To the extent that the proposed finding claims that “[t]o save time on the new PMTA, Altria wanted to use the PMTA research already done on the old, pre-BVR 2.8 version of MarkTen by bridging—‘building a bridge from the prior data to the new product,’ Complaint Counsel does not disagree.

The proposed finding is also incomplete and misleading because it does not specify the technical issues referred to, when the purported technical issues arose, if and when the technical issues were addressed, the cost associated with addressing the issues, or the specific impact on Altria’s PMTAs attributed to the issues.

To the extent that the proposed finding suggests that bridging was a necessary strategy for Altria to achieve PMTA approval, the proposed finding is misleading because bridging was not required to achieve PMTA approval, but was merely one allowed approach that might save time and resources. (CCFF ¶ 1296; Murillo (Altria/JLI) Tr. 3004 (“[T]he concept of bridging is that you don’t have to redo all of the work required for a PMTA for . . . things [that] are sufficiently similar to each other”); PX8005 at 005-06 (¶ 32) (Graham (NJOY), Decl.) (describing FDA guidance on the ability to “bridge” to data pertaining to another product)).

The proposed finding is incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is also incomplete and misleading because for some portions of a PMTA, a manufacturer may file interim data with its initial filing and then file completed data in a supplemental filing, suggesting that the need to re-run some studies need not have significantly delayed Altria's PMTA. (Gardner (Altria) Tr. 2692-93).

505. Essentially, if Altria could demonstrate that the old MarkTen cig-a-like and the new MarkTen cig-a-like with BVR 2.8 "behaved the same in delivering an aerosol," then Altria could use the toxicology, clinical, and behavior studies already completed with the old product for the new BVR 2.8 PMTA. (Gardner (Altria) Tr. 2573).

#### **Response to Finding No. 505**

Complaint Counsel does not disagree.

506. All told this would add 12 to 18 months to the PMTA timeline, but would save considerable time and resources. (Gardner (Altria) Tr. 2570).

#### **Response to Finding No. 506**

The proposed finding is unreliable, vague, incomplete, and unsupported by the cited evidence.

The proposed finding is unreliable because it relies solely on the self-interested statement of an Altria employee.

The proposed finding is vague and incomplete because it does not explain what it means by "this would add 12 to 18 months to the PMTA timeline, but would save considerable time and resources," and how much time and resources would be saved, or the underlying basis for this claim.

The proposed finding is unsupported by the citation to Dr. Gardner. At the citation provided in the proposed finding, Dr. Gardner does not testify about saved time or resources. (*See* Gardner (Altria) Tr. 2570).

507. But Altria's scientists were "not going to start PMTA studies until [they] definitively [knew] [they could] make the product as intended and bridge to the 2016 product." (Gardner (Altria) Tr. 2579).

#### **Response to Finding No. 507**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding refers to "PMTA studies," the proposed finding is incomplete and misleading because does it not specify which studies it refers to or the timeframe at issue.

To the extent that the proposed finding implies that Altria had not started PMTA studies for MarkTen in 2018, the proposed finding is contrary to the weight of the evidence. An August 10, 2018, presentation entitled "MarkTen Regulatory Strategy Update," which was submitted by Quigley to Willard, Gifford, Garnick, and Crosthwaite ahead of a meeting on Nu Mark's regulatory strategy stated "MarkTen PMTA application is 75% complete." (CCFF ¶ 1264).

To the extent that the proposed finding implies that delaying some PMTA studies for MarkTen cigalike might have delayed Altria's PMTA, the proposed finding is misleading because for some portions of a PMTA, a manufacturer may file interim data with its initial filing and then file completed data in a supplemental filing. (Gardner (Altria) Tr. 2692-93).

To the extent that the proposed finding implies that bridging was required for Altria's PMTA, the proposed finding is misleading because bridging was not required to achieve PMTA approval, but was merely one allowed approach that might save time and resources. (CCFF ¶ 1296; Murillo (Altria/JLI) Tr. 3004 ("[T]he concept of bridging is that you don't have to redo all of the work required for a PMTA for . . . things [that] are sufficiently similar to each other"); PX8005 at

005-06 (¶ 32) (Graham (NJOY), Decl.) (describing FDA guidance on the ability to “bridge” to data pertaining to another product)).

To the extent that the proposed finding implies that delaying certain PMTA studies for MarkTen cigalike might delay Altria’s PMTA, the proposed finding is incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

508. Ultimately, Altria never was able to demonstrate that the original MarkTen cig-a-like and the proposed new MarkTen cig-a-like with BVR 2.8 performed comparably enough to permit bridging. Altria had “challenges with [BVR 2.8] being reproducible” and “major challenges with BVR 2.8 delivering the same aerosol as the product in the market.” (Gardner (Altria) Tr. 2685). Specifically, the modified product with BVR 2.8 had lower aerosol mass yields than the initial product, which would make it more difficult to rely on studies conducted on the old product. (Gardner (Altria) Tr. 2571-74).

### **Response to Finding No. 508**

The proposed finding is incomplete, misleading, and unsupported by the cited evidence.

The first sentence of the proposed finding should be disregarded because it contains no citations to the record.

The proposed finding is also incomplete and misleading because Altria continued to work on PMTAs for its MarkTen cigalike products until Altria announced that it would discontinue the products in December 2018, (CCFF ¶ 1265), and at that time Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is also misleading because for some portions of a PMTA, a manufacturer may file interim data with its initial filing and then file completed data in a supplemental filing, suggesting that the need to re-run some studies need not have significantly delayed Altria's PMTA. (Gardner (Altria) Tr. 2692-93).

To the extent that the proposed finding claims that "Altria had 'challenges with [BVR 2.8] being reproducible' and 'major challenges with BVR 2.8 delivering the same aerosol as the product in the market'" and "the modified product with BVR 2.8 had lower aerosol mass yields than the initial product, which would make it more difficult to rely on studies conducted on the old product," the proposed finding is incomplete and misleading.

The proposed finding is incomplete because it does not explain whether these challenges were addressed, the time and resources associated with addressing the challenges, and the impact of these challenges on PMTA approval.

To the extent that the proposed finding implies that Altria had "major challenges with BVR 2.8 delivering the same aerosol as the product in the market" and that this impacted Altria's bridging strategy for MarkTen cigalike, the proposed finding is incomplete and misleading because bridging was not required to achieve PMTA approval, but was merely one allowed approach that might save time and resources. (CCFF ¶ 1296; Murillo (Altria/JLI) Tr. 3004 ("[T]he concept of bridging is that you don't have to redo all of the work required for a PMTA for . . . things [that] are sufficiently similar to each other"); PX8005 at 005-06 (¶ 32) (Graham (NJOY), Decl.) (describing FDA guidance on the ability to "bridge" to data pertaining to another product)).

509. As a result, even by December 2018, Altria had not yet completed the one-year stability study required for the PMTA of the MarkTen cig-a-like. (Gardner (Altria) Tr. 2585). Altria "never [even] started the PMTA studies for BVR 2.8." (Gardner (Altria) Tr. 2580).

### **Response to Finding No. 509**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding implies that delaying some PMTA studies for MarkTen cigalike might have delayed Altria's PMTA, the proposed finding is incomplete and misleading because for some portions of a PMTA, a manufacturer may file interim data with its initial filing and then file completed data in a supplemental filing. (Gardner (Altria) Tr. 2692-93). The proposed finding is incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA denied the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

To the extent that the proposed finding claims, Altria "never [even] started the PMTA studies for BVR 2.8," the proposed finding is contrary to the weight of the evidence. An August 10, 2018, presentation entitled "MarkTen Regulatory Strategy Update," which was submitted by Quigley to Willard, Gifford, Garnick, and Crosthwaite ahead of a meeting on Nu Mark's regulatory strategy stated "MarkTen PMTA application is 75% complete." (CCFF ¶ 1264).

**2. Elite Had Significant Design Flaws, Which Compromised Its PMTA Prospects**

**a. Elite's PMTA Perpetually Was In Flux**

510. Before March 2018, Elite had no PMTA timeline. (RX0630 (Altria) at 012).

**Response to Finding No. 510**

The proposed finding is vague and misleading.

The proposed finding is vague because the term "PMTA timeline" is ambiguous.

To the extent that the proposed finding implies that Altria did not have a "PMTA timeline" for MarkTen Elite until a relatively late date, the proposed finding is misleading. Altria only acquired a license for MarkTen Elite in late 2017 and prepared to launch the product on an



accelerated schedule. (CCFF ¶¶ 138-39). Altria launched MarkTen Elite on February 26, 2018. (CCFF ¶ 1144). Altria made a decision to pursue a PMTA for MarkTen Elite on March 15, 2018, (CCFF ¶ 1267; PX4318 (Altria) at 007), and that decision was still in place as of August 30, 2018. (CCFF ¶ 1268; PX4318 (Altria) at 005, 007).

511. Nu Mark did not decide to pursue a PMTA for Elite until March 15, 2018. (PX4318 (Altria) at 007; Quigley (Altria) Tr. 1977).

### **Response to Finding No. 511**

The proposed finding is misleading. To the extent that, in claiming “Nu Mark did not decide to pursue a PMTA for Elite until March 15, 2018,” the proposed finding implies that Altria did not make that decision until a relatively late date, the proposed finding is misleading. Altria only acquired a license for MarkTen Elite in late 2017 and prepared to launch the product on an accelerated schedule. (CCFF ¶¶ 138-39). Altria launched MarkTen Elite on February 26, 2018. (CCFF ¶ 1144). Altria made a decision to pursue a PMTA for MarkTen Elite on March 15, 2018, (CCFF ¶ 1267; PX4318 (Altria) at 007), and that decision was still in place as of August 30, 2018. (CCFF ¶ 1268; PX4318 (Altria) at 005, 007).

512. But this PMTA was never more than a contingency plan: Altria knew that the PMTA for the in-market product faced “[i]ncreased application risk” and an “[u]ncertain authorization outcome.” (RX0496 (Altria) at 011). Accordingly, the PMTA for the in-market Elite was to be pursued as a contingency while the company redesigned the product to have the “must have” features necessary for PMTA approval. (RX0496 (Altria) at 010-015, 017; *see also* PX7017 Magness (Altria) Dep. at 102-03; PX7041 Quigley (Altria) Dep. at 150-54; PX7003 Quigley (Altria) IHT at 118-19). Without these features, and unable to add them without changing the predicate product, the company knew a PMTA for the in-market Elite would not be approved. (RX0496 (Altria) at 010-015, 017); Murillo (Altria/JLI) Tr. 2942 (“[F]rom the first day [Altria] got [Elite], [it] knew that there were a number of changes that were likely going to be necessary ultimately for both consumer and regulatory purposes . . . .”); PX7041 Quigley (Altria) Dep. at 150-54; PX7003 Quigley (Altria) IHT at 118-19; *see also infra* Part III.F.2.c).

### **Response to Finding No. 512**

The proposed finding is vague, incomplete, unsupported by the cited evidence, and contrary to the weight of the evidence.

To the extent that the proposed finding characterizes Altria's plans for a MarkTen Elite PMTA as a contingency plan, the proposed finding is vague because the term "contingency plan" is ambiguous.

To the extent that the proposed finding claims that "Altria knew that the PMTA for the in-market product faced '[i]ncreased application risk' and an '[u]ncertain authorization outcome'" and that this finding refers to MarkTen Elite 1.0, the proposed finding is incomplete and misleading because it fails to note that in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA denied the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is also incomplete because neither the proposed finding, nor the cited exhibit explain what "increased application risk" was a reference to in relative terms or opine in any way on the extent of the risk. The proposed finding is also misleading because, by definition, all PMTAs bear some risk and, to the extent that MarkTen Elite's PMTA had an "[u]ncertain authorization outcome," all e-cigarette products have an uncertain authorization outcome until the FDA approves their PMTAs.

To the extent that the proposed finding claims that "the PMTA for the in-market Elite was to be pursued as a contingency while the company redesigned the product to have the "must have" features necessary for PMTA approval," the proposed finding is incomplete because the "must have" features are not specified.

To the extent that the proposed finding claims that “[w]ithout these features, and unable to add them without changing the predicate product, the company knew a PMTA for the in-market Elite would not be approved,” the proposed finding is incomplete because the features are not specified.

The proposed finding is also contrary to the weight of the evidence. At least one Altria employee, Bob Arents, Altria’s “Senior Director of E-Vapor Product Development, held the view that Altria’s “product integrity requirements were too strict” and that MarkTen Elite had “generally acceptable materials” in connection with “PMTA viability.” (CCFF ¶ 1273).

**b. A Half Dozen Of Elite’s Components Needed To Be Replaced**

513. Elite lacked dry puff prevention technology, (*see supra* Part III.B.2), but the lack of dry puff prevention technology was not its only design flaw. To the contrary, many of the product’s components were made of materials that Altria scientists “did not like to use in e-vapor products.” (PX7026 Gardner (Altria) Dep. at 90).

**Response to Finding No. 513**

The proposed finding is incomplete and misleading.

To the extent that the proposed finding claims, “many of the product’s components were made of materials that Altria scientists ‘did not like to use in e-vapor products,’” the proposed finding is incomplete and misleading because the personal preferences of Altria’s scientists regarding materials do not necessarily reflect the FDA’s views on the likelihood of PMTA approval, and Altria was working on improvements to Elite 2.0 that would address the PMTA concerns surrounding Elite 1.0. (CCFF ¶¶ 1281-85, 1289, 1293).

To the extent that the proposed finding claims that “Elite lacked dry puff prevention technology,” Complaint Counsel has no specific response.

514. For example, Elite contained nickel wire, which was “very concerning” and something about which Altria “needed long-term studies to definitively understand whether it was a risk or not.” (Gardner (Altria) Tr. 2663-64).

**Response to Finding No. 514**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that nickel wire “was ‘very concerning’ and something about which Altria ‘needed long-term studies to definitively understand whether it was a risk or not,’” the proposed finding is incomplete and misleading because it also states that Altria did not know “whether it was a risk or not” and because the potential risk does not clearly have any bearing on Elite’s likelihood of PMTA approval or any other issue in this case.

To the extent that the proposed finding implies that the presence of nickel wire posed a serious health risk, the proposed finding is incomplete and misleading because it fails to mention that Altria knew about this potential risk when it introduced MarkTen Elite, (CCFF ¶ 1271; PX7026 (Gardner (Altria) Dep. at 96-97)), yet still made the decision to expose consumers to the product, which is inconsistent with a sincere belief that the product posed a risk to public health.

The proposed finding is also contrary to the weight of the evidence. In a report detailing Elite’s potential material risks, Dr. Gardner himself acknowledged that the currently available data on Elite’s nickel wire did not “show concern.” (PX4025 (Altria) at 001).

Moreover, at least one Altria employee, Bob Arents, Altria’s “Senior Director of E-Vapor Product Development, held the view that Altria’s “product integrity requirements were too strict” and that MarkTen Elite had “generally acceptable materials” in connection with “PMTA viability.” (CCFF ¶ 1273).

To the extent that the proposed finding claims that “Elite contained nickel wire,” Complaint Counsel has no specific response.

515. Elite’s “black parts” were “made out of ABS plastic.” (PX7026 Gardner (Altria) Dep. at 90). “The A, the B and the S all represent [harmful or potentially harmful constituents] that are toxic, and if there’s any impurities in the manufacturing process, they could be

released into the liquid and aerosol and expose the smokers.” (PX7026 Gardner (Altria) Dep. at 90; Gardner (Altria) Tr. 2614).

### **Response to Finding No. 515**

The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “Elite’s ‘black parts’ were ‘made out of ABS plastic’” and “‘The A, the B and the S all represent [harmful or potentially harmful constituents] that are toxic, and if there’s any impurities in the manufacturing process, they could be released into the liquid and aerosol and expose the smokers,’” the proposed finding is misleading because the finding does not claim that there actually were any “impurities in the manufacturing process” or that the presence of “ABS plastic” posed a risk to public health or had any bearing on Elite’s likelihood of PMTA approval or any other issue in this case.

To the extent that the proposed finding implies that the presence of ABS plastic posed a health risk, the proposed finding is contrary the weight of the evidence. Altria knew about this potential risk when it introduced MarkTen Elite, (CCFF ¶ 1271; PX7026 (Gardner (Altria) Dep. at 96-97)), yet still made the decision to expose consumers to the product, which is inconsistent with a sincere belief that the product posed a risk to public health. Moreover, at least one Altria employee, Bob Arents, Altria’s “Senior Director of E-Vapor Product Development, held the view that Altria’s “product integrity requirements were too strict” and that MarkTen Elite had “generally acceptable materials” in connection with “PMTA viability.” (CCFF ¶ 1273).

The proposed finding is also incomplete and misleading because it fails to mention that Altria was working on improvements to Elite 2.0 that would address the PMTA concerns surrounding Elite 1.0. (CCFF ¶¶ 1281-85, 1289, 1293).

516. In addition, Elite’s pod “was made of polycarbonate,” which has “some toxicity in fish studies, not in humans” but nonetheless “has a lot of science stigma around it.” (PX7026 Gardner (Altria) Dep. at 90).

**Response to Finding No. 516**

The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “Elite’s pod ‘was made of polycarbonate,’ which has ‘some toxicity in fish studies, not in humans’ but nonetheless ‘has a lot of science stigma around it,’” the proposed finding is misleading because the finding does not claim that the “polycarbonate” in Elite actually posed a risk to public health or had any bearing on Elite’s likelihood of PMTA approval or any other issue in this case.

To the extent that the proposed finding implies that the presence of polycarbonate posed a health risk, the proposed finding is contrary to the weight of the evidence. Altria knew about this potential risk when it introduced MarkTen Elite, (CCFF ¶ 1271; PX7026 (Gardner (Altria) Dep. at 96-97)), yet still made the decision to expose consumers to the product, which is inconsistent with a sincere belief that the product posed a risk to public health. Moreover, Dr. Gardner testified that Altria thought that the polycarbonate in Elite “was appropriate to be in the market.” (PX7026 (Gardner (Altria) Dep. at 90)).

The proposed finding is also incomplete and misleading because it fails to mention that Altria was working on improvements to Elite 2.0 that would address the PMTA concerns surrounding Elite 1.0. (CCFF ¶¶ 1281-85, 1289, 1293).

517. “And [Elite’s e-liquid] formulations were not developed by Altria” and thus “were not developed to use [Altria’s] toolbox of ingredients for e-vapor formulations,” meaning those “ingredients that [Altria] had sufficient data that [it] felt was necessary for a PMTA.” (PX7026 Gardner (Altria) Dep. at 90-91). For those non-toolbox ingredients, Altria “would have to do significant study, years of studies to demonstrate they’re appropriate for the protection of public health.” (PX7026 Gardner (Altria) Dep. at 91).

**Response to Finding No. 517**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding attributes significance to the claim that “Altria ‘would have to do significant study, years of studies to demonstrate [that certain components of Elite were] appropriate for the protection of public health,” the proposed finding is incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)). Moreover, for some portions of a PMTA, a manufacturer may file interim data with its initial filing and then file completed data in a supplemental filing, suggesting that the need to run some studies need not have significantly delayed Altria’s PMTA. (Gardner (Altria) Tr. 2692-93).

The proposed finding is also contrary to the weight of the evidence. As of August 30, 2018, Altria had a plan in place to submit a PMTA for MarkTen Elite before the then-PMTA deadline of August 8, 2022, and for MarkTen Elite 2.0 by January 2022. (PX4318 (Altria) at 005, 015).

To the extent that the proposed finding claims that “[Elite’s e-liquid] formulations were not developed by Altria’ and thus ‘were not developed to use [Altria’s] toolbox of ingredients for e-vapor formulations,’ meaning those ‘ingredients that [Altria] had sufficient data that [it] felt was necessary for a PMTA,’” Complaint Counsel has no specific response.

518. All told, Altria determined in early 2018 that a half-dozen components of Elite would need to be replaced. (PX4025 (Altria) at 001).

### **Response to Finding No. 518**

The proposed finding is incomplete, unreliable, and misleading.

The proposed finding is incomplete, and thus unreliable and misleading, because it does not specify the components of Elite that purportedly needed to be replaced, why they needed to be

replaced, whether the components could be changed without creating a product modification necessitating a new PMTA, whether the components actually were replaced before Elite was discontinued, whether their replacement had any bearing on Elite's likelihood of PMTA approval, or whether the assessment from "early 2018" was still applicable as to each component by the time that Altria discontinued MarkTen Elite in October 2018.

The proposed finding is also incomplete and misleading because it fails to mention that Altria was working on improvements to Elite 2.0 that would address the PMTA concerns surrounding Elite 1.0. (CCFF ¶¶ 1281-85, 1289, 1293).

**c. Elite Needed To Be Changed So Significantly That A New Product, Elite 2.0, Needed To Be Designed, Which Would Require A New PMTA**

519. The discovery of Elite's many design flaws led Altria to "conceptualize[]" a redesigned version of the product called "Elite 2.0." (Murillo (Altria/JLI) Tr. 2942).

**Response to Finding No. 519**

The proposed finding overstates the cited evidence and is misleading.

To the extent that the proposed finding claims that "[t]he discovery of Elite's many design flaws led Altria to 'conceptualize' . . . Elite 2.0," the proposed finding overstates the cited evidence and is misleading insofar as it characterizes Elite as having "design flaws," which is a term that does not appear in the cited testimony.

To the extent that the proposed finding claims that "Altria [] 'conceptualized[]' a redesigned version of [MarkTen Elite] called 'Elite 2.0,'" Complaint Counsel has no specific response.

520. But Elite 2.0 was never more than "a product in the pipeline that was subject to product development." (Garnick (Altria) Tr. 1614). Altria never finalized the design of Elite 2.0, nor was it ever sold in the market. (Garnick (Altria) Tr. 1614).

**Response to Finding No. 520**



The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding implies that Altria's plans for MarkTen Elite 2.0 were nascent or preliminary, the proposed finding is misleading and contrary to the weight of the evidence. On March 16, 2018, Altria initiated product development for an improved version of MarkTen Elite, MarkTen Elite 2.0. (PX1930 (Altria) at 013). As early as April 26, 2018, Altria had established a PMTA timeline for MarkTen Elite 2.0 with the intention of submitting a PMTA by August 2021 (PX1930 (Altria) at 014, 020). As of August 30, 2018, Altria planned to submit a PMTA for MarkTen Elite 2.0 by January 2022. (PX4318 (Altria) at 005, 015). Altria developed prototypes of Elite 2.0 with a number of improvements, including dry puffing, nicotine salts, toxicologically acceptable materials, reduced pod leakage (the c1A gasket), limited carbonyl formation, a battery life LED indicator, new flavors, and nicotine strengths of 1.8 percent and 2.5 to 4 percent. (CCFF ¶¶ 1281-93). In October 2018, Altria allowed consumers to use prototypes of Elite 2.0 in consumer research studies and they described one Elite 2.0 prototype mix as having a "smooth but not too smooth draw," with "a full and consistent volume of vapor upon inhale and exhale that was reminiscent of a cigarette experience," and "immediate nicotine satisfaction achieved within 3-4 puffs." (CCFF ¶¶ 1290-92). In September 2018, Altria expected designs for MarkTen Elite 2.0 to be locked by the second quarter of 2020. (CCFF ¶ 1294).

To the extent that the proposed finding claims that Elite 2.0 was a "product in [Altria's] pipeline," that "Altria never finalized the design of Elite 2.0," and that Elite 2.0 was never "sold in the market," Complaint Counsel does not disagree.

521. "The kind of changes that were being contemplated for Elite 2.0 would clearly require a PMTA," so the modified product could not be introduced on the market in advance of FDA approval. (Garnick (Altria) Tr. 1700; *see also* Jupe (Altria) Tr. 2256-58 ("[T]he answer is no. It first had to be obviously developed and designed and tested, the science approved by the FDA, get an authorization from the FDA, and then commercialize it, and . . . our best guess at that point was five to six years."); PX7014 Baculis (Altria) Dep. at 151-52;

PX7017 Magness (Altria) Dep. at 108-12; PX1673 (Altria) at 013). Complaint Counsel's expert Dr. Rothman conceded "that the expectation was that if Altria introduced MarkTen Elite 2.0, that that product would require PMTA authorization." (PX7046 Rothman Dep. at 207).

### **Response to Finding No. 521**

The proposed finding is misleading. To the extent that the proposed finding claims that, in 2018, it would have taken "five to six years" for Altria to commercialize MarkTen Elite 2.0, the proposed finding is misleading. In 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)). Altria thus had a plan in place to submit a PMTA for MarkTen Elite 2.0 in January 2022, to achieve PMTA approval while MarkTen Elite was still on the market, and to commercialize Elite 2.0 in a seamless market transition from the on-market version of MarkTen Elite. (CCFF ¶¶ 1298-300; PX4318 (Altria) at 015).

To the extent that the proposed finding claims that "[t]he kind of changes that were being contemplated for Elite 2.0 would clearly require a PMTA' so the modified product could not be introduced on the market in advance of FDA approval" and "the expectation was that if Altria introduced MarkTen Elite 2.0, that that product would require PMTA authorization," Complaint Counsel does not disagree.

522. Thus, Altria knew in March 2018 that "Elite, both the current version and the future version, need to be modified and redesigned, resulting in a delay in PMTA work and filing." (RX0270 (Altria) at 001).

### **Response to Finding No. 522**

The proposed finding is incomplete and misleading.

To the extent that the proposed finding attributes significance to the claim that, “in March 2018, ‘Elite, both the current version and the future version, need[ed] to be modified and redesigned resulting in a delay in PMTA work and filing,’” the proposed finding is incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

The proposed finding is also misleading because for some portions of a PMTA, a manufacturer may file interim data with its initial filing and then file completed data in a supplemental filing, suggesting that delays in some studies need not have significantly delayed Altria’s PMTA. (Gardner (Altria) Tr. 2692-93).

523. To maximize the time for FDA to review the Elite 2.0 PMTA, the plan was to use the on-market Elite (known as “1.0”) as a placeholder filing: To “get the 1.0 [PMTA] in at the very last moment knowing that it was going to be an insufficient application and really just allow for that review time on the preferred version of the 2.0.” (PX7017 Magness (Altria) Dep. at 102-03; *see also supra* Part III.F.2.a).

### **Response to Finding No. 523**

The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding characterizes Altria’s planned PMTA for MarkTen Elite as “insufficient,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 512. (*See* Response to RPF ¶ 512).

To the extent that the proposed finding claims that “[t]o maximize the time for FDA to review the Elite 2.0 PMTA, [Altria’s] plan was to use the on-market Elite (known as ‘1.0’) as a placeholder filing: To ‘get the 1.0 [PMTA] in at the very last moment,” Complaint Counsel does not disagree.

524. Altria considered whether it could rely on some bridging, (*see supra* Part I.D.3.b), of Elite 1.0 to Elite 2.0 in any PMTA. But the plan for bridging from Elite 1.0 to Elite 2.0 was entirely “conceptual” because the base scientific data was not done, as Elite 2.0 was not yet even designed. (PX7027 Murillo (Altria/JLI) Dep. at 161-62).

#### **Response to Finding No. 524**

The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding attributes significance to the claim that “the plan for bridging from Elite 1.0 to Elite 2.0 was entirely ‘conceptual’ because the base scientific data was not done,” the proposed finding is misleading because bridging was not required to achieve PMTA approval, but was merely one allowed approach that might save time and resources. (CCFF ¶ 1296; Murillo (Altria/JLI) Tr. 3004 (“[T]he concept of bridging is that you don’t have to redo all of the work required for a PMTA for . . . things [that] are sufficiently similar to each other”); PX8005 at 005-06 (¶ 32) (Graham (NJOY), Decl.) (describing FDA guidance on the ability to “bridge” to data pertaining to another product)).

To the extent that the proposed finding claims that “Elite 2.0 was not yet even designed,” the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 520. (*See* Response to RPF ¶ 520).

525. Nu Mark would not know whether the bridging plan for Elite 2.0 would work “until [it] did years’ worth of work.” (PX7041 Quigley (Altria) Dep. at 152).

#### **Response to Finding No. 525**

The proposed finding is incomplete and misleading.

To the extent that the proposed finding attributes significance to the claim that “Nu Mark would not know whether the bridging plan for Elite 2.0 would work ‘until [it] did years’ worth of work,” the proposed finding is incomplete and misleading because bridging was not required to achieve PMTA approval, but was merely one allowed approach that might save time and resources. (CCFF ¶ 1296; Murillo (Altria/JLI) Tr. 3004 (“[T]he concept of bridging is that you don’t have to

redo all of the work required for a PMTA for . . . things [that] are sufficiently similar to each other”); PX8005 at 005-06 (¶ 32) (Graham (NJOY), Decl.) (describing FDA guidance on the ability to “bridge” to data pertaining to another product)). Moreover, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

526. Murillo expected that by the time they were done with this testing and design, Elite 1.0 and 2.0 might “be tremendously different, so th[e] bridging [would] not be a -- necessarily a timesaver.” (PX7027 Murillo (Altria/JLI) Dep. at 161-62).

#### **Response to Finding No. 526**

The proposed finding is misleading. To the extent that the proposed finding attributes significance to the claim that “Murillo expected that by the time they were done with this testing and design, Elite 1.0 and 2.0 might ‘be tremendously different, so th[e] bridging [would] not be a -- necessarily a timesaver,’” the proposed finding is misleading because bridging was not required to achieve PMTA approval, but was merely one allowed approach that might save time and resources. (CCFF ¶ 1296; Murillo (Altria/JLI) Tr. 3004 (“[T]he concept of bridging is that you don’t have to redo all of the work required for a PMTA for . . . things [that] are sufficiently similar to each other”); PX8005 at 005-06 (¶ 32) (Graham (NJOY), Decl.) (describing FDA guidance on the ability to “bridge” to data pertaining to another product)). Moreover, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (RX0272 (Altria) at 043; CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

527. As of June 2018, Nu Mark estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (RX0450 (Altria) at 069).

**Response to Finding No. 527**

The proposed finding is incomplete and misleading.

The proposed finding is incomplete and misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until August 2022, (CCFF ¶ 1257), and would have been able to keep its existing e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; PX7017 Magness (Altria) Dep. at 102-03 (describing using Elite 1.0 as a placeholder filing with the FDA)).

To the extent that the proposed finding claims that Altria had a plan in place to submit a PMTA for MarkTen Elite 2.0 in “the first quarter of 2022,” Complaint Counsel does not disagree.

**G. FDA’s April And May 2018 Statements Emphasized The Potential Value Of E-Vapor To Convert Adult Smokers While Also Highlighting The Downside Risk Of Attracting Youth**

528. These considerable PMTA problems for Altria’s e-vapor products were mounting against the backdrop of intensifying FDA scrutiny of the entire e-vapor industry. (RX0155 (FDA); RX0156 (FDA)).

**Response to Finding No. 528**

The proposed finding is unsupported by the cited evidence and contrary to the weight of the evidence.

To the extent that the proposed finding claim that “Altria’s e-vapor products” had “considerable PMTA problems,” the proposed finding is unsupported by the cited evidence, which is an FDA document, and is contrary to the weight of the evidence for the reasons cited in Response to RPF ¶¶ 486-527. (See Responses to RPF ¶¶ 486-527). Moreover, the evidence suggests that Altria believed that its e-cigarette products could have achieved PMTA approval. (CCFF ¶¶ 1267-1352).

To the extent that the proposed finding claims that “FDA scrutiny of the entire e-vapor industry” intensified in 2018, Complaint Counsel does not disagree.

529. In April 2018, FDA launched a “nationwide blitz” to crack down on retailers selling to minors. (RX0155 (FDA) at 002).

#### **Response to Finding No. 529**

Complaint Counsel does not disagree.

530. Accordingly, in April and May 2018, FDA sent letters to five e-vapor manufacturers of pod-based products, including JLI, requiring each company “to submit important documents to better understand the reportedly high rates of youth use” of their products. (RX0155 (FDA) at 003; *see also* RX0156 (FDA) at 001).

#### **Response to Finding No. 530**

Complaint Counsel does not disagree.

531. These letters targeted pod-based products with nicotine salts. (Willard (Altria) Tr. 1369 (discussing RX0156 (FDA) at 002)).

#### **Response to Finding No. 531**

Complaint Counsel does not disagree.

532. Altria did not receive a letter because its pod-based product, Elite, did not have nicotine salts. (Willard (Altria) Tr. 1369).

#### **Response to Finding No. 532**

The proposed finding overstates the cited evidence and is unreliable.

To the extent that the proposed finding claims that “Altria did not receive a letter because its pod-based product, Elite, did not have nicotine salts,” the proposed finding overstates the cited evidence because in the cited testimony, Howard Willard, Altria’s former CEO, did not attribute the FDA’s decision not to send a letter to Altria to the absence of nicotine salts in Altria’s pod-based products. (*See* Willard (Altria) Tr. 1369).

The proposed finding is unreliable to the extent that it relies on testimony from Willard for the rationale for a decision made by the FDA.

To the extent that the proposed finding claims that “Altria did not receive a letter,”

Complaint Counsel has no specific response.

533. Consistent with its adoption of the “continuum of risk” concept, FDA’s April 23 statement acknowledged “the possibility for . . . products like e-cigarettes . . . to provide a potentially less harmful alternative for currently addicted individual adult smokers who still want to get access to satisfying levels of nicotine without many of the harmful effects that come with the combustion of tobacco.” (RX0155 (FDA) at 004). But, the agency added, “we’ve got to step in to protect our kids.” (RX0155 (FDA) at 004).

### **Response to Finding No. 533**

Complaint Counsel does not disagree and adds that the FDA has suggested that an e-cigarette’s impact on youth initiation is an important factor in its evaluation of PMTAs. (CCFF ¶¶ 1323-27).

534. As Willard testified, the April announcement acknowledged that the “future promise” of e-vapor for public health had to be “counterbalance[d] . . . against the concern [FDA] had about increased levels of youth usage of e-cigarette or [e-vapor] products.” (Willard (Altria) Tr. 1362; RX0155 (FDA) at 004). FDA was trying to figure out “how to balance the two.” (Willard (Altria) Tr. 1363).

### **Response to Finding No. 534**

Complaint Counsel does not disagree.

535. FDA’s April statement “convinced [Altria] that in pursuing JLI, [it] had to take into account the FDA’s concerns.” (Willard (Altria) Tr. 1363). Altria believed that FDA’s concern “was clearly a factor [it] needed to consider in structuring a deal.” (Willard (Altria) Tr. 1363).

### **Response to Finding No. 535**

The proposed finding is vague, incomplete, and misleading.

To the extent that the proposed finding claims that the FDA’s statement “convinced [Altria] that in pursuing JLI, [it] had to take into account the FDA’s concerns” and “Altria believed that FDA’s concern ‘was clearly a factor [it] needed to consider in structuring a deal,’” the proposed finding is vague, incomplete, and misleading, because it does not explain how Altria took into account the FDA’s concerns and how Altria’s belief influenced the transaction structure.



536. In May 2018, FDA issued a press release emphasizing that the “agency plan[ned] to explore additional restrictions on the sale and promotion” of e-vapor products, including “measures on flavors/designs that appeal to youth.” (RX0156 (FDA) at 002).

**Response to Finding No. 536**

Complaint Counsel does not disagree.

**IV. IN EARLY 2018, DISCUSSIONS BETWEEN JLI AND ALTRIA REMAINED PRELIMINARY AS THEY DEBATED MAJORITY VERSUS MINORITY INVESTMENTS**

537. As Elite was struggling to get off the ground, negotiations between Altria and JLI continued to “heat and cool through time,” (Gifford (Altria) Tr. 2761), proceeding in “fits and starts,” (PX7000 Garnick (Altria) IHT at 83).

**Response to Finding No. 537**

The proposed finding is unsupported, misleading, and contrary to the weight of the evidence.

To the extent that, in claiming “Elite was struggling to get off the ground,” the proposed finding implies that MarkTen Elite was not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-32. (*See Responses to RPF 431-32*).

The claim that MarkTen “Elite was struggling to get off the ground” is unsupported by the cited testimony, which does not discuss Elite’s performance.

To the extent that the proposed finding claims that “negotiations between Altria and JLI continued to “heat and cool through time” and “proceeding in ‘fits and starts,’” the proposed finding is misleading and contrary to the weight of the evidence. Respondents negotiated continuously from early 2018 to December 2018, when they consummated the transaction. (CCF 639-866; *see also Responses to RPF 562-1132*).

The proposed finding is also misleading because in the cited testimony from Gifford, he also says that in early 2018 “there were always talks.” (Gifford (Altria) Tr. 2761). In the cited

testimony from Garnick, he states “it’s hard to remember exactly what time.” (PX7000 (Garnick (Altria), IHT at 83)).

538. Early discussions were “general” and “unstructured,” with a focus on the potential synergies of a partnership between the two companies. (PX7031 Willard (Altria) Dep. at 138-39; *see also* Pritzker (JLI) Tr. 775-76). Discussions “heat[ed] up” as the companies “progressed into 2018.” (Gifford (Altria) Tr. 2761). But then the companies found “that there were material differences” and talks “cool[ed] off” again. (Gifford (Altria) Tr. 2761).

### **Response to Finding No. 538**

The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “[e]arly discussions were ‘general’ and ‘unstructured,’ with a focus on the potential synergies of a partnership between the two companies,” the proposed finding is misleading because it does not specify a timeframe. The cited testimony refers to April 2018 and earlier. (PX7031 (Willard (Altria), Dep. at 138-39)).

To the extent that, in claiming “the companies found ‘that there were material differences’ and talks ‘cool[ed] off’ again,” the proposed finding implies that transaction negotiations proceeded uncertainly or intermittently in 2018, the proposed finding is misleading and contrary to the weight of the evidence. Respondents negotiated continuously from early 2018 to December 2018, when they consummated the transaction. (CCFF ¶¶ 639-866; *see also* Responses to RPF ¶¶ 562-1132).

#### **A. April 5, 2018 Meeting**

539. In early spring, after sporadic conversations during the first quarter, (*see, e.g.*, PX2456 (JLI) at 001), the two companies began to explore more concrete investment structures, (PX2026 (JLI) at 001-04; Pritzker (JLI) Tr. 777).

### **Response to Finding No. 539**

The proposed finding is unsupported, vague, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding characterizes transaction negotiations in “the first quarter” of 2018 as “sporadic,” the proposed finding is unsupported by the cited evidence, which does not use that phrase.

The proposed finding is vague because the term “sporadic” is ambiguous.

To the extent that the proposed finding implies that transaction negotiations proceeded uncertainly or intermittently in 2018, the proposed finding is misleading and contrary to the weight of the evidence. Respondents negotiated continuously from early 2018 to December 2018, when they consummated the transaction. (CCFF ¶¶ 639-866; *see also* Responses to RPFF ¶¶ 562-1132).

540. As Gifford explained, Altria “typically like[s] control of the company,” so early on it was focused on negotiating for a majority of JLI. (Gifford (Altria) Tr. 2763).

#### **Response to Finding No. 540**

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

541. On April 5, 2018, Pritzker, Valani, and Burns traveled to Richmond for a meeting with Willard and Gifford at Altria headquarters. (Pritzker (JLI) Tr. 777; PX2297 (JLI) at 001; PX2298 (JLI) at 001).

#### **Response to Finding No. 541**

Complaint Counsel has no specific response.

542. At the time, the companies remained far apart on valuation. The \$4.5 billion initially offered by Altria was “a nonstarter for [JLI].” (Pritzker (JLI) Tr. 782; *see also* Pritzker (JLI) Tr. 779-82).

#### **Response to Finding No. 542**

The proposed finding is vague, unsupported, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because the phrases “far apart” and “nonstarter” are ambiguous.

The first sentence of the proposed finding is unsupported because it does not cite any evidence.

To the extent that, in claiming “the companies remained far apart on valuation,” the proposed finding implies that transaction negotiations proceeded uncertainly or intermittently in 2018, the proposed finding is misleading and contrary to the weight of the evidence. Respondents negotiated continuously from early 2018 to December 2018, when they consummated the transaction. (CCFF ¶¶ 639-866; *see also* Responses to RPF ¶¶ 562-1132).

543. Seeking to bridge the gap, and with JLI’s valuation rising, Altria abandoned its 100-percent-ownership demand and instead sought to buy a bare majority of JLI in two steps. (Pritzker (JLI) Tr. 780). At the April meeting, Altria outlined a concept in which it would buy 40 percent of the U.S. business initially and then, following FTC approval, purchase the remaining 10.1 percent, for a total of 50.1 percent ownership. (Pritzker (JLI) Tr. 780-81; *see also* PX2026 (JLI) at 002-03).

#### **Response to Finding No. 543**

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

#### **B. April 20, 2018 Letter From JLI**

544. On April 20, 2018, JLI sent Altria a letter putting into writing the general terms of the potential transaction structure that was discussed at the April 5 meeting. (Pritzker (JLI) Tr. 777-79; PX2026 (JLI) at 002).

#### **Response to Finding No. 544**

To the extent that the proposed finding implies that the “April 20, 2018 . . . letter” from Altria to JLI was the first communication between Altria and JLI executives following the “April

5[, 2018] meeting” referred to in RPF 541, the proposed finding is misleading because it was not the first communication between Altria and JLI Executives following that meeting. On April 16, 2018, Willard emailed an illustrative payment structure proposal to Pritzker, Valani, and Burns ahead of a conference call to discuss the transaction. (CCFF ¶ 648). The proposed structure envisioned Altria’s purchasing 50.1 percent of JLI. (CCFF ¶ 648). In that email, Willard suggested that Altria’s and JLI’s antitrust counsel “connect to assess antitrust risk.” (CCFF ¶ 649). That afternoon, Willard and Gifford scheduled a call with Pritzker, Burns, and Valani. (CCFF ¶ 649).

545. The JLI Board believed that if JLI were going to continue talking with Altria, it “should . . . start to become specific about what deal terms might look like.” (Pritzker (JLI) Tr. 778). JLI wanted to align on key terms—namely “price, payment, and governance terms”—up front before proceeding with diligence. (PX2026 (JLI) at 002).

#### **Response to Finding No. 545**

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

546. The April 20 letter, which was sent by Burns but prepared by JLI’s counsel, contemplated that, consistent with earlier discussions, Altria would acquire 50.1 percent of JLI’s U.S. business in two steps. (Pritzker (JLI) Tr. 778-81). Altria initially would purchase a 40 percent nonvoting ownership stake for \$6.4 billion, with an expectation that “no HSR filing would be required in connection with this portion of the transaction.” (PX2026 (JLI) at 003; *see also* Pritzker (JLI) Tr. 780-81). “Promptly following [Altria’s] initial \$6.4 billion investment, Altria would seek regulatory approval to obtain a 50.1% . . . ownership interest in [JLI] via an additional \$1.6 billion capital investment (for a total of \$8.0 billion).” (PX2026 (JLI) at 003; *see also* Pritzker (JLI) Tr. 780-81). Following “regulatory approvals,” the previously acquired nonvoting equity would convert to voting equity. (PX2026 (JLI) at 002; *see also* Pritzker (JLI) Tr. 780-81).

#### **Response to Finding No. 546**

To the extent that the proposed finding purports to comprehensively describe the contents of the April 20, 2018 letter from JLI to Altria, the proposed finding is misleading. The April 20,

2018 letter also proposed that “JUUL’s and Altria’s respective anti-trust counsel would discuss and develop a plan with respect to seeking and obtaining regulatory approval for the majority investment, including the treatment of any competitive products owned by Altria.” (CCFF ¶ 651). Valani understood the reference to “competitive products” to mean electronic nicotine delivery systems. (CCFF ¶ 651). As of April 20, 2018, the electronic nicotine delivery systems (e-cigarettes) sold by Altria included MarkTen and MarkTen Elite. (CCFF ¶ 651). Willard and Gifford scheduled a call with Pritzker, Burns, and Valani on the afternoon of April 20, 2018, after Burns sent his letter. (CCFF ¶ 652). The Altria and JLI negotiators first had conversations about what Altria would do with its existing e-cigarette products around the time that the notion of Altria purchasing less than 100 percent of JLI arose. (CCFF ¶ 653).

547. In addition to the payments for equity shares, JLI would receive \$1 billion upon receipt of regulatory approval of its PMTA for JUUL. (PX2026 (JLI) at 003 & n.1; *see also* Pritzker (JLI) Tr. 781). Thus, all told, the letter contemplated an investment of \$9 billion for 50.1 percent of the domestic company. (Pritzker (JLI) Tr. 781).

#### **Response to Finding No. 547**

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

548. JLI’s letter also specifically contemplated that, given the complexity of the transaction, “[JLI’s] and Altria’s respective anti-trust counsel would discuss and develop a plan with respect to seeking and obtaining regulatory approval for the majority investment, including the treatment of any competitive products owned by Altria.” (PX2026 (JLI) at 003; *see also* Pritzker (JLI) Tr. 784-85).

#### **Response to Finding No. 548**

The proposed finding is incomplete, misleading, and unsupported.

The proposed finding is incomplete because it does not define or contextualize the term “competitive products.” Valani understood the reference to “competitive products” to mean electronic nicotine delivery systems. (CCFF ¶ 651). As of April 20, 2018, the electronic nicotine delivery systems (e-cigarettes) sold by Altria included MarkTen and MarkTen Elite. (CCFF ¶ 651). The Altria and JLI negotiators first had conversations about what Altria would do with its existing e-cigarette products around the time that the notion of Altria purchasing less than 100 percent of JLI arose. (CCFF ¶ 653).

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

549. As Pritzker testified, JLI understood from the outset that “if we were going to pursue a transaction of this nature, that it would be closely scrutinized by regulatory agencies, and that antitrust counsel would have to be brought in at an early stage so that any conversations around control, board seats, existing products, all of that would be structured in a way so as to be above-board and to optimize the chance for a successful regulatory outcome.” (Pritzker (JLI) Tr. 784).

#### **Response to Finding No. 549**

The proposed finding is misleading and wholly unsupported by the record.

To the extent that the proposed finding implies that Respondents strived to comply with antitrust requirements in connection with the transaction, the proposed finding is misleading and wholly unsupported because there is no evidence in the record of what counsel advised JLI and

Altria regarding potential antitrust liability stemming from their actions. Respondents never introduced into the record evidence relating to the content of the legal advice provided by counsel. Indeed, Respondents' counsel sought to block Complaint Counsel from developing such evidence at every turn.

Furthermore, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

550. At the time, Pritzker's "assumption [was that] the FTC would most likely require divestiture of products, meaning the sale of products to another entity, so those products would stay in the market and not be withdrawn and that Altria would be free to sell them to some other tobacco company or private equity company or somebody that would continue to market those products." (Pritzker (JLI) Tr. 785-86).

#### **Response to Finding No. 550**

The proposed finding is incomplete, misleading, and wholly unsupported by the record.

The proposed finding is incomplete and misleading because it fails to state that, regardless of the method, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

Furthermore, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).



551. As for governance provisions, JLI proposed that it would continue operating “on a stand-alone basis,” including “equal board representation” and “management selection by non-Altria directors,” among other rights. (PX2026 (JLI) at 004). In addition, JLI wanted to remain “free to complete an IPO or otherwise raise equity” without any input or consent by Altria, notwithstanding Altria’s majority stake. (PX2026 (JLI) at 004).

### **Response to Finding No. 551**

The proposed finding is incomplete and misleading.

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

To the extent that the proposed finding implies that the proposed terms that it references were incorporated into Respondents’ final transaction agreement, the proposed finding is misleading. Under Respondents’ final transaction agreement, Altria obtained the right to appoint one-third of JLI’s directors pending HSR approval. (*See* RPF ¶ 1127).

### **C. Altria’s May 2018 Responses**

552. In the weeks that followed, Altria and JLI had “several conversations” and Altria sent “two letters . . . to JLI to propose additional terms or to refine the terms” and address valuation. (Pritzker (JLI) Tr. 793). But, although there was continued “back-and-forth, . . . it was not really leading anywhere.” (Pritzker (JLI) Tr. 793).

### **Response to Finding No. 552**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding suggests that the “conversations” and “two letters” that followed the April 20, 2018 meeting only addressed valuation concerns and refined and proposed additional terms, the proposed finding is incomplete and misleading. On April 24, 2018, Willard sent an email to Valani, Pritzker, and Burns stating that he had a “proposal to partially address your antitrust risk concern.” (CCFF ¶ 656). Valani testified that he thinks Willard was

referring to the issue of whether Altria would purchase nonvoting stock initially (JLI's preference) or enter an agreement for voting stock that "wouldn't be completed until after antitrust clearance was obtained." (CCFF ¶ 656). Later in the day on April 24, 2018, Willard, Gifford, Valani, Pritzker, and Burns scheduled a conference call. (CCFF ¶ 657). On April 26, 2018, Willard emailed Pritzker and proposed a meeting between Altria and JLI on May 6, 2018, in Chicago. (CCFF ¶ 658). Willard wrote that they would have "the antitrust experts available by phone." (CCFF ¶ 658).

To the extent that, in claiming "although there was continued 'back-and-forth, . . . it was not really leading anywhere,'" the proposed finding implies that transaction negotiations proceeded uncertainly or intermittently in 2018, the proposed finding is misleading and contrary to the weight of the evidence. Respondents negotiated continuously from early 2018 to December 2018, when they consummated the transaction. (CCFF ¶¶ 639-866; *see also* Responses to RPF ¶¶ 562-1132).

The proposed finding is also incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

553. Altria sent its first counterproposal on May 3, 2018, in a letter that tracked JLI's April 20 proposal in some respects, but with critical differences that revealed major fault lines on valuation and control. (PX2184 (JLI) at 001-02; Pritzker (JLI) Tr. 793).

### **Response to Finding No. 553**

The proposed finding is vague, unsupported, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because the terms "critical differences" and "major fault lines" are ambiguous.

The proposed finding is unsupported to the extent that the terms “critical differences” and “major fault lines” are not found in the cited document or testimony.

To the extent that, in claiming Altria’s letter had “critical differences that revealed major fault lines,” the proposed finding implies that transaction negotiations proceeded uncertainly or intermittently in 2018, the proposed finding is misleading and contrary to the weight of the evidence. Respondents negotiated continuously from early 2018 to December 2018, when they consummated the transaction. (CCFF ¶¶ 639-866; *see also* Responses to RPF ¶¶ 562-1132).

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

554. Consistent with JLI’s letter, Altria proposed a 50.1 percent acquisition of the U.S. business made in two phases, along with an additional payment contingent upon receipt of PMTA approval, for a total of up to \$9 billion. (PX2184 (JLI) at 002-03).

#### **Response to Finding No. 554**

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

555. But unlike JLI’s proposal for \$6.4 billion up front, Altria proposed making a smaller initial payment of \$500 million for approximately three percent ownership interest. (PX2184 (JLI) at 002). Following antitrust approval, Altria would then top up to 50.1 percent and pay an additional \$5 billion. (PX2184 (JLI) at 003). And, while Altria was willing to offer “up to” an additional \$3.5 billion upon JLI’s receipt of PMTA approval, this was subject to additional terms not included in the letter. (PX2184 (JLI) at 003 (“We are open to discussing the exact terms of such payment but prefer to discuss it in person.”)).

#### **Response to Finding No. 555**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

To the extent that, in claiming Altria's proposal "was subject to additional terms not included in the letter," the proposed finding implies that transaction negotiations proceeded uncertainly or intermittently in 2018, the proposed finding is misleading and contrary to the weight of the evidence. Respondents negotiated continuously from early 2018 to December 2018, when they consummated the transaction. (CCFF ¶¶ 639-866; *see also* Responses to RPF ¶¶ 562-1132).

556. Altria also outlined a markedly different view of the control and governance provisions. It refused to have its 50.1 percent interest included in any future IPO. (PX2184 (JLI) at 003). And it insisted on appointing a majority of the JLI Board. (PX2184 (JLI) at 004).

#### **Response to Finding No. 556**

The proposed finding is vague, unsupported, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because the phrase "markedly different" is ambiguous.

The first sentence of the proposed finding is unsupported because it does not cite any evidence.

The proposed finding is incomplete and misleading because regardless of other deal issues that needed to be negotiated, JLI demanded and Altria understood that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993).

To the extent that, in claiming Altria "outlined a markedly different view of the control and governance provisions," the proposed finding implies that transaction negotiations proceeded uncertainly or intermittently in 2018, the proposed finding is misleading and contrary to the weight

of the evidence. Respondents negotiated continuously from early 2018 to December 2018, when they consummated the transaction. (CCFF ¶¶ 639-866; *see also* Responses to RPF ¶¶ 562-1132).

557. Several weeks later, after it became clear that the parties were still far apart, Altria improved its offer in a letter sent on May 30, 2018. (RX1402 (JLI) at 001).

### **Response to Finding No. 557**

The proposed finding is vague, unsupported, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because the phrase “still far apart” is ambiguous.

The proposed finding is unsupported to the extent that the claim that “the parties were still far apart” is not supported by the cited evidence.

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

To the extent that, in claiming “several weeks later, after it became clear that the parties were still far apart, Altria improved its offer in a letter sent on May 30, 2018,” the proposed finding implies that there were no significant communications between May 3, 2018 and May 30, 2018, the proposed finding is misleading. Pritzker and Valani scheduled a phone call with Willard and Gifford on May 15, 2018. (CCFF ¶ 660). On May 29, 2018, Willard emailed Valani and Pritzker, writing, “We are finalizing our response to the subjects we discussed last week and we will send it out to you tomorrow May 30.” (CCFF ¶ 661).

To the extent that, in claiming “the parties were still far apart,” the proposed finding implies that transaction negotiations proceeded uncertainly or intermittently in 2018, the proposed finding is misleading and contrary to the weight of the evidence. Respondents negotiated continuously

from early 2018 to December 2018, when they consummated the transaction. (CCFF ¶¶ 639-866; *see also* Responses to RPF ¶¶ 562-1132).

558. In that second letter, Altria matched the financial terms from JLI's letter of the prior month. It offered \$6.4 billion payable up front for an initial 40 percent interest in JLI's U.S. business, followed by an additional \$1.6 billion upon increasing its investment to 50.1 percent voting equity after antitrust clearance. (RX1402 (JLI) at 002). It further proposed a top up payment of between \$1 to \$3 billion upon receipt of PMTA approval, depending on JLI's earning performance at the time. (RX1402 (JLI) at 002-03). This approach offered the potential for an additional \$2 billion beyond what JLI had proposed in April, or a total of up to \$11 billion for 50.1 percent of the company. (*Compare* PX2026 (JLI) at 003 (JLI's April 20 letter), *with* RX1402 (Altria) at 002 (Altria's May 30 letter)). The May 30 letter also emphasized Altria's "best-in-class infrastructure to maximize the growth of JUUL and address serious youth vaping issues . . . . [Altria] believe[d] that JUUL and Altria ha[d] an historic opportunity to work together, in a manner wholly consistent with stated FDA policy, to reduce consumption of cigarettes and provide adults who want nicotine with potentially less harmful noncombustible alternative products." (RX1402 (Altria) at 002).

#### **Response to Finding No. 558**

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

559. JLI was unimpressed by Altria's letter. From its perspective, "Altria always seemed to be a little bit behind the curve" on valuation. (Pritzker (JLI) Tr. 783). Around this period, JLI's revenue was growing by approximately 30 percent per month. (Pritzker (JLI) Tr. 782). Thus, by the time Altria "came to a number" sought by JLI, "the value of JUUL had jumped ahead of that." (Pritzker (JLI) Tr. 783).

#### **Response to Finding No. 559**

The proposed finding is vague, unsupported, unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because the phrases "unimpressed" and "behind the curve" are ambiguous.

The first sentence of the proposed finding is unsupported because it does not cite any evidence.

The proposed finding is unreliable to the extent that it cites only the self-serving testimony of a JLI executive.

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

The proposed finding is also misleading because the referenced letter covers many terms and conditions, while the proposed finding cites only to Pritzker's views on valuation, not the letter as a whole. (RX1402 (JLI) at 002-04).

To the extent that, in claiming "JLI was unimpressed by Altria's letter," the proposed finding implies that transaction negotiations proceeded uncertainly or intermittently in 2018, the proposed finding is misleading and contrary to the weight of the evidence. Respondents negotiated continuously from early 2018 to December 2018, when they consummated the transaction. (CCFF ¶¶ 639-866; *see also* Responses to RPFF ¶¶ 562-1132).

560. The other major problem was that, in the intervening weeks, JLI had become "more and more concerned about the nature of control," and decided that it was "going to be unable or unwilling to do a transaction where Altria either had control or had a path to control of JLI." (Pritzker (JLI) Tr. 793).

#### **Response to Finding No. 560**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because the phrase "nature of control" is ambiguous.

The proposed finding is unreliable to the extent that it cites only the self-serving testimony of a JLI executive.

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

To the extent that, in claiming JLI "decided that it was 'going to be unable or unwilling to do a transaction where Altria either had control or had a path to control of JLI,'" the proposed finding implies that transaction negotiations proceeded uncertainly or intermittently in 2018, the proposed finding is misleading and contrary to the weight of the evidence. Respondents negotiated continuously from early 2018 to December 2018, when they consummated the transaction. (CCFF ¶¶ 639-866; *see also* Responses to RPF ¶¶ 562-1132).

561. There also was "an increasing concern" on JLI's part about "how cumbersome it would be to try to actually divide" JLI into domestic and international companies—as the current proposals contemplated—and the prospect that "the value of the international company [would] be diminished in a transaction where the two were split." (Pritzker (JLI) Tr. 783; *see also* Gifford (Altria) Tr. 2763 (explaining that in the spring there were "heavy conversations going back and forth of how could [JLI] spin off international so that [Altria] could really invest in just the U.S. business"))).

### **Response to Finding No. 561**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because the phrase "increasing concern" is ambiguous.

The proposed finding is unreliable to the extent that it cites only the self-serving testimony of Altria and JLI executives.

The proposed finding is incomplete and misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in



Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993).

To the extent that the proposed finding implies that transaction negotiations proceeded uncertainly or intermittently in 2018, the proposed finding is misleading and contrary to the weight of the evidence. Respondents negotiated continuously from early 2018 to December 2018, when they consummated the transaction. (CCFF ¶¶ 639-866; *see also* Responses to RPF ¶¶ 562-1132).

**V. IN THE LATE SPRING OF 2018, ALTRIA BEGAN TO REASSESS ITS E-VAPOR STRATEGY**

**A. Presentations For Altria's May Board Meeting Highlighted The Growing Dominance Of Pods**

562. In May 2018, Altria's management gave presentations to the Board of Directors on the state of the e-vapor category and Nu Mark's ability to compete in that market. (*See, e.g.*, PX1229 (Altria) at 001-02, 004-06, 011-24).

**Response to Finding No. 562**

Complaint Counsel has no specific response.

563. By May 2018, the e-vapor category was "growing faster than . . . anticipated" and "specifically what was driving that was pod-based products." (Begley (Altria) Tr. 1106; PX1229 (Altria) at 005). As Willard testified at trial, this growth was "the kind of growth [Altria] really hadn't seen from really any other reduced-risk product before," and "was almost completely driven by JUUL's growth." (Willard (Altria) Tr. 1364; *see also* Gifford (Altria) Tr. 2743-44; RX0272 (Altria) at 005).

**Response to Finding No. 563**

To the extent that the proposed finding stands for the proposition that JLI was the driving force behind the growth of pod-based products within the overall closed-system e-cigarette market,

Complaint Counsel does not disagree.

564. The explosive growth of pod-based products in general and JUUL in particular confirmed for Altria that its cig-a-like portfolio was not going to provide a path to e-vapor category leadership. (Begley (Altria) Tr. 1108; *see also* Willard (Altria) Tr. 1366 (noting cig-a-like category was in "free-fall")).

**Response to Finding No. 564**

The proposed finding is incomplete, misleading and contrary to the weight of the evidence.

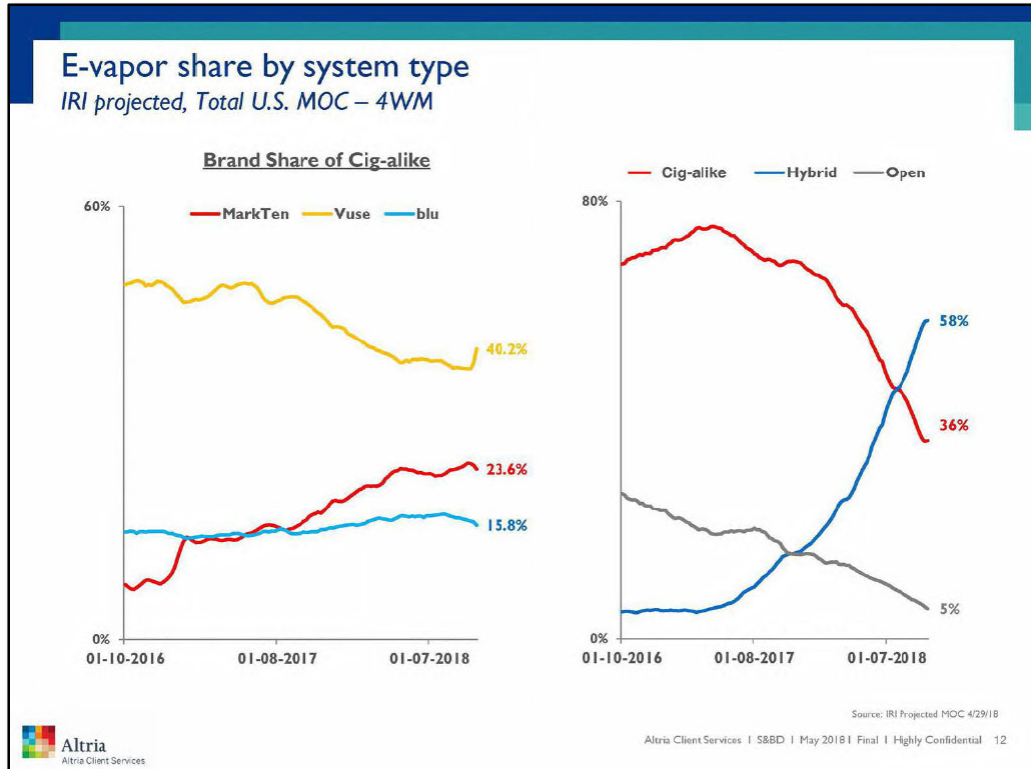
To the extent that the proposed finding claims that “[t]he explosive growth of pod-based products in general and JUUL in particular confirmed for Altria that its cig-a-like portfolio was not going to provide a path to e-vapor category leadership,” the proposed finding is incomplete, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 276-314. (See Responses to RPF 276-314).

The proposed finding is also misleading because Altria was aware that JUUL’s rapid growth was associated with new-user initiation, which threatened JUUL’s PMTA. (CCFF 1248-53; RPF 528-36).

To the extent that the proposed finding characterizes the “cig-a-like category” as being in “free-fall,” the proposed finding is misleading because sales revenue for Altria’s cigalike products grew continuously from 2016 to 2018 and Altria consistently assessed that its cigalike products were commercially successful and meeting internal financial targets. (CCFF 1088-111). The proposed finding is incomplete and misleading because it fails to note that in 2017, Nu Mark { [REDACTED] } (CCFF 136, 489; see also CCFF 334). Moreover, other major e-cigarette manufacturers continue to market cigalike products. (CCFF 1173-76).

Lastly, the proposed finding is contrary to the weight of the evidence to the extent it implies that cigalikes are not part of the closed-system e-cigarette market. (CCFF 268-350).

565. In May 2018, Gifford and Begley presented to the Board a slide that Willard recalls showed that “the cigalike share of total e-vapor [was] plummeting. . . . [I]t started at the beginning of this time frame in excess of 70 percent share and it’s down to 36 percent.” (Willard (Altria) Tr. 1365-66; RX0272 (Altria) at 013):



(RX0272 (Altria) at 013).

**Response to Finding No. 565**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “the cigalike share of total e-vapor [was] plummeting,” the proposed finding is incomplete, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 276-314. (See Responses to RPF 276-314).

The proposed finding is misleading because sales revenue for Altria’s cigalike products grew continuously from 2016 to 2018, and Altria consistently assessed that its cigalike products were doing well and meeting targets. (CCFF 1088-111).

The proposed finding is incomplete and misleading because it fails to note that in 2017, Nu Mark { [REDACTED] } (CCFF ¶¶ 136, 489; *see also* CCFF ¶ 334).

The proposed finding is misleading because the short-term growth of the pod-based category was associated with new-user initiation, which threatened pod-based products' PMTAs. (CCFF ¶¶ 1248-53, 1328-30; RPF ¶¶ 528-36). Moreover, other major e-cigarette manufacturers continue to market cigalike products. (CCFF ¶¶ 1173-76).

Lastly, the proposed finding is contrary to the weight of the evidence to the extent that it implies that cigalikes are not part of the closed-system e-cigarette market. (CCFF ¶¶ 268-350).

566. Altria's cig-a-like products had never been profitable. (Willard (Altria) Tr. 1366; *see also* Parts III.A.1, III.C.3).

#### **Response to Finding No. 566**

The proposed finding is misleading, contradicted by other evidence in the record, and unreliable.

The proposed finding is misleading because Altria and other tobacco companies [REDACTED] (CCFF ¶¶ 1064-82), Altria anticipated that its cigalike products would be profitable in the future, (CCFF ¶¶ 1083-87), and the financial performance of Altria's cigalike products improved continuously from 2016 to 2018 while Altria consistently assessed that its cigalike products were doing well and meeting targets. (CCFF ¶¶ 1088-111).

To the extent that the proposed finding claims that "Altria's cigalike products had never been profitable," the proposed finding is contradicted by other evidence in the record. In 2018 Altria's cigalike franchise achieved a positive marginal contribution of 21 percent. (CCFF ¶¶ 1106-07).

The proposed finding is unreliable to the extent that it relies on the self-serving testimony of an Altria executive.

567. And there was no path for Altria's cig-a-like products to become profitable, because cig-a-likes were "falling off a cliff" in terms of market share among e-vapor products. (Gifford (Altria) Tr. 2745; RX0272 (Altria) at 013). As Begley explained at trial, he "expected" pods would see "some growth," but he did not at all expect that they would come to overwhelm cig-a-likes. (Begley (Altria) Tr. 1110).

### **Response to Finding No. 567**

The proposed finding is contradicted by other evidence in the record, misleading, unreliable, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that "there was no path for Altria's cigalike products to become profitable because cigalikes were "falling off a cliff" in terms of market share among e-vapor products," the proposed finding is contradicted by other evidence in the record. In 2018, Altria's cigalike franchise achieved a positive marginal contribution of 42 percent. (CCFF ¶¶ 1106-07; *see also* Responses to RPF ¶¶ 1701, 1705).

The proposed finding is misleading and contrary to the weight of the evidence because Altria anticipated that its cigalike products would be profitable in the future, (CCFF ¶¶ 1083-87), and the financial performance of Altria's cigalike products improved continuously from 2016 to 2018 while Altria consistently assessed that its cigalike products were doing well and meeting targets. (CCFF ¶¶ 1088-111). Moreover, other major e-cigarette manufacturers continue to market cigalike products. (CCFF ¶¶ 1173-76).

The proposed finding is unreliable to the extent that it relies on the self-serving testimony of an Altria executive.

To the extent that the proposed finding stands for the proposition that Altria benchmarked cigalike products' market share against that of pod-products, Complaint Counsel does not disagree.

568. Nu Mark was “encouraged enough by the [early] results of [MarkTen Bold] to expand it to an additional 15,000 stores by the end of the year.” (PX7022 Begley (Altria) Dep. at 126-27). Bold was “getting initial traction with consumers,” “largely because of expanded distribution and promotional offers.” (Willard (Altria) Tr. 1386; PX9047 (Altria) at 003, 009-10). But Bold was a cig-a-like, with insufficient nicotine satisfaction and a form evocative of a cigarette, and in a declining category. (Jupe (Altria) Tr. 2228-29, 2232-34; Quigley (Altria) Tr. 2037; Myers (Altria) Tr. 3390; PX7016 Jupe (Altria) Dep. at 107; *see also supra* Part I.B.1; *infra* Part V.C.1.b.iii).

### **Response to Finding No. 568**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

To the extent that the proposed finding implies that the fact that Bold had “a form evocative of a cigarette” was detrimental to its future commercial prospects, the proposed finding is incomplete and misleading. The proposed finding is also incomplete and misleading because the short-term growth of the pod-based category was associated with new-user initiation, which threatened pod-based products’ PMTAs. (CCFF ¶¶ 1248-53, 1328-30; RPF ¶¶ 528-36).

To the extent that the proposed finding claims that Bold had “insufficient nicotine satisfaction,” the proposed finding is contrary to the weight of the evidence. According to a presentation Altria made to investors in November 2017 “[t]he MarkTen Bold formulation, currently in a lead market, offers a better sensory experience and greater nicotine satisfaction for current smokers. It includes 4% nicotine by weight and uses a proprietary recipe for nicotine salts with ingredients commonly found in the tobacco leaf.” (CCFF ¶ 464). While addressing investors in 2018, Altria CEO Howard Willard stated that “MarkTen Bold, which is currently in about 25,000 retail stores, uses a proprietary recipe of nicotine salts, with 4% nicotine by weight to deliver a differentiated sensory experience and nicotine satisfaction, approaching that of cigarettes.” (CCFF ¶ 465).

To the extent that the proposed finding claims that Bold was “in a declining category,” the proposed finding is misleading because sales revenue for Altria’s cigalike products grew continuously from 2016 to 2018, and Altria consistently assessed that its cigalike products were doing well and meeting targets. (CCFF ¶¶ 1088-111). Moreover, other major e-cigarette manufacturers continue to market cigalike products. (CCFF ¶¶ 1173-76).

To the extent that the proposed finding relies on RPF section I.B.1 and V.C.1.b.iii, Complaint Counsel incorporates its responses to the proposed findings in those sections herein. (See Responses to RPF ¶¶ 7-17, 638-51).

Lastly, the proposed finding is contrary to the weight of the evidence to the extent that it implies that cigalikes are not part of the closed-system e-cigarette market. (CCFF ¶¶ 268-350).

569. As Begley testified at trial, when Altria first had started down the e-vapor path, it “didn’t know how the category was going to shape up and where consumer preferences were going to land, so [it] thought placing multiple bets was appropriate.” (Begley (Altria) Tr. 1108). But by May 2018, Altria had realized that “the bet [it] really needed to make was a satisfying product that didn’t look like a cigarette. So if you could think about the criteria we talked about before, satisfaction and form or design really mattered.” (Begley (Altria) Tr. 1108). And Altria’s cig-a-likes lacked both the satisfaction and form that smokers wanted. (See *infra* Part V.C.1.b).

### **Response to Finding No. 569**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “by May 2018, Altria had realized that ‘the bet [it] really needed to make was a satisfying product that didn’t look like a cigarette[, s]o if you could think about the criteria we talked about before, satisfaction and form or design really mattered,’” the proposed finding is incomplete and misleading. Begley testified that in the years leading up to the transaction “consumer preferences were evolving rather rapidly, and the marketplace was dynamic in and of itself. If you go back in history, there were a number of different leaders from a brand standpoint in that category. You saw the rise and fall of multiple

leaders and different preferences start to play out with respect to product formats.” (PX7022 (Begley (Altria) Dep. at 116-17)). Given that, and notwithstanding the rapid rise of JUUL, it was no more clear in 2018 than it is now which kinds of products would drive long-term growth in the e-vapor category. Indeed, the FDA has expressed concern about the association between pod-based products, nicotine salts, and high-nicotine strength products on the one side and youth initiation on the other, and has yet to determine whether those product characteristics are appropriate for the protection of public health or eligible for PMTA approval. (CCFF ¶¶ 1248-53, 1328-52). Other major e-cigarette manufacturers continue to market cigalike products. (CCFF ¶¶ 1173-76).

To the extent that the proposed finding claims that “Altria’s cig-a-likes lacked both the satisfaction and form that smokers wanted,” the proposed finding is contrary to the weight of the evidence. According to a presentation Altria made to investors in November 2017 “[t]he MarkTen Bold formulation, currently in a lead market, offers a better sensory experience and greater nicotine satisfaction for current smokers. It includes 4% nicotine by weight and uses a proprietary recipe for nicotine salts with ingredients commonly found in the tobacco leaf.” (CCFF ¶ 464). According to Altria CEO Howard Willard while addressing investors in 2018, “MarkTen Bold, which is currently in about 25,000 retail stores, uses a proprietary recipe of nicotine salts, with 4% nicotine by weight to deliver a differentiated sensory experience and nicotine satisfaction, approaching that of cigarettes.” (CCFF ¶ 465).

To the extent that the proposed finding relies on Part V.C.1.b for support, Complaint Counsel incorporates its responses to the proposed findings in that section herein. (*See Responses to RPPF ¶¶ 614-51*).



To the extent that the proposed finding stands for the proposition that it is important to make multiple bets on product development efforts in a relatively new and growing market, Complaint Counsel does not disagree.

570. In his May 2018 presentation to the Board, Begley also expressed concern about the competitiveness of Nu Mark's pod-based product, Elite. As Begley informed the Board, Altria had realized by this point that "JUUL and MarkTen Elite appeal[ed] to different [adult tobacco consumer] audiences." (PX1229 (Altria) at 017). "JUUL appeals to [those] that are seeking a familiar cigarette-like experience while Elite appeals to [those] that are seeking a vaping experience." (PX1229 (Altria) at 017). This distinction was a critical problem for Elite: It was the smokers who were driving e-vapor growth, and the group interested in a smoking experience was twice the size of the group interested in a vaping experience. (Begley (Altria) Tr. 1112).

### **Response to Finding No. 570**

The proposed finding is incomplete, unsupported, and misleading.

To the extent that the proposed finding claims that "Begley informed the Board, Altria had realized by this point that 'JUUL and MarkTen Elite appeal[ed] to different [adult tobacco consumer] audiences' . . . 'JUUL appeals to [those] that are seeking a familiar cigarette-like experience while Elite appeals to [those] that are seeking a vaping experience,'" the proposed finding is incomplete, unsupported, and misleading. The proposed finding cites to a slide in a presentation that in turn cites "JUUL/Elite/Cync 6-week Extended HUT – Jan 2018; Tobacco Landscape Study, Jan 2018; Caravan, May 2018." (PX1229 (Altria) at 017). The quoted portion from the slide is not supported by the associated chart, which conveys the relative size of "adult vaper" and "adult smoker" populations, along with estimates of the proportion of each group that prefer a "familiar cigarette-like experience" and a "vaping experience," but does not indicate the degrees to which JUUL or Elite were preferred by either group, or the likely impact those preferences would have on long-term revenue estimates. (PX1229 (Altria) at 017). Moreover, the previous slide from the same presentation indicates that one of the same studies showed that, after trying each product, 45 percent of consumers expressed an intent to purchase JUUL while 42

percent expressed an intention to purchase MarkTen Elite, but after three weeks of product trials, only 35 percent of consumers expressed an intent to purchase JUUL while 43 percent expressed an intention to purchase MarkTen Elite. (PX1229 (Altria) at 016). Furthermore, the same document also highlights Nu Mark's 2018 product launch plans, which included the launch and expansion of Elite through Q4 2018 and the expansion of MarkTen Bold into Q3 2018. (PX1229 (Altria) at 011).

To the extent that the proposed finding claims that “[t]his distinction was a critical problem for Elite: It was the smokers who were driving e-vapor growth, and the group interested in a smoking experience was twice the size of the group interested in a vaping experience,” citing to testimony discussing the slide cited earlier in the proposed finding, (PX1229 (Altria) at 017), the proposed finding is incomplete, unsupported, and misleading for the reasons discussed above in connection with that slide.

The proposed finding is also incomplete and misleading because it fails to note that Altria executives were aware that Elite 1.0 and the MarkTen cigalikes did appeal to certain consumers and had roles to play in the e-cigarette market. (CCFF ¶¶ 1315-22). Furthermore, the proposed finding is misleading because it fails to mention that Altria was working on higher nicotine formulas with nicotine salts for use in Elite 2.0. (CCFF ¶¶ 1283-92).

571. Accordingly, Begley informed the Board that “it was not the case” that “Elite could be a head-to-head JUUL fighter.” (Begley (Altria) Tr. 1111). “Maybe there was some potential for . . . Elite, but it was not a head-to-head competitor with JUUL, . . . primarily because it didn’t have a nicotine salts formulation that was satisfying.” (Begley (Altria) Tr. 1111; *see also* PX1229 (Altria) at 006 (advising the Board that JUUL provided satisfaction that Elite did not)).

### **Response to Finding No. 571**

The proposed finding is vague, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “Begley informed the Board that “it was not the case” that “Elite could be a head-to-head JUUL fighter,” the proposed finding is vague because the term “head-to-head JUUL fighter” is ambiguous.

To the extent that the proposed finding implies that Elite was not likely to convert JUUL users at a high rate, the proposed finding is misleading because the weight of the evidence suggests that Altria thought MarkTen Elite had the potential to convert traditional cigarette smokers. (CCFF ¶¶ 1310-22).

To the extent that the proposed finding claims that “[m]aybe there was some potential for . . . Elite, but it was not a head-to-head competitor with JUUL, . . . primarily because it didn’t have a nicotine salts formulation that was satisfying,” the proposed finding is misleading and contrary to the weight of the evidence. MarkTen Elite’s commercial potential was demonstrated by the fact that the product’s sales grew consistently after its launch. (CCFF ¶¶ 1112-31). Altria executives were aware that Elite 1.0 did appeal to a set of current cigarette smokers and had a role to play in the closed-system e-cigarette market. (CCFF ¶¶ 1315-17). Other manufacturers continued to market e-cigarette products without nicotine salts which suggests that they still had commercial potential. (CCFF ¶¶ 1166-72). Nicotine salts are also associated with youth initiation which represents a substantial PMTA risk. (CCFF ¶¶ 1336-39). Altria was developing an improved version of MarkTen Elite with nicotine salts, MarkTen Elite. 2.0, and had plans to introduce that product to the market. (CCFF ¶¶ 1281-300).

To the extent that the proposed finding implies that Altria thought that MarkTen Elite would not be as likely as JUUL to convert non-smokers and youth, Complaint Counsel does not disagree and adds that Altria’s executives consistently testified that their MarkTen e-cigarette

products did not have a youth initiation issue, (CCFF ¶¶ 1345-52), and that they knew JUUL did. (CCFF ¶¶ 1248-53).

572. At the time, Begley did not believe that Altria would “be successful with Elite in the context of being able to convert adult smokers and compete effectively in that important segment.” (PX7022 Begley (Altria) Dep. at 267). Essentially, “the market had shifted on [Altria],” and it found itself falling further and further behind JUUL, “a competitor that [it] had no answer for in [its] portfolio.” (PX7022 Begley (Altria) Dep. at 240-41).

### **Response to Finding No. 572**

The proposed finding is unreliable, contrary to the weight of the evidence, and misleading for the reasons outlined in response to RPF ¶ 571. (*See* Response to RPF ¶ 571).

To the extent that the proposed finding claims that “Begley did not believe that Altria would ‘be successful with Elite in the context of being able to convert adult smokers and compete effectively in that important segment,’” the proposed finding is unreliable because Begley testified that he was no longer involved with Nu Mark after May 31, 2018, mere weeks after MarkTen Elite was launched and months before Altria discontinued the product. (CCFF ¶¶ 987, 1195, 1996-97).

The proposed finding is contrary to the weight of the evidence. Begley himself testified that the results of an early HUT study suggested that MarkTen Elite had conversion potential. (PX7022 (Begley (Altria) Dep. at 172-178, 267 (discussing PX4075))). Other evidence also suggests that MarkTen Elite had the potential to convert traditional cigarette smokers. (CCFF ¶¶ 1301-22).

To the extent that the proposed finding claims that “‘the market had shifted on [Altria],’ and it found itself falling further and further behind JUUL, ‘a competitor that [it] had no answer for in [its] portfolio,’” the proposed finding is misleading because, while Altria’s share of the closed-system e-cigarette market declined as JLI’s grew, MarkTen’s cigalike products and MarkTen Elite consistently met financial targets and were growing in terms of sales revenue, sales volume, and profitability. (CCFF ¶¶ 1088-143).

Furthermore, to the extent that the proposed finding suggests that Altria's cigalike products were not already competing with JLI's pod-based product, it is contrary to the weight of the evidence because cigalikes and pod products are part of the overall closed-system e-cigarette market. (CCFF ¶¶ 268-350).

573. And because of the constraints imposed by the regulatory regime, Altria could not simply launch a new product that was not on the market by August 2016. (*See supra* Part I.D.2). Altria "had a challenge in this market that most companies in other categories don't face, which is that [it] couldn't take everything [it] learned, put it into a product, and introduce it into the market." (Willard (Altria) Tr. 1370).

### **Response to Finding No. 573**

The proposed finding is unreliable, misleading, vague, and contradicted by other evidence in the record.

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

To the extent that the proposed finding claims that "because of the constraints imposed by the regulatory regime, Altria could not simply launch a new product that was not on the market by August 2016," the proposed finding is misleading. Altria commercially launched MarkTen Elite (a pod-based product) and MarkTen Bold (a product with high nicotine strength and nicotine salts) after August 2016 and after JUUL's sales revenue began to rise dramatically in 2017. (CCFF ¶¶ 1195-97). Reynolds, ITG, and NJOY also commercially launched pod-based products with high nicotine strength and nicotine salts after August 2016 and after JUUL's sales revenue began to rise dramatically in 2017. (CCFF ¶¶ 1198-205). In 2018, Altria also successfully designed and implemented e-cigarette product improvements to MarkTen Elite despite the Deeming Rule, including the introduction of a new gasket, the c1A gasket, that reduced leaking, reduced formaldehyde, and increased aerosol mass. (CCFF ¶¶ 1206-34, 1489-92). JLI also made changes to JUUL to address a leaking issue after August 2016. (CCFF ¶¶ 1203-05, 1483-88).

To the extent that the proposed finding claims that Altria “had a challenge in this market that most companies in other categories don’t face, which is that [it] couldn’t take everything [it] learned, put it into a product, and introduce it into the market,” the proposed finding is vague, misleading, and contradicted by other evidence in the record. Altria’s competitors in the e-cigarette market, including Reynolds, ITG, JTI, JLI, and NJOY, faced the same regulatory constraints that Altria did. (*See Responses to RPF* ¶¶ 56-71).

To the extent that the proposed finding stands for the proposition that the only meaningful competition in the closed-system e-cigarette market is the direct head-to-head competition between Respondents’ existing products at any given time, it is misleading and contradicted by other evidence in the record detailing the extensive competition between Respondents on improvements to existing products and development of next generation e-cigarettes. (CCFF ¶¶ 1463-92, 1538-87).

To the extent that the proposed finding relies on RPF Part I.D.2 for support, Complaint Counsel incorporates its responses to the proposed findings in that section herein. (*See Responses to RPF* ¶¶ 56-71).

574. This all “gave [Begley] great concern.” (PX7022 Begley (Altria) Dep. at 240-41).

#### **Response to Finding No. 574**

The proposed finding is vague. To the extent that the proposed finding refers back to RPF ¶ 573, Complaint Counsel incorporates its response to that proposed finding herein. (*See Response to RPF* ¶ 573).

The proposed finding is also unreliable because it relies only on self-serving testimony.

575. To be clear, Elite’s lack of success was not for lack of effort. As Begley and Gifford informed the Board in May 2018, Elite already had been promoted heavily to no avail. (Gifford (Altria) Tr. 2755; RX0272 (Altria) at 021-22; *see also supra* Part III.D-E). And Nu Mark planned starting that month to introduce the \$8.99 trial bundle offer—essentially giving the device away for free—to incent trial, and also was increasing its marketing

efforts, including through direct mailing coupons and promotional events in Las Vegas. (Gifford (Altria) Tr. 2753-55; RX0272 (Altria) at 021-22; *see also* { [REDACTED] } [REDACTED] })).

### **Response to Finding No. 575**

The proposed finding overstates the evidence and is unsupported, incomplete, misleading, vague, and contrary to the weight of the evidence.

The first sentence cites no evidence in the record and is therefore unsupported.

To the extent that the proposed finding claims that Altria made “effort[s]” to promote Elite and that “Nu Mark planned starting [May 2018] to introduce the \$8.99 trial bundle offer—essentially giving the device away for free—to incent trial, and also was increasing its marketing efforts, including through direct mailing coupons and promotional events in Las Vegas,” the proposed finding is incomplete and misleading because it fails to note that NJOY, Reynolds, and JLI have offered similar promotions. (PX7033 (O’Hara (Altria) Dep. at 121-22)).

To the extent that the proposed finding claims that “Begley and Gifford informed the Board in May 2018 [that] Elite already had been promoted heavily to no avail,” the proposed finding overstates the evidence and is vague, misleading, and contrary to the weight of the evidence.

The proposed finding overstates the evidence and is vague because it cites to testimony from Gifford that did not characterize Elite’s promotions as “heavy” or that they were carried out “to no avail,” but merely suggested that they were not as successful as Altria hoped they would be. (Gifford (Altria) Tr. 2755 (“You would see minor blips here and there, but, again, nothing compared to what you would expect when you’re trying to disrupt the consumer and trying to get a consolidated group of consumers to engage with the brand. . . .”)). Respondents themselves acknowledge “[n]obody expected [Elite] to have the level of growth that JUUL had, that was relatively unusual.” (RPF 577)). The proposed finding is misleading because Altria did not

announce that it would withdraw MarkTen Elite until October 25, 2018, (CCFF ¶ 1145), and Elite's sales grew at an increasing rate after May 2018. (CCFF ¶ 1128).

To the extent that the proposed finding characterizes MarkTen Elite as having “lack of success” and that it was “promoted heavily to no avail,” the proposed finding is contrary to the weight of the evidence. MarkTen Elite's sales grew consistently from the product's launch until Altria announced its discontinuation and the product had positive marginal returns. (CCFF ¶¶ 1112-31). Altria also discontinued Elite before it had time to assess the product's long-term potential and after a far shorter period of investment compared to Altria's other tobacco products. (CCFF ¶¶ 1144-62).

576. Notwithstanding these efforts, Altria had determined by this point that Elite was not performing as Altria had hoped. As Gifford explained at trial and had informed the Board in May 2018, JUUL had been “really the first pod product in the marketplace, it was new to consumers, and so the consumer has to become acquainted with it.” (Gifford (Altria) Tr. 2750-51; RX0272 (Altria) at 018). You would expect a “fast follower”—a product with a similar look and operation—to “grow much faster,” but Elite never did. (Gifford (Altria) Tr. 2751; RX0272 (Altria) at 018).

#### **Response to Finding No. 576**

The proposed finding is vague, incomplete, unreliable, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “Altria had determined by this point that Elite was not performing as Altria had hoped,” the proposed finding is vague and incomplete because it does not explain what timeframe it refers to or what Altria's expectations were.

The proposed finding is unreliable to the extent that it relies on self-serving testimony from an Altria executive.

To the extent that the proposed finding claims that “Gifford explained at trial and had informed the Board in May 2018, JUUL had been ‘really the first pod product in the marketplace, it was new to consumers, and so the consumer has to become acquainted with it,’ . . . You would



expect a ‘fast follower’—a product with a similar look and operation—to ‘grow much faster,’ but Elite never did,” the proposed finding is vague and incomplete because it does not explain what Altria’s growth expectations were, how they were set, or what MarkTen Elite’s actual growth rate was. Respondents themselves acknowledge “[n]obody expected [Elite] to have the level of growth that JUUL had, that was relatively unusual.” (RPFF ¶ 577).

To the extent that the proposed finding implies that MarkTen Elite did not grow quickly, the proposed finding is contrary to the weight of the evidence. MarkTen Elite’s sales grew consistently from the product’s launch until Altria announced its discontinuation and the product had positive marginal returns. (CCFF ¶¶ 1112-31). Altria also discontinued Elite before it had time to assess the product’s long-term potential and after a far shorter period of investment compared to Altria’s other tobacco products. (CCFF ¶¶ 1144-62).

577. Elite’s distribution was being expanded, but its sales had “largely plateaued,” which Willard thought was a “bad sign.” (Willard (Altria) Tr. 1388). “Nobody expected [Elite] to have the level of growth that JUUL had, that was relatively unusual, but . . . you would have liked to have seen an upward slope to that, and [Altria] didn’t see it.” (Willard (Altria) Tr. 1388).

### **Response to Finding No. 577**

The proposed finding is vague, incomplete, unreliable, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that Elite’s sales had “largely plateaued” and that Altria “didn’t see” an “upward slope” in Elite’s sales, the proposed finding is vague and incomplete because it does not specify what Altria’s sales growth targets for Elite were or what Elite’s sales growth rate actually was.

The proposed finding is unreliable to the extent that it relies on the self-serving testimony of an Altria executive.

The proposed finding is contrary to the weight of the evidence because MarkTen Elite's sales grew consistently from the product's launch until Altria announced its discontinuation and the product had positive marginal returns. (CCFF ¶¶ 1112-31). Altria also discontinued Elite before it had time to assess the product's long-term potential and after a far shorter period of investment compared to Altria's other tobacco products. (CCFF ¶¶ 1144-62).

To the extent that the proposed finding claims that “[n]obody expected [Elite] to have the level of growth that JUUL had, that was relatively unusual,” Complaint Counsel does not disagree.

578. In sum, as of May 2018, Altria found itself “at a bit of an inflection point, because [it] recognized . . . [that it] needed to be able to compete in the pod segment, because that was going to be the fastest-growing segment within e-vapor and MOC, and if [it] couldn't compete there, [Altria] had some strategic decisions that [it was] going to have to make that were potentially tough decisions.” (Begley (Altria) Tr. 1116; *see also* Begley (Altria) Tr. 961).

#### **Response to Finding No. 578**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

To the extent that the proposed finding implies that MarkTen cigalikes or MarkTen Elite “couldn't compete,” the proposed finding is vague, misleading, and contrary to the weight of the evidence, which shows that MarkTen cigalikes and MarkTen Elite had positive growth and positive marginal contribution, consistently met or exceeded Altria's expectations, and that Altria expected them to continue to be profitable in the future. (CCFF ¶¶ 1088-131).

To the extent that the proposed finding suggests that Altria's cigalike products were not already competing with JLI's pod-based product, it is contrary to the weight of the evidence because cigalikes and pod products are part of the overall closed-system e-cigarette market. (CCFF ¶¶ 268-350).

To the extent that the proposed finding claims that “as of May 2018, Altria [knew that the pod segment] was going to be the fastest-growing segment within e-vapor and MOC,” the proposed finding is misleading. Altria’s cigalike products were commercially successful, and other manufacturers still sell cigalike products. (CCFF ¶¶ 1088-111, 1173-76). Moreover, the FDA has expressed concern about the association between youth initiation and pod-based products, nicotine salts, and high-nicotine strength products, and has yet to determine whether those product characteristics are appropriate for the protection of public health, or that products with those characteristics are eligible for PMTA approval. (CCFF ¶¶ 1248-53, 1328-52; Responses to RPF ¶¶ 528-36).

To the extent that the proposed finding claims that “as of May 2018, Altria found itself ‘at a bit of an inflection point’” and “had some strategic decisions that [it was] going to have to make that were potentially tough decisions,” the proposed finding is vague because the phrases “inflection point” and “potentially tough decisions” are ambiguous.

To the extent that the proposed finding purports to summarize RPF ¶¶ 562-77, Complaint Counsel incorporates its responses to those proposed findings herein. (*See* Responses to RPF ¶¶ 562-77).

To the extent that the proposed finding stands for the proposition that Altria recognized the importance of having a pod product in its portfolio, Complaint Counsel does not disagree, and adds that Altria recognized the importance of e-cigarettes to its future, was strongly committed to participating in the closed-system e-cigarette market, and was willing to sacrifice short-term profits to succeed in that market. (CCFF ¶¶ 411-92, 1041-82).

**B. In Mid-May, Altria Restructured Its Leadership To Address Innovation Failings**

579. In May of 2018, Marty Barrington retired as Altria’s CEO. (PX9045 (Altria) at 001). He was replaced on May 17 by Howard Willard. (PX9045 (Altria) at 001; Begley (Altria) Tr. 962).

**Response to Finding No. 579**

Complaint Counsel has no specific response.

580. Willard wanted Altria “to change [its] approach on innovation to have a better chance to fulfill [its] aspiration of being the U.S. authorized leader in noncombustible reduced-risk products.” (Willard (Altria) Tr. 1372-73 (discussing RX0836 (Altria))).

**Response to Finding No. 580**

The proposed finding is vague and incomplete.

To the extent that the proposed finding claims that “Willard wanted Altria ‘to change [Altria’s] approach on innovation,’” the proposed finding is vague and incomplete because it does not explain what Altria’s approach to innovation was, how Willard wanted Altria to change it, or what the significance of Willard’s intentions were.

To the extent that the proposed finding claims that Altria had the “aspiration of being the U.S. authorized leader in noncombustible reduced-risk products,” Complaint Counsel does not disagree and adds that Altria recognized the importance of e-cigarettes to its future, was strongly committed to participating in the closed-system e-cigarette market, and was willing to sacrifice short-term profits to succeed in that market. (CCFF ¶¶ 411-92, 1041-82).

581. To do so, less than one week after he took the helm, Willard restructured Altria into “two divisions—core tobacco and innovative products.” (RX0836 (Altria) at 001; *see also* Quigley (Altria) Tr. 2000 (describing restructuring as creating “three key jobs”: (1) the “tobacco operating unit, which consisted of Philip Morris USA and U.S. Smokeless Tobacco”; (2) “the chief growth officer function, which was designed to . . . really drive innovation and product development capability”; and (3) “Nu Mark, the innovative products business”)).

**Response to Finding No. 581**

Complaint Counsel has no specific response.

582. The goals of the overhaul were to “align” Altria’s business units to the regulatory approach the FDA recently had announced, namely the continuum of risk between “combustible and noncombustible products”; “to rapidly transform [Altria’s] product development capability”; “to turn around [its] e-vapor business,” (PX7003 Quigley (Altria) IHT at 25-26); and to overcome “the siloed nature of the way Altria did work,” (PX7034 Mountjoy (Altria) Dep. at 93).

**Response to Finding No. 582**

The proposed finding is incomplete and misleading in that it fails to note that senior JLI executives reacted to the announcement of Altria’s reorganization and the creation of the Chief Growth Officer role by noting that there were “very clear executional advantages to this divide” and that it was “very easy to imagine the organizational alignment & incentive improvements this will enable.” (PX2003 (JLI) at 001).

583. On the innovation side, Willard tapped Brian Quigley, who previously had run U.S. Smokeless Tobacco, to become the new CEO of Nu Mark. (RX0836 (Altria) at 002; *see also* Gifford (Altria) Tr. 2758-59; PX7031 Willard (Altria) Dep. at 248).

**Response to Finding No. 583**

Complaint Counsel has no specific response.

584. As Gifford testified at trial, Quigley had racked up “some pretty big wins” in his tenure as CEO of U.S. Smokeless Tobacco, including a very successful launch of Copenhagen Wintergreen. (Gifford (Altria) Tr. 2758-59).

**Response to Finding No. 584**

The proposed finding is incomplete and misleading because it fails to note that Quigley was given six years to turn the U.S. Smokeless Tobacco Company, significantly more time than he was given to turn the Nu Mark business around. (CCFF ¶¶ 1152-54).

585. As Willard explained, he wanted “to have a fresh set of eyes go in and see whether we had missed anything that could make one of [Nu Mark’s] products successful.” (Willard (Altria) Tr. 1371-72; *see also* PX7031 Willard (Altria) Dep. at 248).

**Response to Finding No. 585**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies only on self-serving testimony.

The proposed finding is incomplete and misleading because it fails to note that Quigley was given six years to turn the U.S. Smokeless Tobacco Company, significantly more time than he was given to turn the Nu Mark business around. (CCFF ¶¶ 1152-54).

The proposed finding is also incomplete and misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding implies that none of Nu Mark's products were "successful," the proposed finding is contrary to the weight of the evidence. MarkTen cigalikes and MarkTen Elite had positive growth and positive marginal contribution, consistently met or exceeded Altria's expectations, and Altria expected them to continue to be profitable in the future. (CCFF ¶¶ 1088-131).

To the extent that the proposed finding claims that Willard "wanted "to have a fresh set of eyes go in and see whether we had missed anything," Complaint Counsel has no specific response.

586. Willard asked Quigley to "go in and assess the strengths and, frankly, the weaknesses of the Nu Mark business and to make an assessment in his judgment on whether or not there were opportunities to make adjustments that would deliver greater success in the short run, and if success in the short run was a challenge, to identify what needed to happen over the longer term in order to have Nu Mark have more success." (Willard (Altria) Tr. 1373-74).

#### **Response to Finding No. 586**

The proposed finding is incomplete and misleading because it fails to note that Quigley was given six years to turn the U.S. Smokeless Tobacco Company, significantly more time than he was given to turn the Nu Mark business around. (CCFF ¶¶ 1152-54).

The proposed finding is also incomplete and misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

587. Willard believed that “[i]f there were opportunities to turn that business around, [Quigley] would likely be well positioned to identify them and, frankly, also if the business was as challenged as it seemed, . . . if he drew that conclusion, that that would be important feedback.” (PX7031 Willard (Altria) Dep. at 252).

### **Response to Finding No. 587**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

The proposed finding is incomplete and misleading because it fails to note that Quigley was given six years to turn the U.S. Smokeless Tobacco Company, significantly more time than he was given to turn the Nu Mark business around. (CCFF ¶¶ 1152-54).

The proposed finding is also incomplete and misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding implies that Nu Mark’s business “seemed” to be “challenged,” the proposed finding is contrary to the weight of the evidence. MarkTen cigalikes and MarkTen Elite had positive growth and positive marginal contribution, consistently met or exceeded Altria’s expectations, and that Altria expected them to continue to be profitable in the future. (CCFF ¶¶ 1088-131).

588. As Quigley testified at trial, he understood that he was taking over a business that was “struggling and underperforming,” and that his “directive was to figure out what was wrong and to fix the business.” (Quigley (Altria) Tr. 1941; *see also* Quigley (Altria) Tr. 2086 (agreeing that Willard had “charge[d] [him] with coming up with the best plan [he] could to turn around [Nu Mark]”). His impression was that at the time, Altria did “not yet fully understand what was wrong with the [Nu Mark] business.” (Quigley (Altria) Tr. 2003-04).

**Response to Finding No. 588**

The proposed finding is incomplete, misleading, unreliable, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that Quigley was given six years to turn the U.S. Smokeless Tobacco Company, significantly more time than he was given to turn the Nu Mark business around. (CCFF ¶¶ 1152-54). The proposed finding is also incomplete and misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

The proposed finding is unreliable to the extent that it relies only on the self-serving trial testimony of a former Altria executive, who currently serves on the Board of Directors of a company partially owned by Altria and with ongoing business ties to Altria. (CCFF ¶ 2039).

To the extent that the proposed finding implies that in June 2018, Nu Mark's business was "struggling and underperforming" or needed to be "turn[ed] around," the proposed finding is contrary to the weight of the evidence. MarkTen cigalikes and MarkTen Elite had positive growth and positive marginal contribution, consistently met or exceeded Altria's expectations, and Altria expected them to continue to be profitable in the future. (CCFF ¶¶ 1088-131).

589. Quigley viewed himself as "a fixer"—"someone that had the capability to . . . turn a business around." (Quigley (Altria) Tr. 2002).

**Response to Finding No. 589**

The proposed finding is incomplete and misleading because it fails to note that Quigley was given six years to turn the U.S. Smokeless Tobacco Company, significantly more time than he was given to turn the Nu Mark business around. (CCFF ¶¶ 1152-54).



The proposed finding is also misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

590. Willard also appointed K.C. Crosthwaite as Chief Growth Officer and tasked him with “building and acquiring the competencies, technologies and talent [Altria would] need to achieve [its] innovative products aspiration.” (RX0836 (Altria) at 002).

#### **Response to Finding No. 590**

The proposed finding is incomplete and misleading in that it fails to note that senior JLI executives reacted to the announcement of Altria’s reorganization and the creation of the Chief Growth Officer role by noting that there were “very clear executional advantages to this divide” and that it was “very easy to imagine the organizational alignment & incentive improvements this will enable.” (PX2003 (JLI) at 001).

591. Finally, because commercializing new products was contingent on FDA approval, Willard moved the Regulatory Sciences division under the supervision of Murray Garnick, Altria’s General Counsel and head of Regulatory Affairs, to better align regulatory strategy with the scientific agenda. (RX0836 (Altria) at 003).

#### **Response to Finding No. 591**

Complaint Counsel has no specific response.

592. As Willard explained, Altria leadership “traditionally heard relatively positive things about [the company’s] chances of getting through FDA from the organization,” and worried that the “positive news” was “bubbl[ing] up faster than negative news.” (Willard (Altria) Tr. 1375). Garnick’s appointment reflected the concerns of the company’s leadership that they were not “on top of” all of the e-vapor products’ regulatory and scientific issues. (Garnick (Altria) Tr. 1709-10).

#### **Response to Finding No. 592**

The proposed finding is unreliable, incomplete, misleading, and vague.

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

The proposed finding is incomplete and misleading because it fails to note that Altria’s PMTA plans were well advanced in 2018 and that Altria had plans to pursue PMTAs for

MarkTen's cigalike products, MarkTen Elite, and improved versions of both products. (CCFF ¶¶ 1258-300).

To the extent that the proposed finding claims that "Altria leadership . . . worried that the 'positive news' was 'bubbl[ing] up faster than negative news,'" and "Garnick's appointment reflected the concerns of the company's leadership that they were not 'on top of' all of the e-vapor products' regulatory and scientific issues," the proposed finding is vague and incomplete because it does not explain the basis for the purported concern or what motivated the concern, whether Altria actually discovered any issues that is was "not 'on top of,'" what the significance of those issues was to Altria's PMTA or commercial prospects, whether the issues were ultimately addressed, or the resources necessary to address the issues.

593. Accordingly, Garnick was tasked with learning "the belief . . . of the scientific experts about the potential for Nu Mark's products to ultimately get approved by the FDA." (Willard (Altria) Tr. 1375).

#### **Response to Finding No. 593**

Complaint Counsel has no specific response.

594. Garnick did not believe there was any connection between his reassignment and negotiations with JLI, and, while he was aware of the negotiations "on a general level," he was not "involved in the day-to-day" work. (Garnick (Altria) Tr. 1711).

#### **Response to Finding No. 594**

To the extent that the proposed finding claims that "[Garnick] was aware of the negotiations 'on a general level,' he was not 'involved in the day-to-day' work," the proposed finding is contrary to the weight of the evidence. Garnick was one of Altria's key negotiators and he was heavily involved in transaction negotiations throughout 2018. (CCFF ¶¶ 578, 586, 588, 596, 621, 701, 717, 726, 738, 740, 744-45, 748, 752-54, 756-57, 759, 763-64, 771).

To the extent that the proposed finding claims that “Garnick did not believe there was any connection between his reassignment and negotiations with JLI,” Complaint Counsel has no specific response.

595. This restructuring was a “big event,” as Altria did not “create new positions at that senior level very often.” (Willard (Altria) Tr. 1372). But “given the business challenges [Altria was] facing, and the cultural challenge,” leadership “wanted to send a strong signal that [the company was] embracing a different path forward where [it] could be a different company and really focus on [its] harm-reduction future.” (Quigley (Altria) Tr. 2000; *see also* PX9047 (Altria) at 002).

### **Response to Finding No. 595**

The proposed finding is incomplete, misleading, and vague.

The proposed finding is incomplete and misleading in that it fails to note that senior JLI executives reacted to the announcement of Altria’s reorganization and the creation of the Chief Growth Officer role by noting that there were “very clear executional advantages to this divide” and that it was “very easy to imagine the organizational alignment & incentive improvements this will enable.” (PX2003 (JLI) at 001).

To the extent that the proposed finding claims that “[t]his restructuring was a ‘big event,’ as Altria did not ‘create new positions at that senior level very often,’” the proposed finding is vague because the terms “big event,” “new positions at that senior level,” and “very often” are ambiguous.

To the extent that the proposed finding claims that “‘given the business challenges [Altria was] facing, and the cultural challenge,’ leadership ‘wanted to send a strong signal that [the company was] embracing a different path forward where [it] could be a different company and really focus on [its] harm-reduction future,’” the proposed finding is vague and incomplete because it does not specify the “business challenges” and the “cultural challenge” Altria was purportedly

facing, whether they related to Altria's traditional cigarette business or its e-cigarette business, or what their significance was to any issue in this case.

To the extent that the proposed finding's reference to "business challenges" includes any of the purported challenges discussed in RPF 579-94, Complaint Counsel incorporates its responses to those proposed findings herein. (*See* Responses to RPF 579-94).

To the extent that the proposed finding claims that Altria wanted to "focus on [its] harm-reduction future," Complaint Counsel does not disagree.

**C. Over The Course Of June And July 2018, Altria Leadership Concluded That Nu Mark's Products Were Flawed Fundamentally**

**1. By Summer 2018, Altria's Scientists and Regulatory Experts Had Concluded That Nu Mark's Products Could Not Obtain FDA Approval**

596. By the summer of 2018, Altria's scientists knew the factors key to e-vapor success were "conversion, satisfaction and ability to get through FDA." (Gardner (Altria) Tr. 2588 (discussing RX0788 (Altria) at 001)).

**Response to Finding No. 596**

The proposed finding is unreliable, incomplete, misleading, and confusing.

The evidence cited to support the proposed finding is unreliable because it cites to testimony from Dr. Gardner, who testified that he was not an expert in conversion potential or nicotine satisfaction in e-cigarette products and was not responsible for assessing conversion potential in Altria's e-cigarette products. (CCFF 2000-02; Gardner (Altria) Tr. 2640-42).

To the extent that the proposed finding claims that "[b]y the summer of 2018, Altria's scientists knew the factors key to e-vapor success were 'conversion, satisfaction and ability to get through FDA,'" the proposed finding is incomplete, misleading, and confusing. PMTA approval, or the "ability to get through FDA" is required to introduce a new e-cigarette product or for a product to remain on the market. (CCFF 197-207). A product's propensity to convert adult smokers, that is "conversion," is one factor that the FDA assesses in the PMTA process. (*See, e.g.,*

CCFF ¶ 1913). In 2018, there was no consensus in the e-vapor industry or within Altria on what drives conversion potential in e-cigarette products. (CCFF ¶ 1302). Nicotine satisfaction refers to a product's "overall nicotine delivery" and how it "compare[s] to a cigarette, as well as do [consumers] like the product and do they want to continue using the product," and is one factor that may contribute to conversion potential in e-cigarettes. (PX7026 (Gardner (Altria) Dep. at 56-57); *see also* Jupe (Altria) Tr. 2224-25; PX7037 (Huckabee (Reynolds) Dep. at 39-40)). Factors that may influence nicotine satisfaction include nicotine-acid ratio, nicotine per puff, aerosol mass per puff, and flavors. (PX7026 (Gardner (Altria) Dep. at 139-40). Moreover, Altria never conducted any actual conversion studies on Elite. (CCFF ¶¶ 1305-07).

To the extent that the proposed finding implies that Altria's scientists "knew the factors key to e-vapor success" in commercial terms, the proposed finding is unreliable because other Nu Mark employees directly focused on commercial matters, such as Nu Mark's market insights team, are the best source of information on that topic, not the scientists responsible for meeting regulatory requirements. (*See generally* RPF ¶ 607).

597. As Gardner explained, these criteria were related. Smokers who were looking to switch to an e-vapor product would need nicotine satisfaction. (Gardner (Altria) Tr. 3089-90). And conversion, in turn, was "necessary to demonstrate 'appropriate for the protection of public health,' which was the standard for the PMTA." (Gardner (Altria) Tr. 2586). "[I]f adult smokers don't convert to the product, you're not reducing harm to the population and to the adult smokers, so . . . the product had no reason for being in the market." (Gardner (Altria) Tr. 2586; *see also* PX7017 Magness (Altria) Dep. at 279 ("If the products are unsuccessful at converting adult smokers, they will not succeed through the regulatory pathway.")).

### **Response to Finding No. 597**

The proposed finding is unsupported, incomplete, and misleading.

The first sentence of the proposed finding cites to no evidence in the record and is therefore unsupported.

The proposed finding is incomplete and therefore misleading because it fails to note that the standard for granting an e-cigarette's PMTA also looks to whether the product poses a risk of unintended consequences such as youth usage. (CCFF ¶¶ 1323-27, 1912-17).

The proposed finding is also misleading because it fails to note that the FDA has not provided clear guidance on the criteria or thresholds that it will use when reviewing PMTAs to assess whether e-cigarette products have adequate conversion potential to be considered appropriate for the protection of the public health. (Gardner (Altria) Tr. 2640-41).

To the extent that the term "nicotine satisfaction" refers to the use of nicotine salts, the proposed finding is also incomplete and misleading because it fails to note that Altria was working on an improved version of MarkTen Elite that would have nicotine salts, (CCFF ¶¶ 1284-92), and also had the U.S. rights to PMI's e-cigarette products, including VEEV with nicotine salts. (CCFF ¶¶ 1654-59).

598. Therefore, demonstrating that a product is capable of converting smokers "is a critical part of the evidence [Altria] ha[s] to produce" to FDA to win PMTA approval. (Jupe (Altria) Tr. 2220).

#### **Response to Finding No. 598**

The proposed finding is incomplete and therefore misleading because it fails to note that the standard for granting an e-cigarette's PMTA also looks to whether the product poses a risk of unintended consequences such as initiation and youth usage. (CCFF ¶¶ 1323-27, 1912-17).

599. A manufacturer must "show that [a] substantial amount of adult smokers will switch completely to the e-vapor product." (PX7015 Gogova (Altria) Dep. at 126; *see also* Jupe (Altria) Tr. 2220 (agreeing that "switching" is synonymous with "conversion"); Gardner (Altria) Tr. 2586; PX7017 Magness (Altria) Dep. at 279).

#### **Response to Finding No. 599**

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The proposed finding is incomplete and therefore misleading because it fails to note that the standard for granting an e-cigarette's PMTA also looks to whether the product poses a risk of unintended consequences such as initiation and youth usage. (CCFF ¶¶ 1323-27, 1912-17).

The proposed finding is also misleading because it fails to note that the FDA has not provided clear guidance on the criteria or thresholds that it will use when reviewing PMTAs to assess whether e-cigarette products have adequate conversion potential to be considered appropriate for the protection of the public health. (Gardner (Altria) Tr. 2640-41).

600. And it has to be complete switching; dual use of e-vapor and cigarettes will not suffice. (Murillo (Altria/JLI) Tr. 2907; PX7015 Gogova (Altria) Dep. at 126-27; PX7023 Fernandez (Altria) Dep. at 79-80, 83). That is because, "unless consumers actually switch to the product, there is no reduction of risk." (PX7026 Gardner (Altria) Dep. at 242). "They're just maintaining their cigarette consumption but adding something to it." (Murillo (Altria/JLI) Tr. 2907; *see also* PX7023 Fernandez (Altria) Dep. at 83 (explaining that if you are only an occasional use product "[y]ou can't be successful in this market," and "the regulator wouldn't make you exist anyway"))).

#### **Response to Finding No. 600**

The proposed finding is incomplete and therefore misleading because it fails to note that the standard for granting an e-cigarette's PMTA also looks to whether the product poses a risk of unintended consequences such as initiation and youth usage. (CCFF ¶¶ 1323-27, 1912-17).

The proposed finding is also misleading because it fails to note that the FDA has not provided clear guidance on the criteria or thresholds that it will use when reviewing PMTAs to assess whether e-cigarette products have adequate conversion potential to be considered appropriate for the protection of the public health. (Gardner (Altria) Tr. 2640-41).

#### **a. Neither MarkTen Cig-A-Like Nor Elite Was Demonstrating That It Could Convert Smokers**

601. By late spring 2018, the sluggish sales data for Nu Mark's products was raising questions about their ability to convert adult smokers. (Gardner (Altria) Tr. 2648).

#### **Response to Finding No. 601**

The proposed finding is misleading, unreliable, contradicted by other evidence in the record, and contradicted by the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

To the extent that the proposed finding characterizes “Nu Mark’s products” as having “sluggish sales,” it is contradicted by the weight of the evidence. Nu Mark’s products, including MarkTen cigalike and MarkTen Elite, had positive sales growth and positive marginal contribution, they consistently met or exceeded Altria’s internal goals, and Altria anticipated that they would grow in profitability in the future. (CCFF ¶¶ 1083-131). In addition, MarkTen Elite sales performance either matched or beat those of competitors’ e-cigarettes that were not abruptly pulled from the market. (CCFF ¶¶ 1501-03, 165, 178).

To the extent that the proposed finding implies that “Nu Mark’s products” may not have had “the ability to convert adult smokers,” it is contradicted by the weight of the evidence. The FDA has not provided clear guidance on the criteria or thresholds that it will use when reviewing PMTAs to assess whether e-cigarette products have adequate conversion potential to be considered appropriate for the protection of the public health (Gardner (Altria) Tr. 2640-41), so it was impossible in 2018 to know with certainty that a product lacked adequate conversion potential to achieve PMTA approval. Notwithstanding that, Altria had evidence that its e-cigarette products did, in fact, have conversion potential. (CCFF ¶¶ 1310-22). Moreover, Altria thought that the in-market versions of MarkTen cigalike and MarkTen Elite could achieve PMTA approval, and was planning to submit PMTAs improved versions of the products before the PMTA deadline. (CCFF ¶¶ 1258-300).

To the extent that the proposed finding stands for the proposition that “sluggish sales data” could inform an assessment of “conversion potential,” the proposed finding is misleading and



contradicted by other evidence in the record because conversion potential is a measure of the rate at which consumers that use an e-cigarette product stop smoking traditional cigarettes and sales revenue is not an input to conversion potential. (Gardner (Altria) Tr. 2644-49). Indeed, Dr. Gardner himself acknowledged that an e-cigarette product could have low sales, but a high conversion rate, if the few traditional cigarette smokers that use the product readily convert. (Gardner (Altria) Tr. 2648-49). Dr. Gardner also acknowledged that an e-cigarette product could also have high sales, but a low conversion rate, if most of its sales are to non-smokers or if the consumers purchasing the product remain dual users of both the e-cigarette product and traditional cigarettes. (Gardner (Altria) Tr. 2645-46). Furthermore, Altria did not conduct actual conversion studies of MarkTen Elite. (CCFF ¶¶ 1305-08) .

602. “[A] low sales rate or sales volume does not indicate conversion potential.” (Gardner (Altria) Tr. 2648; *see also* PX7023 Fernandez (Altria) Dep. at 155-56 (“[W]hen we got in the market, the indicator was, we were not performing to the extent that we needed to, despite the fact, as you pointed out earlier, that we had a better price.”)). Simply put, “[i]f consumers don’t like [a product], they’re not going to convert.” (Gardner (Altria) Tr. 2648).

### **Response to Finding No. 602**

The proposed finding is misleading, unreliable, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

To the extent that the proposed finding claims that “[A] low sales rate or sales volume does not indicate conversion potential,” the proposed finding is misleading and incorrect because a low sales rate also does not indicate the absence of conversion potential. Conversion potential is a measure of the rate at which consumers that use an e-cigarette product stop smoking traditional cigarettes and sales revenue is not an input to conversion potential. (Gardner (Altria) Tr. 2644-49). An e-cigarette product could have low sales, but a high conversion rate, if the few traditional cigarette smokers that use the product readily convert. (Gardner (Altria) Tr. 2648-49).

To the extent that, in claiming “when we got in the market, the indicator was, we were not performing to the extent that we needed to. . .” and “[s]imply put, ‘[i]f consumers don’t like [a product], they’re not going to convert,’” the proposed finding implies that consumers did not “like” Altria’s e-cigarette products and that they were “not performing” well, the proposed finding is contradicted by the weight of the evidence. Nu Mark’s products, including MarkTen cigalike and MarkTen Elite, had positive sales growth and positive marginal contribution, they consistently met or exceeded Altria’s internal goals, and Altria anticipated that they would grow in profitability in the future. (CCFF ¶¶ 1083-131). In addition, MarkTen Elite sales performance either matched or beat those of competitors’ e-cigarettes that were not abruptly pulled from the market. (CCFF ¶¶ 1501-03, 165, 178).

To the extent that the proposed finding implies that Altria’s sales were inadequate to show conversion potential, the proposed finding is misleading and contrary to the weight of the evidence for the reasons set forth above in response to RPF ¶ 601. (*See* Response to RPF ¶ 601).

603. Thus, sales data is an important part of the conversion assessment. Market share is not equivalent to conversion rate, but “market share tells you . . . what the adult smokers are actually doing in the market with their money.” (Gardner (Altria) Tr. 2644-45). “[T]hat piece of data, combined with other information, is used to assess the conversion potential of the product.” (Gardner (Altria) Tr. 2645).

### **Response to Finding No. 603**

The proposed finding is vague, misleading, unreliable, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

To the extent that the proposed finding claims that “[m]arket share is not equivalent to conversion rate,” Complaint Counsel does not disagree. To the extent that the proposed finding uses the word “thus” to refer back to prior proposed findings, it is vague as to which proposed findings the term refers.

To the extent that the proposed finding claims that “sales data is an important part of the conversion assessment. . . ‘market share tells you . . . what the adult smokers are actually doing in the market with their money . . . that piece of data, combined with other information, is used to assess the conversion potential of the product,’” the proposed finding is misleading and contrary to the weight of the evidence for the reasons set forth above in response to RPF 601-02. (*See Responses to RPF 601-02*). A product’s sales revenue and market share are not factors in measuring conversion potential, which is the rate that users convert from traditional cigarettes to a product. (*See Responses to RPF 601-02*).

604. For this reason, the regulatory affairs team “track[ed] the market performance [of Altria’s products] as part of thinking about the [PMTA] framework.” (Murillo (Altria/JLI) Tr. 3045).

#### **Response to Finding No. 604**

The proposed finding is vague, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding uses the phrase “[f]or this reason” to refer back to prior proposed findings, it is vague as to which proposed findings it refers.

To the extent that the proposed finding implies that there is a direct relationship between “market performance” and “conversion potential or the “PMTA framework,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons set forth above in response to RPF 601-03. (*See Responses to RPF 601-03*).

605. Competitors also looked to market performance when assessing the conversion potential of different products. For example, PMI interpreted poor marketplace results as an indication that Altria’s e-vapor products were not converting smokers. (PX7020 King (PMI) Dep. at 246-47).

#### **Response to Finding No. 605**

The proposed finding is misleading and overstates the cited evidence.

To the extent that, in claiming that “[c]ompetitors also looked to market performance when assessing the conversion potential of different products” and that “PMI interpreted poor marketplace results as an indication that Altria’s e-vapor products were not converting smokers,” the proposed finding implies that marketplace results actually had any bearing on conversion potential, and the proposed finding is misleading for the reasons set forth above in response to RPF 601-03. (See Responses to RPF 601-03).

The proposed finding overstates the cited evidence because it claims that “[c]ompetitors also looked to market performance when assessing the conversion potential of different products,” but then only cites to testimony from one executive.

606. Beyond the poor sales data, mounting consumer research cast further doubt on the conversion potential of Nu Mark’s products. (Jup (Altria) Tr. 2234, 2251-53; RX0496 (Altria) at 019; PX1225 (Altria) at 001, 037; see also *supra* Part III.C.2).

#### **Response to Finding No. 606**

The proposed finding is incomplete, misleading, unsupported, incorrect, and contradicted by the weight of the evidence.

To the extent that the proposed finding implies that Nu Mark’s products had “poor sales data” or that there is a logical relationship between “poor sales data” and “conversion potential,” the proposed finding is misleading, incorrect, and contradicted by the weight of the evidence for the reasons set forth above in response to RPF 601-03. (See Responses to RPF 601-03).

To the extent that the proposed finding claims that “mounting consumer research cast further doubt on the conversion potential of Nu Mark’s products,” the proposed finding is incomplete, misleading, and contradicted by the weight of the evidence. The proposed finding is incomplete and unsupported because it does not identify any such consumer research. Furthermore, Altria did not conduct actual conversion studies of MarkTen Elite. (CCFF 1305-08).

The proposed finding is misleading because the FDA has not provided clear guidance on the criteria or thresholds that it will use when reviewing PMTAs to assess whether e-cigarette products have adequate conversion potential to be considered appropriate for the protection of the public health (Gardner (Altria) Tr. 2640-41), so it was impossible in 2018 to know with certainty that a product lacked adequate conversion potential to achieve PMTA approval.

The proposed finding is contradicted by the weight of the evidence because Altria had evidence from its HUT study that its e-cigarette products did, in fact, have conversion potential. (CCFF ¶¶ 1310-22).

607. The regulatory affairs team worked very closely with the market insights team because “all of the results that [Altria] generate[d] with respect to a product need[ed] to be accessible to the FDA, and if [consumer research studies were] sufficiently related to the PMTA, they, in fact, ha[d] to be included with the PMTA.” (Murillo (Altria/JLI) Tr. 3048).

#### **Response to Finding No. 607**

The proposed finding is incomplete in that it fails to note that Altria did not conduct actual conversion studies of MarkTen Elite. (CCFF ¶¶ 1305-08).

608. Consumer research about the MarkTen cig-a-like “indicate[d] . . . that the satisfaction was not there.” (Jupe (Altria) Tr. 2234).

#### **Response to Finding No. 608**

The proposed finding is vague, unreliable, unsupported, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “[c]onsumer research about the MarkTen cig-a-like ‘indicate[d] . . . that the satisfaction was not there,’ the proposed finding is vague and unsupported because it does not cite to any consumer research and because the reference to satisfaction being “not there” is ambiguous.

To the extent that the proposed finding implies that MarkTen cigalike did not satisfy consumers, the proposed finding is contrary to the weight of the evidence. MarkTen cigalike had

positive sales growth and positive marginal contribution, consistently met or exceeded Altria's internal goals, and Altria anticipated that it would grow in profitability in the future. (CCFF ¶¶ 1083-131).

Altria also had evidence that MarkTen cigalike did, in fact, have conversion potential. (CCFF ¶¶ 1310-22).

The proposed finding is also unreliable because it relies only on self-serving testimony.

609. The HUT results from January had been an early indication that Elite and Cync did not offer the necessary nicotine satisfaction for cigarette users, with Cync demonstrating no meaningful impact on cigarette occasions at all and Elite showing negligible effect until over a month into the study, long after the average consumer would have rejected the product. (Jupe (Altria) Tr. 2251-53; RX0496 (Altria) at 019; *see also supra* Part III.C.2).

#### **Response to Finding No. 609**

The proposed finding overstates the cited evidence and is unreliable, contradicted by another proposed finding, and contrary to the weight of the evidence.

The proposed finding overstates the cited evidence because, far from a “negligible” result, the cited study results show that MarkTen Elite users increasingly tended to stop using traditional cigarettes after using MarkTen Elite for three weeks. (Jupe (Altria) Tr. 2251-53; RX0496 (Altria) at 019).

To the extent that the proposed finding claims that the “average consumer would have rejected the product” before beginning to stop using cigarettes, that claim is unreliable because it is not supported by the cited study, but is rather based on self-interested testimony of Altria's witness, Jupe, and is contradicted by the fact that MarkTen Elite experienced robust sales growth until it was discontinued. (CCFF ¶¶ 1112-31).

The proposed finding is contradicted by RPF ¶ 378 because in that finding, Respondents characterized the same test results as “an encouraging initial sign” and claimed “[t]he preliminary

results showed that, over a three-week period, the purchase intent for MarkTen Elite remained steady, at 43 percent, and was higher than that of JUUL.” (RPFF ¶ 378).

To the extent that the proposed finding implies that MarkTen Elite did not have conversion potential, the proposed finding is contrary to the weight of the evidence. Altria had evidence from its HUT studies that MarkTen Elite did, in fact, have conversion potential. (CCFF ¶¶ 1311-17).

610. In the spring of 2018, Nu Mark received further evidence of this conclusion when it reanalyzed the HUT data. (PX1225 (Altria) at 001). This time, instead of analyzing participants based on whether they had used an e-vapor product within the last week, Altria’s consumer research team analyzed the results based on whether the participants had indicated they were seeking a cigarette experience or a vaping experience. Under that lens, neither Cync nor Elite had any meaningful impact on cigarette occasions. JUUL was the only product among the three that was “taking cigarette occasions from those who [were] seeking a cigarette experience.” (PX1225 (Altria) at 037).

#### **Response to Finding No. 610**

The proposed finding overstates the cited evidence and is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding overstates the cited evidence and is incomplete and misleading because the cited exhibit summarizes Nu Mark’s revised analysis as follows: “you will see reinforcement to the idea that Elite, Cync & APEX are more for those seeking the vaping experience than the smoking experience,” and Schwartz replies, “[j]ust wanted to refresh my memory on the MarkTen Elite’s performance in the HUT . . . confirms we have a good horse in the race that truly merits incenting Trial at all levels / channels.” (PX1225 (Altria) at 001 (ellipses in original)).

To the extent that the proposed finding implies that MarkTen Elite did not have conversion potential, the proposed finding is contrary to the weight of the evidence. Altria had evidence from its HUT studies that MarkTen Elite did, in fact, have conversion potential. (CCFF ¶¶ 1311-17).

611. As Jennifer Schmidt, the market researcher responsible for analyzing the HUT data explained, “Elite [and] Cync . . . are more for those seeking the vaping experience than the

smoking experience. JUUL tends to have the most behavioral impact among those seeking the smoking experience.” (PX1225 (Altria) at 001).

### **Response to Finding No. 611**

To the extent that the proposed finding implies that MarkTen Elite did not have conversion potential, the proposed finding is contrary to the weight of the evidence. Altria had evidence from its HUT studies that MarkTen Elite did, in fact, have conversion potential. (CCFF ¶¶ 1311-17).

To the extent that the proposed finding claims that “Jennifer Schmidt, the market researcher responsible for analyzing the HUT data explained, ‘Elite [and] Cync . . . are more for those seeking the vaping experience than the smoking experience. JUUL tends to have the most behavioral impact among those seeking the smoking experience,’” Complaint Counsel has no specific response.

612. In July, Paige Magness, then Managing Director of Regulatory Affairs and responsible for PMTA submissions, wrote that the regulatory “team need[ed] to recommend which products should move forward and which should not, based on conversion potential and satisfaction.” (RX0788 (Altria) at 002). She concluded that “none of [Altria’s] products [were] anywhere near ready (still concepts, formulations not decided, no data to know if we can make a successful PMTA).” (RX0788 (Altria) at 001; *see also* PX1028 (Altria) at 006-07 (comparing MarkTen products with those of competing brands and demonstrating that each of the MarkTen products had a lower nicotine content and higher pH than JUUL and Vuse)).

### **Response to Finding No. 612**

The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding suggests that Altria thought its e-cigarette products did not have “conversion potential” and were not “anywhere near ready” to achieve PMTA approval, the proposed finding is contrary to the weight of the evidence. The FDA has not provided clear guidance on the criteria or thresholds that it will use when reviewing PMTAs to assess whether e-cigarette products have adequate conversion potential to be considered appropriate for the protection of the public health (Gardner (Altria) Tr. 2640-41), so it was impossible in 2018 to



know with certainty that a product lacked adequate conversion potential to achieve PMTA approval.

Notwithstanding that, Altria had evidence that its e-cigarette products did, in fact, have conversion potential. (CCFF ¶¶ 1311-22; Response to RPF ¶ 611). In 2018, Altria published an “Actual Use Study” that involved giving MarkTen cigalike products to a sample of adult smokers over an eight-week period. (CCFF ¶ 1321). None of the participants in Altria’s “Actual Use Study” for MarkTen reported plans to quit smoking at the outset of the study, but “[b]y the end of the study, 77% of the Total Sample indicated that they would like to quit smoking. Of those, 39% reported plans to quit in the next 30 days, and of those, 89% reported currently trying to quit.” (CCFF ¶ 1322).

Altria did not conduct actual conversion studies of MarkTen Elite, (CCFF ¶¶ 1305-08), but Altria had evidence from its HUT studies that MarkTen Elite did, in fact, have conversion potential. (CCFF ¶¶ 1311-17). According to an email written by Craig Schwartz on May 1, 2018, Altria’s HUT study results “confirm[ed] we [Altria] have a good horse in the race that truly merits incenting Trial at all levels / channels.” (CCFF ¶ 1312). On August 8, 2018, Baculis stated in an email that the results of Altria HUTs indicate that MarkTen “Elite has a role to play” in that it “should be able to peel off some of the folks that are using Juul but would really rather have something else” even though Elite could not compete “head to head with Juul where Juul is strong (immediate nicotine satisfaction)” because Elite and Juul have “different opportunities and strengths.” (CCFF ¶ 1315). On September 7, 2018, Craig Schwartz sent several Altria colleagues a presentation titled “MarkTen Elite Potential Investment Justification Information” which included the results of a HUT study that showed that MarkTen Elite produced conversion rates comparable to or better than JUUL under certain circumstances, and he stated that the results

“could support a decision to further invest in MarkTen Elite 1.0 – if that’s what we decide to do.” (CCFF ¶ 1320).

In 2018, Altria’s former CEO Howard Willard claimed to investors, “MarkTen Bold . . . uses a proprietary recipe of nicotine salts, with 4% nicotine by weight to deliver a differentiated sensory experience and nicotine satisfaction, approaching that of cigarettes.” (CCFF ¶ 465). Moreover, Altria thought that the in-market versions of MarkTen cigalike and MarkTen Elite could achieve PMTA approval and was planning to submit PMTAs for improved versions of the products before the PMTA deadline. (CCFF ¶¶ 1258-300).

To the extent that the proposed finding claims that MarkTen products “had a lower nicotine content and higher pH than” competing brands, the proposed finding is contrary to the weight of the evidence and is misleading. MarkTen’s cigalike products came with liquid nicotine percentages of 4, 3.5, 2.5, and 2.4 percent, which was comparable to a number of e-cigarette products in the market, including JUUL, which had percentages of 5, 3, and 1 percent. (CCFF ¶¶ 1179, 1181; *see also* CCFF ¶¶ 1332-35). Notwithstanding the fact that MarkTen Elite had a nicotine percentage of 1.8 percent, lower than some of JUUL’s products, it had higher aerosol mass, meaning that its overall nicotine per puff was equal to or greater than the version of JUUL with 5 percent liquid nicotine. (CCFF ¶¶ 1178, 1189-91). Moreover, Altria subsequently nearly doubled MarkTen Elite’s aerosol mass by adding the c1A gasket to the product. (CCFF ¶¶ 1232-34).

To the extent that the proposed finding implies that low nicotine strength makes a product less likely to achieve PMTA approval, the proposed finding is misleading and contradicted by the weight of the evidence. The FDA is considering a possible association between high-nicotine strength and abuse liability, meaning that low nicotine strength could be an advantage in the PMTA process. (PX9112 (FDA) at 038 (“The rate and extent of nicotine delivery significantly impact

product abuse liability. Higher nicotine content and faster nicotine delivery increase products' abuse liability due to the rapid absorption of nicotine in the brain.”)). Other manufacturers have submitted PMTAs for products with nicotine strength comparable to MarkTen's lower-strength products. (CCFF ¶¶ 1332-35).

613. Gardner agreed with Magness's assessment: None of the products that Altria had on the market—not MarkTen cig-a-like, not Bold, not Elite—could provide the satisfaction necessary to convert smokers. (Gardner (Altria) Tr. 2590).

### **Response to Finding No. 613**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding refers back to RPF 612 or implies that none of Altria's e-cigarette products has sufficient conversion potential to achieve PMTA approval, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612. (*See* Response to RPF 612).

To the extent that the proposed finding relies on testimony from Dr. Gardner, the testimony is unreliable because Dr. Gardner testified that he was not an expert in conversion potential or nicotine satisfaction in e-cigarette products and was not responsible for assessing conversion potential in Altria's e-cigarette products. (CCFF ¶¶ 2000-02; Gardner (Altria) Tr. 2640-43).

#### **b. Scientists Realized That The Products Were Not Converting Adult Smokers Because They Lacked The Nicotine Salts Required For Nicotine Satisfaction**

##### **i. Scientists Discovered Salts Were Required for Satisfaction**

614. By summer 2018, Altria's scientists had realized that nicotine salts—a shorthand term for what results from the addition of organic acid to an e-liquid—were *necessary* for nicotine satisfaction, and that they only could mimic the cigarette experience if they were used in the correct ratio. (Jupe (Altria) Tr. 2142, 2229; PX4504 (Altria) at 009, 024).

### **Response to Finding No. 614**

The proposed finding is misleading and contrary to the weight of the evidence. To the extent that the proposed finding implies that e-cigarettes need to have nicotine salts or “mimic the cigarette experience” to achieve PMTA approval or to succeed commercially, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612. (See Response to RPF 612).

In addition, The FDA is considering a possible association between nicotine salts and youth initiation, meaning that nicotine salts could be a disadvantage in the PMTA process. (CCFF 1336-39). Other manufacturers continue to market and have submitted PMTAs for products without nicotine salts. (CCFF 1166-72). Moreover, Altria’s e-cigarette products without nicotine salts were commercially successful and Altria expected them to continue to be profitable. (CCFF 1083-131).

615. Altria’s understanding of nicotine salts had evolved gradually over time. The company’s scientists had long understood that salts were important for “abating some of the irritation in the throat” caused by nicotine. (Jupe (Altria) Tr. 2139, 2229-30; see also PX4504 (Altria) at 009 (explaining that salts “[m]odulat[e] . . . harshness”).

#### **Response to Finding No. 615**

Complaint Counsel has no specific response.

616. And while the same scientists previously had hypothesized that salts also were important to nicotine satisfaction, they “didn’t have the data” to support that hypothesis. (PX7015 Gogova (Altria) Dep. at 312). Up until 2018, because of safety and other concerns, Altria’s scientists were not permitted to run consumer tests with nicotine salts in sufficient concentrations, which limited their ability to develop effective nicotine salt formulations. (PX7034 Mountjoy (Altria) Dep. at 65; PX7015 Gogova (Altria) Dep. at 133-37, 310-13).

#### **Response to Finding No. 616**

The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that, in suggesting “salts also were important to nicotine satisfaction, the proposed find implies that nicotine salts were necessary to achieve PMTA approval or to succeed commercially, the proposed finding is misleading and contrary to the weight of the evidence for

the reasons cited in response to RPF 601-03, 612-14. (*See Responses to RPF 601-03, 612-14*).

To the extent that the proposed finding implies that Altria did not understand nicotine salts before 2018 or was unable to develop effective nicotine salt formulations for its products, the proposed finding is contrary to the weight of the evidence. In 2017, Altria was aware that nicotine salts could help consumers with nicotine satisfaction and, with that in mind, Altria introduced MarkTen Bold, which relied on nicotine salts to mimic the nicotine delivery of a cigarette. (CCFF 461-65, 1196). In February 2018, Altria’s former CEO Howard Willard proclaimed to investors, “MarkTen Bold . . . uses a proprietary recipe of nicotine salts, with 4% nicotine by weight to deliver a differentiated sensory experience and nicotine satisfaction, approaching that of cigarettes.” (CCFF 465). In 2018, Altria developed a version of MarkTen Elite 2.0 with an improved nicotine salt formula that it considered “approximately the right ratio needed to achieve nicotine satisfaction” and tested it on consumers with good results. (CCFF 1284-94). Altria had plans to submit PMTAs for an improved version of MarkTen Bold and MarkTen Elite 2.0 before the then-PMTA deadline. (CCFF 1295-300). In addition to offering e-liquid formulations with nicotine salts, Nu Mark also planned to offer Elite 2.0 with formulations that did *not* contain nicotine salts, further confirming that Altria recognized that it was important for consumers to have that option. (PX4318 (Altria) at 008).

617. When Altria’s scientists finally were able to conduct this testing in 2018, the results led to what its scientists have termed a “eureka moment.” (Jupe (Altria) Tr. 2142).

### **Response to Finding No. 617**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616. (*See Responses to RPF 612-14, 616*).

618. The scientists discovered that in addition to mitigating the harshness of nicotine in the throat, nicotine salts created nicotine absorption most similar to how the nicotine in a cigarette is absorbed. (Jupe (Altria) Tr. 2137-39; PX4504 (Altria) at 009; RX0526 (Altria) at 006).

#### **Response to Finding No. 618**

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 612-14, 616. (See Responses to RPF 612-14, 616).

619. More specifically, Altria's scientists discovered that without nicotine salts, the nicotine in aerosolized e-vapor is largely in the gas phase, and such nicotine escapes into the mouth and throat before it can be absorbed in the lungs. (Jupe (Altria) Tr. 2271; RX0796 (Altria) at 039; PX7015 Gogova (Altria) Dep. at 40-42). The addition of organic acid creates nicotine salts, which keep more of the nicotine in the particulate phase (and thus enable it to reach the lungs). (Jupe (Altria) Tr. 2138, 2271; Quigley (Altria) Tr. 2006; RX0796 (Altria) at 039; PX7015 Gogova (Altria) Dep. at 40-42).

#### **Response to Finding No. 619**

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 612-14, 616. (See Responses to RPF 612-14, 616).

620. As a result, nicotine salts are necessary to preventing nicotine from escaping the particles before the nicotine reaches the deep lung, where it is absorbed most effectively. (Jupe (Altria) Tr. 2137-39; PX4504 (Altria) at 009; PX7015 Gogova (Altria) Dep. at 40-42; RX0526 (Altria) at 006).

#### **Response to Finding No. 620**

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 612-14, 616. (See Responses to RPF 612-14, 616).

621. “[I]f you are really looking for immediate nicotine satisfaction and replacement of conventional cigarettes, the easiest way would be [to] provide the adult smokers with similar nicotine release profile as a conventional cigarette, and this cannot be achieved truly without the acids to create nicotine salts technology.” (PX7015 Gogova (Altria) Dep. at 42).

#### **Response to Finding No. 621**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616. (*See Responses to RPF 612-14, 616*).

622. In the summer of 2018, Altria’s scientists reached a consensus that the “[u]se of nicotine salts or addition of acids to achieve a certain pH is required for a satisfying and relaxing E-vapor experience.” (Jupe (Altria) Tr. 2275; RX0796 (Altria) at 053 (same); PX4504 (Altria) at 024 (same); *see also* Gardner (Altria) Tr. 2585-86 (“[T]he consensus was that nicotine salts would be required for adult smoker conversion to e-vapor products.”); RX0419 (Altria) at 001-02; RX0526 (Altria) at 006)).

### **Response to Finding No. 622**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616. (*See Responses to RPF 612-14, 616*).

To the extent that the proposed finding relies on testimony from Dr. Gardner that “the consensus was that nicotine salts would be required for adult smoker conversion to e-vapor products,” the proposed finding is unreliable. When Dr. Gardner was asked in his deposition “was there a consensus at Altria on what drove conversion rates,” Dr. Gardner testified, “I don’t think we understood what drove conversion to e-vapor products.” (PX7033 (Gardner (Altria) Dep. at 59). Dr. Gardner delivered contradictory testimony at trial, but subsequently confirmed his deposition testimony. (Gardner (Altria) Tr. 2650-52).

623. The addition of organic acid (or salts) is required because it brings down the pH of the nicotine in e-liquid. In layman’s terms, pH is “a measure of acidity.” (Gardner (Altria) Tr. 2601). pH serves as a proxy for how nicotine is delivered to the lungs because “the more acid you added, the lower the pH of the liquid, and . . . the more nicotine salt would be created.” (Quigley (Altria) Tr. 2006; *see also* Jupe (Altria) Tr. 2269 (“The salts influence the pH. The right level of salts take the pH down . . . .”)).

### **Response to Finding No. 623**

To the extent that the proposed finding claims that nicotine salts are “required” for an e-cigarette product to demonstrate conversion potential or to achieve PMTA approval and to the extent that the proposed finding relies on testimony from Dr. Gardner to support that claim, the proposed finding is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 622. (See Responses to RPF 612-14, 616, 622).

To the extent that the proposed finding claims that “[t]he addition of organic acid (or salts) . . . brings down the pH of the nicotine in e-liquid,” “[i]n layman’s terms, pH is ‘a measure of acidity.’ . . . pH serves as a proxy for how nicotine is delivered to the lungs because ‘the more acid you added, the lower the pH of the liquid, and . . . the more nicotine salt would be created,’” and “[t]he salts influence the pH. The right level of salts take the pH down,” Complaint Counsel has no specific response.

624. The goal therefore was to add enough acid to “adjust the pH of an aerosol from an e-vapor product” so that it would match as closely as possible the pH of a cigarette and “replicate the nicotine satisfaction experience [of smoking] . . . in an e-cigarette.” (Quigley (Altria) Tr. 2006; *see also* Jupe (Altria) Tr. 2270; Murillo (Altria/JLI) Tr. 3051-52).

#### **Response to Finding No. 624**

The proposed finding is incomplete in that it fails to note that, in 2017, Altria was aware that nicotine salts could help consumers with nicotine satisfaction and, with that in mind, Altria introduced MarkTen Bold, which relied on nicotine salts to mimic the nicotine delivery of a cigarette. (CCFF 461-65, 1196). In February 2018, Altria’s former CEO Howard Willard proclaimed to investors, “MarkTen Bold . . . uses a proprietary recipe of nicotine salts, with 4% nicotine by weight to deliver a differentiated sensory experience and nicotine satisfaction, approaching that of cigarettes.” (CCFF 465). In 2018, Altria developed a version of MarkTen Elite 2.0 with an improved nicotine salt formula that it considered “approximately the right ratio



needed to achieve nicotine satisfaction” and tested it on consumers. (CCFF ¶¶ 1284-94). Altria had plans to submit PMTAs for an improved version of MarkTen Bold and MarkTen Elite 2.0 before the then-PMTA deadline. (CCFF ¶¶ 1295-300).

625. Ultimately, the scientists determined that a 4:3 ratio of nicotine to organic acids was the “most appropriate ratio.” (Jupe (Altria) Tr. 2137).

#### **Response to Finding No. 625**

To the extent that the proposed finding relates to Altria’s claims regarding its products and nicotine salts in RPF 612-24, Complaint Counsel incorporates its responses to RPF 612-24 herein. (*See* Responses to RPF 612-24).

626. These realizations led Altria’s scientists to take the position that “[a]ll newly developed e-vapor products, regardless of nicotine content, should utilize nicotine salt technology.” (Jupe (Altria) Tr. 2275; RX0796 (Altria) at 053).

#### **Response to Finding No. 626**

The proposed finding is misleading and contrary to the weight of the evidence.

The proposed finding is misleading because Altria was planning to submit PMTAs for in-market versions of the MarkTen cigalike products that did not have nicotine salts, for improved versions of those products without nicotine salts, and for the-in market version of MarkTen Elite, which did not have nicotine salts. (CCFF ¶¶ 1295-300). Altria continued to work on PMTAs for its MarkTen cigalike products without nicotine salts until Altria announced that it would discontinue the products in December 2018. (CCFF ¶ 1265). Altria planned to submit a PMTA for the in-market version of MarkTen Elite until at least September 2018. (CCFF ¶¶ 1295-300).

To the extent that the proposed finding claims that nicotine salts are “required” for an e-cigarette product to demonstrate conversion potential or to achieve PMTA approval, the proposed finding is unreliable, misleading, and contrary to the weight of the evidence for the

reasons cited in response to RPF 612-14, 616, 622. (See Responses to RPF 612-14, 616, 622).

Moreover, other manufacturers continue to market products without nicotine salts and have submitted PMTAs for them. (CCFF 1166-72). Eldridge testified that ITG still sells *myblu* freebase pods, which do not contain nicotine salts, and has submitted PMTAs for them. (CCFF 1166). Eldridge testified that two of ITG's four *myblu* pod products currently on the market do not have nicotine sales, and none of Blu's cigalikes or disposable products have nicotine salts. (CCFF 1166). The proposed finding is misleading because it fails to note that lower nicotine strength e-liquids without salts may not present the same youth initiation risks as higher-nicotine strength e-liquids with salts, which could be a potential advantage in the PMTA process. (CCFF 1332-39).

627. But none of the Nu Mark products contained nicotine salts in the correct ratio. (O'Hara (JLI) Tr. 547 (Elite); Begley (Altria) Tr. 1084 (Elite); Willard (Altria) Tr. 1357 (Elite), 1384 (Bold); Schwartz (Altria) Tr. 1921 (Elite); Quigley (Altria) Tr. 2031-32 (Elite), 2037-38 (Bold); Jupe (Altria) Tr. 2136-38 (Bold), 2153-54 (Elite), 2228-29 (MarkTen cig-a-like and Bold), 2324-25 (Elite and MarkTen cig-a-like); Gardner (Altria) Tr. 2595-96 (Elite and MarkTen cig-a-like), 2606 (Elite), 2644 (MarkTen cig-a-like and Bold); PX7016 Jupe (Altria) Dep. at 107 (Bold)).

### **Response to Finding No. 627**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 626. (See Responses to RPF 612-14, 616, 626).

### **ii. Elite Did Not Have Nicotine Salts**

628. Elite did not contain salts and had a low nicotine content. (Willard (Altria) Tr. 1357).

### **Response to Finding No. 628**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding implies that nicotine salts or high-nicotine content are necessary to achieve commercial success or PMTA approval, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 626. (See Responses to RPF 612-14, 616, 626).

The proposed finding is incomplete and misleading because it fails to note that Altria executives believed Elite 1.0 had a role to play in Altria's portfolio and could appeal to certain consumers. (CCF 1312-17).

The proposed finding also fails to note that in 2018, Altria developed a version of MarkTen Elite 2.0 with an improved nicotine salt formula that it considered "approximately the right ratio needed to achieve nicotine satisfaction" and tested it on consumers. (CCF 1284; see also CCF 1285-94).

The proposed finding is misleading because it also fails to note that lower nicotine strength e-liquids without salts may not present the same youth initiation risks as higher-nicotine strength e-liquids with salts, which could be a potential advantage in the PMTA process. (CCF 1332-39).

629. Because Elite lacked salts, its e-liquid pH was too high to mimic that of a cigarette and caused a "significant amount of nicotine loss." (RX0419 (Altria) at 001). Elite's pH was approximately 9. (RX2036 (Altria) at 005; see also RX0429 (Altria) at 004 (same); PX1028 (Altria) at 006 (showing Elite's pH was approximately 9)). The pH of a Marlboro cigarette, by contrast, is around 5.8. (RX2036 (Altria) at 005; RX0796 (Altria) at 037; RX0429 (Altria) at 004).

### **Response to Finding No. 629**

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 628. (See Responses to RPF 612-14, 616, 628).

630. Altria's scientists agreed that Elite's high pH was "not ideal for conversion." (PX1028 (Altria) at 001).

### **Response to Finding No. 630**

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 628. (See Responses to RPF 612-14, 616, 628).

631. In essence, Elite's lack of salts meant that virtually none of the nicotine in the vapor was being delivered to the lung in the way it would be delivered in a cigarette. (Jupe (Altria) Tr. 2272-75; RX0796 (Altria) at 050; see also Schwartz (Altria) Tr. 1921 ("[Elite's] vapor delivery system was inefficient in the sense that that vapor stream in the absence of salts was not getting to the lower lung and up into the bloodstream . . .")).

### **Response to Finding No. 631**

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 628. (See Responses to RPF 612-14, 616, 628).

632. In the spring of 2018, Altria scientists ran a denuder tube study to test the role of nicotine salts. A "denuder tube" was "a very long tube" into which a "cigarette was puffed." (Jupe (Altria) Tr. 2272). E-vapor products were then puffed into the same tube, and the goal was to get the aerosol to "come out of the tube just like the cigarette [smoke] does." (Jupe (Altria) Tr. 2272-73). This was "a good proximate of how the lung is receiving nicotine." (Jupe (Altria) Tr. 2273).

### **Response to Finding No. 632**

The proposed finding is incomplete because it fails to note that lower nicotine strength e-liquids without salts may not present the same youth initiation risks as higher-nicotine strength e-liquids with salts, which could be a potential advantage in the PMTA process. (CCFF 1332-39).

633. Altria's scientists presented the results of the denuder tube study to the consumer research team in May 2018. (RX0796 (Altria) at 001; Jupe (Altria) Tr. 2145-46). A tested product with 4.5 percent nicotine by weight and no acid was "pretty close to where Elite was" and the study showed that it was delivering almost no nicotine to the lung. (RX0796 (Altria) at 050; Jupe (Altria) Tr. 2272-75).

### **Response to Finding No. 633**

The proposed finding overstates the cited evidence and is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “[a] tested product with 4.5 percent nicotine by weight and no acid was ‘pretty close to where Elite was’ and the study showed that it was delivering almost no nicotine to the lung,” the proposed finding is misleading and mischaracterizes the evidence. The cited slide does not purport to show results for MarkTen Elite or all versions of JUUL, but rather depicts representative results for the version of JUUL with 5 percent nicotine by weight and for a hypothetical product with 4.5 percent nicotine by weight and unknown aerosol mass. (RX0796 (Altria) at 037-50). The different versions of JUUL had nicotine percentages of 5, 3, and 1 percent. (CCFF ¶¶ 1177-88). MarkTen Elite had a nicotine percentage of 1.8 percent, lower than two versions of JUUL, but Elite had higher aerosol mass, meaning that its overall nicotine per puff was equal to or greater than the version of JUUL with 5 percent liquid nicotine. (CCFF ¶¶ 1189-91). Moreover, Altria subsequently nearly doubled MarkTen Elite’s aerosol mass by adding the c1A gasket to the product. (CCFF ¶¶ 1232-34). Accordingly, there is no reason to conclude that the results of the cited study, which depict nicotine absorption for a hypothetical product with 4.5 percent nicotine and unknown aerosol mass and one version of JUUL, are generalizable to MarkTen Elite and all versions of JUUL.

Furthermore, the citations to Jupe’s testimony are incomplete and misleading because they fail to note that Jupe admitted these denuder tube tests did not examine the performance of the MarkTen Elite 2.0 formulas with nicotine salts and that had they done so, the results would have been closer to those of JUUL’s. (Jupe (Altria) Tr. 2327-29).

To the extent that the proposed finding implies that MarkTen lacked sufficient conversion potential or nicotine satisfaction to achieve PMTA approval or generate consumer demand, the

proposed finding is incomplete, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 628. (*See Responses to RPF 612-14, 616, 628*).

634. As Jupe testified, Elite “was not a product that we found to be satisfying, and in our opinion -- my opinion, especially -- we didn’t think this was going to be a product that was going to convert or switch smokers, because it lacked that nicotine satisfaction that really you can only ascertain through the introduction of salts. And, of course, Elite didn’t have that.” (Jupe (Altria) Tr. 2154).

#### **Response to Finding No. 634**

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 628. (*See Responses to RPF 612-14, 616, 628*).

635. Altria could not solve Elite’s lack of conversion by simply adding nicotine salts. (Jupe (Altria) Tr. 2256).

#### **Response to Finding No. 635**

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 628. (*See Responses to RPF 612-14, 616, 628*).

636. Nu Mark’s “best guess” for how long it would take to create the right nicotine salts formula, submit a PMTA on that formula and receive FDA approval to commercialize the new product “was five to six years.” (Jupe (Altria) Tr. 2256).

#### **Response to Finding No. 636**

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730).

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 521, 612-14, 616, 628. (See Responses to RPF 521, 612-14, 616, 628).

637. As a result of Elite’s lack of salts, Jupe came to believe by summer 2018 that “Elite, as it was, was not the product [Altria] needed in [its] portfolio.” (Jupe (Altria) Tr. 2156).

### **Response to Finding No. 637**

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 521, 612-14, 616, 628. (See Responses to RPF 521, 612-14, 616, 628). Jupe’s cited testimony is also contradicted by evidence in the record that he informed Crosthwaite on June 9, 2018 that he viewed Elite as having “a role as a contingency plan for Project Tree,” and that he was “continuing to invest in this platform going forward.” (CCFF ¶ 1392; PX1086 (Altria) at 001).

### **iii. Bold Had The Wrong Salts Formula**

638. Unlike the other MarkTen cig-a-likes, MarkTen Bold *had* nicotine salts, but by the summer of 2018 Altria realized it did not have the right salts formula. (Quigley (Altria) Tr. 2037-38; Jupe (Altria) Tr. 2232-33; PX7016 Jupe (Altria) Dep. at 107).

### **Response to Finding No. 638**

The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “by the summer of 2018 Altria realized [MarkTen Bold] did not have the right salts formula,” the proposed finding is misleading and contrary to the weight of the evidence. In 2017, Altria was aware that nicotine salts could help consumers with nicotine satisfaction and, with that in mind, Altria introduced MarkTen Bold, which relied on nicotine salts to mimic the nicotine delivery of a cigarette. (CCFF ¶¶ 461-65, 1196). In February 2018, Altria’s former CEO Howard Willard proclaimed to investors, “MarkTen Bold . . . uses a proprietary recipe of nicotine salts, with 4% nicotine by weight to deliver a

differentiated sensory experience and nicotine satisfaction, approaching that of cigarettes.” (CCFF ¶ 465). Altria’s cigalike products, including MarkTen Bold, were commercially successful. (CCFF ¶¶ 1088-111). In particular, on July 26, 2018, Willard stated to investors on an earnings call that “Nu Mark grew volume by approximately 16% in the quarter and 23% for the first half, primarily driven by expanded distribution” and that MarkTen Elite and MarkTen Bold were “[t]he drivers of the growth in second quarter and first half” and were “getting traction with consumers.” (CCFF ¶ 1113). Altria had evidence that its cigalike products, including MarkTen Bold, had conversion potential. (CCFF ¶¶ 1310, 1321-22). Altria had plans to submit PMTAs for both the in-market versions of its cigalike products and improved versions, including the in-market version of MarkTen Bold and an improved version, before the then-PMTA deadline. (CCFF ¶¶ 1295-300). Altria continued to work on PMTAs for its MarkTen cigalike products, including MarkTen Bold, until Altria announced that it would discontinue the products in December 2018. (CCFF ¶ 1265).

To the extent that the proposed finding claims that “MarkTen Bold had nicotine salts,” Complaint Counsel does not disagree.

639. As Jupe explained at trial, the “addition of nicotine salts” was just “part of” what was required for nicotine satisfaction. (Jupe (Altria) Tr. 2136-37). “The second part of it is having the right level of nicotine salts to the right level of nicotine.” (Jupe (Altria) Tr. 2137).

### **Response to Finding No. 639**

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 638. (*See* Responses to RPF 612-14, 616, 628, 638).

640. Bold had a pH of 8, while the pH of a Marlboro cigarette is around 5.8. (RX2036 (Altria) at 005; RX0796 (Altria) at 037; RX0429 (Altria) at 004). pH is measured on “a logarithmic scale, so a one-unit difference in pH -- for example, from 7 to 8 -- is a tenfold difference in the acidity level or the acid level.” (Gardner (Altria) Tr. 2601).

### **Response to Finding No. 640**



The proposed finding is incomplete and misleading for the reasons cited in response to RPF 638. (See Response to RPF 638).

641. “So between 5.6 and 8, that’s 100 times less acidic with MarkTen Bold versus JUUL.” (Gardner (Altria) Tr. 2601; PX1028 (Altria) at 009; see also RX0440 (Altria) at 006 (comparing the four percent acid of Juul with the one percent acid of Bold); supra Part V.C.1.b.i).

#### **Response to Finding No. 641**

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 638. (See Response to RPF 638).

642. Bold’s high pH meant that it was losing approximately half of its nicotine into the mouth and throat region. (Jupe (Altria) Tr. 2274 (discussing RX0796 (Altria) at 50); see also RX0526 (Altria) at 016 (similar); Jup (Altria) Tr. 2274 (explaining that a product “pretty close” to Bold’s nicotine by weight, with the same amount of acid, was “losing 60 percent of its nicotine into the mouth and throat region, not getting to the lung”)).

#### **Response to Finding No. 642**

The proposed finding overstates the cited evidence and is misleading and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “Bold’s high pH meant that it was losing approximately half of its nicotine into the mouth and throat region” and “that a product ‘pretty close’ to Bold’s nicotine by weight, with the same amount of acid, was ‘losing 60 percent of its nicotine into the mouth and throat region, not getting to the lung,’” the proposed finding is misleading, contrary to the weight of the evidence, and overstates the cited evidence for the reasons cited in response to RPF 633. (See Response to RPF 633). The cited testimony does not discuss from results for MarkTen Bold, but instead discusses study results for a representative product with a nicotine percentage and acid ratio similar to MarkTen Bold, but with unknown aerosol mass and unknown acid formulation, and purports to compare this data to only the version JUUL with five percent nicotine. (Jupe (Altria) Tr. 2274 (discussing RX0796 (Altria) at 037-50)).

The different versions of JUUL had nicotine percentages of 5, 3, and 1 percent. (CCFF ¶¶ 1177-88).

Furthermore, the citations to Jupe’s testimony are incomplete and misleading because they fail to note that Jupe admitted these denuder tube tests did not examine the performance of the MarkTen Elite 2.0 formulas with nicotine salts and that had they done so, the results would have been closer to those of JUUL’s. (Jupe (Altria) Tr. 2327-29).

To the extent that the proposed finding suggests that MarkTen Bold’s relative nicotine absorption had some significance to its conversion potential, PMTA prospects, or commercial prospects, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 638. (*See* Response to RPF 638).

643. Bold was proof that it was not enough just to have salts—a product needed salts “in the right quantities and the right configuration of other product elements to be successful.” (Willard (Altria) Tr. 1384; *see also* Gardner (Altria) Tr. 2644 (explaining that Bold’s “nicotine salts [were] insufficient for conversion”)).

#### **Response to Finding No. 643**

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 612-14, 616, 638. (*See* Responses to RPF ¶¶ 612-14, 616, 638).

644. Bold did not have this. The salts ratio in Bold was “the best [Altria] knew” in 2016 when the formulation was created “but it wasn’t enough salt. It just was not satisfying.” (Jupe (Altria) Tr. 2228-29).

#### **Response to Finding No. 644**

The proposed finding overstates the evidence and is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 612-14, 616, 638, 642. (*See* Responses to RPF ¶¶ 612-14, 616, 638, 642).

645. Pharmacokinetic (or PK) studies confirmed that Bold was not delivering nicotine to the bloodstream as quickly as combustible cigarettes. (Jupe (Altria) Tr. 2231-33; RX0176 (Altria) at 142).

**Response to Finding No. 645**

The proposed finding overstates the evidence and is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 638, 642. (*See Responses to RPF 612-14, 616, 638, 642*).

646. Pharmacokinetic models, referred to as “PK curves,” are used to measure how nicotine is delivered to the body. (Jupe (Altria) Tr. 2231-32, 2270).

**Response to Finding No. 646**

Complaint Counsel has no specific response.

647. To generate a PK curve, blood is drawn from a test subject, and nicotine levels are measured in the blood over time. (Jupe (Altria) Tr. 2231). The curve generated from the results of this testing depicts the way that nicotine is delivered to and maintained in the bloodstream. (Jupe (Altria) Tr. 2231-32).

**Response to Finding No. 647**

Complaint Counsel has no specific response.

648. A comparison of a cigarette’s PK curve to that of an e-vapor product “is a surrogate, is a marker for cigarette satisfaction or nicotine satisfaction.” (Jupe (Altria) Tr. 2231-32).

**Response to Finding No. 648**

Complaint Counsel has no specific response.

649. Bold “really wasn’t [like] a cigarette,” and thus its PK results were “not an indicator of conversion potential.” (Jupe (Altria) Tr. 2234 (discussing RX0176 (Altria) at 142)).

**Response to Finding No. 649**

The proposed finding overstates the evidence and is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 638, 642. (*See Responses to RPF 612-14, 616, 638, 642*). In particular, in February 2018, Altria’s former CEO Howard Willard proclaimed to investors, “MarkTen Bold . . . uses a proprietary recipe of nicotine salts,

with 4% nicotine by weight to deliver a differentiated sensory experience and nicotine satisfaction, approaching that of cigarettes.” (CCFF ¶ 465).

650. In practical terms, the problem was that a smoker in the real world trying MarkTen Bold would have to take anywhere from “25 to 30 puffs to really get closer to the conventional cigarette” which is “too much additional work for adult smokers to do to even get closer to where they wanted to be.” (PX7015 Gogova (Altria) Dep. at 144-46). In that situation, the smoker would just start “looking for potentially other alternatives” that do not require working as hard or using the product as much. (PX7015 Gogova (Altria) Dep. at 144-46).

#### **Response to Finding No. 650**

The proposed finding overstates the evidence and is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 638, 642. (*See Responses to RPF 612-14, 616, 638, 642*).

In addition, the proposed finding is misleading and contrary to the weight of the evidence because a number of manufacturers continue to market and have submitted PMTAs for products with relatively low nicotine strength, and JLI marketed a version of JUUL with 1 percent nicotine by weight. (CCFF ¶¶ 1177-88, 1332-35).

651. Accordingly, when JLI’s O’Hara tried Bold, he found it so weak that he did “not think that it had nicotine salts” at all. (O’Hara (JLI) Tr. 503-04). “[I]f it did,” he testified at trial, then the salts it had were “a very poor quality” and “not effective.” (O’Hara (JLI) Tr. 503-04, 627).

#### **Response to Finding No. 651**

The proposed finding is misleading, contrary to the weight of the evidence, and unreliable.

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 638, 650. (*See Responses to RPF 612-14, 616, 638, 650*).

The proposed finding is unreliable because it relies only on self-serving, anecdotal testimony from a JLI executive.

c. **A New Gasket Was Required To Further Fix Elite's Serious Leaking Problem**

652. [REDACTED]

**Response to Finding No. 652**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete because it fails to mention that leaking was a common problem for other pod-based products, including JLI's. (CCFF ¶¶ 1203-05, 1222, 1483-90; PX1395 (Altria) at 006). Altria told customers that "it's relatively normal in the pod-based space for leakage in pods." (PX1822 (Altria) at 002).

## Juul - Preliminary Assessment

### Key Issues

- **Vapor Production:** Air bubbles inside the fluid reservoir causes the device not to produce vapor
- **Pod Leaking :** Randomly the pods will leak during use
- **Charging Issues:** Batteries will not charge as intended
- **Inconsistency:** Overall the performance of this device is not consistent



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(PX1395 (Altria) at 006).

The proposed finding is also incomplete because it fails to mention that Altria developed a new gasket to address the leaking problem in MarkTen Elite. (CCFF ¶¶ 1206-34).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

653. As soon as Altria had discovered Elite's excessive leaking, (*see supra* Part III.E.2), the company had started to work on solutions to the problem. (Schwartz (Altria) Tr. 1888-89; PX1590 (Altria) at 001).

#### **Response to Finding No. 653**

Complaint Counsel does not disagree, but adds that the proposed finding is incomplete because it fails to mention that leaking was a common problem for other pod-based products, including JLI's. (CCFF ¶¶ 1203-05, 1222, 1483-90).

The proposed finding is also incomplete because it fails to mention that Altria developed a new gasket to address the leaking problem in MarkTen Elite. (CCFF ¶¶ 1206-34).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

654. Altria determined that in large part, the leaking was due to "a leaking gasket. When pressures changed, whether that was in shipping or in the distribution system, it would cause the liquid to come out of the pod." (Begley (Altria) Tr. 1103).

#### **Response to Finding No. 654**

Complaint Counsel does not disagree, but adds that the proposed finding is incomplete because it fails to mention that leaking was a common problem for other pod-based products, including JLI's. (CCFF ¶¶ 1203-05, 1222, 1483-90).

The proposed finding is also incomplete because it fails to mention that Altria developed a new gasket to address the leaking problem in MarkTen Elite. (CCFF ¶¶ 1206-34).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

655. [REDACTED]

**Response to Finding No. 655**

Complaint Counsel does not disagree, but adds that the proposed finding is incomplete because it fails to mention that leaking was a common problem for other pod-based products, including JLI's. (CCFF 1203-05, 1222, 1483-90).

The proposed finding is also incomplete because it fails to mention that Altria developed a new gasket to address the leaking problem in MarkTen Elite. (CCFF 1206-34).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

656. [REDACTED]

}; *see also* RX0547 (Altria) at 006).

**Response to Finding No. 656**

Complaint Counsel does not disagree, but adds that the proposed finding is incomplete because it fails to mention that leaking was a common problem for other pod-based products, including JLI's. (CCFF 1203-05, 1222, 1483-90).

The proposed finding is also incomplete because it fails to mention that Altria developed a new gasket to address the leaking problem in MarkTen Elite. (CCFF 1206-34).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (See Responses to RPF 460-77).

657. Nu Mark also experimented with { [REDACTED] }, as well as shipping the pods in blister packs and without caps over the cartridge, (RX0547 (Altria) at 007).

#### **Response to Finding No. 657**

Complaint Counsel does not disagree, but adds that the proposed finding is incomplete because it fails to mention that leaking was a common problem for other pod-based products, including JLI's. (CCFF 1203-05, 1222, 1483-90).

The proposed finding is also incomplete because it fails to mention that Altria developed a new gasket to address the leaking problem in MarkTen Elite. (CCFF 1206-34).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (See Responses to RPF 460-77).

658. By March 2018, a series of these quick fixes had reduced Elite's leaking. (PX4129 (Altria) (showing improvement in leaking)).

#### **Response to Finding No. 658**

Complaint Counsel does not disagree, but adds that the proposed finding is incomplete because it fails to mention that leaking was a common problem for other pod-based products, including JLI's. (CCFF 1203-05, 1222, 1483-90).

The proposed finding is also incomplete because it fails to mention that Altria developed a new gasket to address the leaking problem in MarkTen Elite. (CCFF 1206-34).



To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

659. 

#### **Response to Finding No. 659**

Complaint Counsel does not disagree, but adds that the proposed finding is incomplete because it fails to mention that leaking was a common problem for other pod-based products, including JLI's. (CCFF 1203-05, 1222, 1483-90).

The proposed finding is also incomplete because it fails to mention that Altria developed a new gasket to address the leaking problem in MarkTen Elite. (CCFF 1206-34).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

660. The replacement gasket was called the C1A gasket. (Garnick (Altria) Tr. 1622; Schwartz (Altria) Tr. 1898; Gardner (Altria) Tr. 2664).

#### **Response to Finding No. 660**

Complaint Counsel does not disagree.

661. Testing on the C1A gasket demonstrated that it further improved—but did not entirely resolve—Elite's leaking. (PX1556 (Altria) at 002; PX1560 (Altria) at 002; Schwartz (Altria) Tr. 1901-02; 1908-10; Gardner (Altria) Tr. 2664; PX7016 Jupe (Altria) Dep. at 122; PX7026 Gardner (Altria) Dep. at 187-88).

#### **Response to Finding No. 661**

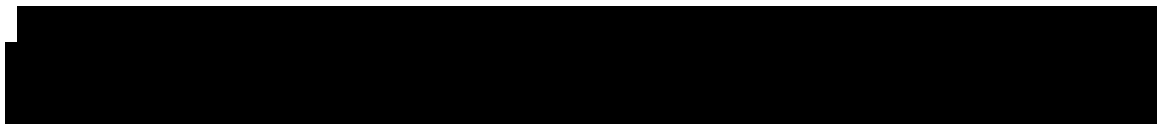
The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete because it fails to mention that leaking was a common problem for other pod-based products, including JLI's. (CCFF ¶¶ 1203-05, 1222, 1483-90).

The proposed finding is also incomplete because it fails to mention that Altria developed a new gasket to address the leaking problem in MarkTen Elite. (CCFF ¶¶ 1206-34).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

662.

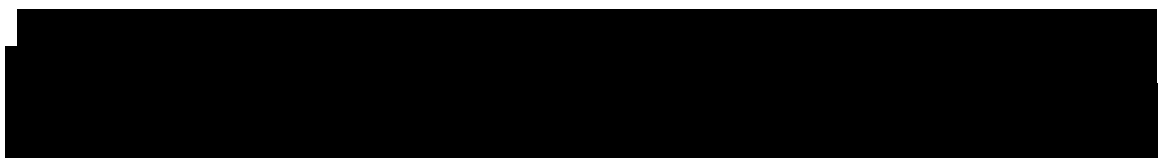
; *see also* Schwartz (Altria) Tr. 1892; Quigley (Altria) Tr. 1946).

#### **Response to Finding No. 662**

Complaint Counsel does not disagree, but adds that the proposed finding is incomplete because it fails to mention that Altria commercialized Elite with the new c1A gasket for less than a month before pulling Elite from the market and that the new gasket substantially reduced leaking in MarkTen Elite. (CCFF ¶¶ 1149, 1206-34). The proposed finding is also incomplete because it fails to mention that Schwartz testified that the FDA permitted product changes that addressed quality or safety issues, without requiring PMTA approval for those changes. (Schwartz (Altria) Tr. 1892; PX7018 (Schwartz (Altria), Dep. at 28-29, 90-91, 107)).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

663.

; *see*

*also* Schwartz (Altria) Tr.1891-92). Representatives from Altria’s legal, regulatory, and product integrity teams—the “three big areas as far as change is concerned”—all served on the CMT. (Schwartz (Altria) Tr. 1894).

### **Response to Finding No. 663**

Complaint Counsel does not disagree, but adds that the proposed finding is incomplete because it fails to mention that Altria commercialized Elite with the new c1A gasket for less than a month before pulling Elite from the market and that the new gasket substantially reduced leaking in MarkTen Elite. (CCFF ¶¶ 1149, 1206-34).

The proposed finding is further incomplete because it fails to acknowledge that JLI also made product changes to JUUL to address a leaking issue. (CCFF ¶¶ 1203-05, 1486-87).

To the extent that the proposed finding attributes significance to MarkTen Elite’s leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 460-77. (*See* Responses to RPF ¶¶ 460-77).

664. The gasket went through this change review process “to make sure that [Nu Mark was] fixing the gasket, addressing the leak, but in that . . . effort, making sure that [it was] not doing anything to compromise what was described as the predicate . . . product for FDA purposes.” (Schwartz (Altria) Tr. 1891).

### **Response to Finding No. 664**

Complaint Counsel does not disagree, but adds that the proposed finding is incomplete because it fails to mention that Altria commercialized Elite with the new c1A gasket for less than a month before pulling Elite from the market and that the new gasket substantially reduced leaking in MarkTen Elite. (CCFF ¶¶ 1149, 1206-34).

The proposed finding is further incomplete because it fails to acknowledge that JLI also made product changes to JUUL to address a leaking issue. (CCFF ¶¶ 1203-05, 1486-87).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

665. Some at Altria were concerned that the gasket change would change the aerosol mass of the device's vapor output, which would be a performance change that would create a "new" product not permitted on the market without FDA approval. (PX7026 Gardner (Altria) Dep. at 255-57; PX4145 (Altria) at 005, 013).

#### **Response to Finding No. 665**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete because it fails to mention that Altria commercialized Elite with the new c1A gasket for less than a month before pulling Elite from the market and that the new gasket substantially reduced leaking in MarkTen Elite. (CCFF 1149, 1206-34).

The proposed finding is further incomplete because it fails to acknowledge that JLI also made product changes to JUUL to address a leaking issue. (CCFF 1203-05, 1486-87).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

666. The CMT met on June 19, 2018. (RX0722 (Altria) at 002). The "CMT approved proceeding with the modifications to the gasket to reduce leakage," and Nu Mark approved the decision. (PX1841 (Altria) at 001; *see also* RX0722 (Altria) at 002).

#### **Response to Finding No. 666**

Complaint Counsel does not disagree, but adds that the proposed finding is incomplete because it fails to mention that Altria commercialized Elite with the new c1A gasket for less than a month before pulling Elite from the market and that the new gasket substantially reduced leaking in MarkTen Elite. (CCFF 1149, 1206-34).

The proposed finding is further incomplete because it fails to acknowledge that JLI also made product changes to JUUL to address a leaking issue. (CCFF ¶¶ 1203-05, 1486-87).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 460-77. (*See Responses to RPF ¶¶ 460-77*).

667. As a June 20 email explains, the CMT's initial approval was elevated to "to go through the appellate process before the decision [was] finalized," because "[t]here were a number of dissenters, and the decision [was] sufficiently close that the issues should be aired so all concerned [were] fully informed of its premises." (PX1206 (Altria); *see also* RX0722 (Altria) at 002).

#### **Response to Finding No. 667**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete because it fails to mention that Altria commercialized Elite with the new c1A gasket for less than a month before pulling Elite from the market and that the new gasket substantially reduced leaking in MarkTen Elite. (CCFF ¶¶ 1149, 1206-34).

The proposed finding is further incomplete because it fails to acknowledge that JLI also made product changes to JUUL to address a leaking issue. (CCFF ¶¶ 1203-05, 1486-87).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 460-77. (*See Responses to RPF ¶¶ 460-77*).

668. The appellate meeting—attended by Willard, Garnick, Begley, Quigley, Murillo, Gardner, and others—was held on June 26, 2018. (RX0722 (Altria) at 002). No decision was made at the meeting. (RX0722 (Altria) at 002).

#### **Response to Finding No. 668**

Complaint Counsel does not disagree, but adds that the proposed finding is incomplete because it fails to mention that Altria commercialized Elite with the new c1A gasket for less than

a month before pulling Elite from the market and that the new gasket substantially reduced leaking in MarkTen Elite. (CCFF ¶¶ 1149, 1206-34).

The proposed finding is further incomplete because it fails to acknowledge that JLI also made product changes to JUUL to address a leaking issue. (CCFF ¶¶ 1203-05, 1486-87).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

669. [REDACTED] }; *see also* Quigley (Altria) Tr. 2058; PX4178 (Altria) at 001).

#### **Response to Finding No. 669**

Complaint Counsel does not disagree. However, to the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is also misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

670. [REDACTED] }; *see also* Garnick (Altria) Tr. 1636).

#### **Response to Finding No. 670**

The proposed finding is incomplete, unreliable, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that [REDACTED]

[REDACTED] } the proposed finding is incomplete and unreliable because it fails to note that Altria's testimony and advocacy on this issue was inconsistent over the course of Complaint

Counsel’s investigation. In its October 15, 2019, narrative response, Altria attributed its decision to discontinue its e-vapor products “in large part” to “e-liquid leaking issues.” (PX0007 (Altria) at 025).

Altria later submitted a White Paper, dated February 27, 2020, to FTC Staff, which stated that “Altria’s pod-based product, Elite, had serious leaking problems and attempts to fix it in a way that did not require submitting a PMTA for new market authorization were unsuccessful,” “[g]iven the seriousness of the issue and the potential consequences, Howard Willard changed direction and ‘did not want to undertake that regulatory risk’ of moving forward with the gasket change without FDA pre-approval,” and “[a]lthough Nu Mark attempted to design a new gasket to alleviate the leaking, the gasket resulted in a number of unintended consequences and Altria concluded that the gasket change could not be made without receiving a market order from the FDA.” (CCFF ¶ 1224). Before June 15, 2020, Altria executives testified that Altria did not approve the c1A change and { [REDACTED] } (CCFF ¶ 1225; *see also* RPF ¶ 671).

However, on June 15, 2020, Altria sent Complaint Counsel a letter stating that “[w]e have recently learned that Nu Mark ultimately incorporated a replacement gasket into Elite and that Nu Mark distributed Elite units with the replacement gasket to its customers for sale to consumers in the fall of 2018. The replacement gasket was known as the c1A gasket . . . .” (CCFF ¶ 1226).

To the extent that the proposed finding attributes significance to MarkTen Elite’s leaking problem, the proposed finding is also misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 460-77. (*See Responses to RPF ¶¶ 460-77*).

671. Several others at Altria recall Willard’s reversal, and accordingly testified at points in this proceeding that they did not believe the gasket change ever had been made. (Quigley

(Altria) Tr. 1946-47; PX7027 Murillo (Altria/JLI) Dep. at 168; PX7036 Garnick (Altria) Dep. at 22; PX7003 Quigley (Altria) IHT at 81; PX7031 Willard (Altria) Dep at 59-60; PX7000 Garnick (Altria) IHT at 113-14).

### **Response to Finding No. 671**

The proposed finding is incomplete, unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete and unreliable for the reasons cited in response to RPF 670. (*See* Response to RPF 670).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is also misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See* Responses to RPF 460-77).

672. In fact, Willard's changed decision never was communicated to Nu Mark operations and the gasket change was implemented. (Schwartz (Altria) Tr. 1905 ("So we bobbed and weaved accordingly and we were in production in August and delivering product September/October."); Garnick (Altria) Tr. 1636 ("[T]he gasket was implemented at some point.")).

### **Response to Finding No. 672**

The proposed finding is incomplete, unreliable, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that "Willard's changed decision never was communicated to Nu Mark operations," the proposed finding is incomplete and unreliable for the reasons cited in response to RPF 670. (*See* Response to RPF 670). Furthermore, the proposed finding is contradicted by Willard's testimony that "certainly members of the Nu Mark organization would have been aware of" the order not to put the new gasket into Elite units going into the marketplace. (PX7031 Willard (Altria) Dep. at 61).



To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is also misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

To the extent that the proposed finding claims that "the gasket change was implemented," Complaint Counsel does not disagree.

673. As soon as Altria realized that the gasket had in fact been implemented, it notified Complaint Counsel. (PX7036 Garnick (Altria) Dep. at 22 ("[A]fter I gave the deposition, I was informed that the gasket to the MarkTen Elite was implemented and product with the gasket was sold. When I was informed by that, I directed outside counsel to send a letter to the FTC to that effect and identifying some documents to base that on."); RX2007 (Altria) (June 15, 2020 letter to Complaint Counsel)).

### **Response to Finding No. 673**

The proposed finding is incomplete and unreliable for the reasons cited in response to RPF 670. (*See Response to RPF 670*).

The proposed finding is also incomplete because it fails to acknowledge that it took Respondents over seven months to disclose that the gasket change for MarkTen Elite was actually implemented. (*See Response to RPF 670*).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is also misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

674. Ultimately though, the precise order of events related to the gasket matters little, as did the gasket change itself. The gasket change was an important step toward resolving Elite's leaking problems, but it was not going to transform Elite into a successful product because it did not remedy Elite's lack of nicotine satisfaction. (Quigley (Altria) Tr. 1947-48, 2057-59; *see also* PX7041 Quigley (Altria) Dep. at 153-54; PX7003 Quigley (Altria) IHT at 118-19). By the summer and fall of 2018, retailers were less concerned about Elite's leaking and "more concerned about, you know, the product itself and the fact that it wasn't moving very quickly, and because it didn't have, in their mind, the right level of nicotine and nicotine salts." (PX7038 Myers (Altria) Dep. at 87).

### **Response to Finding No. 674**

The proposed finding is unsupported, incomplete, unreliable, misleading, and contrary to the weight of the evidence.

The first sentence of the proposed finding is unsupported in that it cites no evidence in the record.

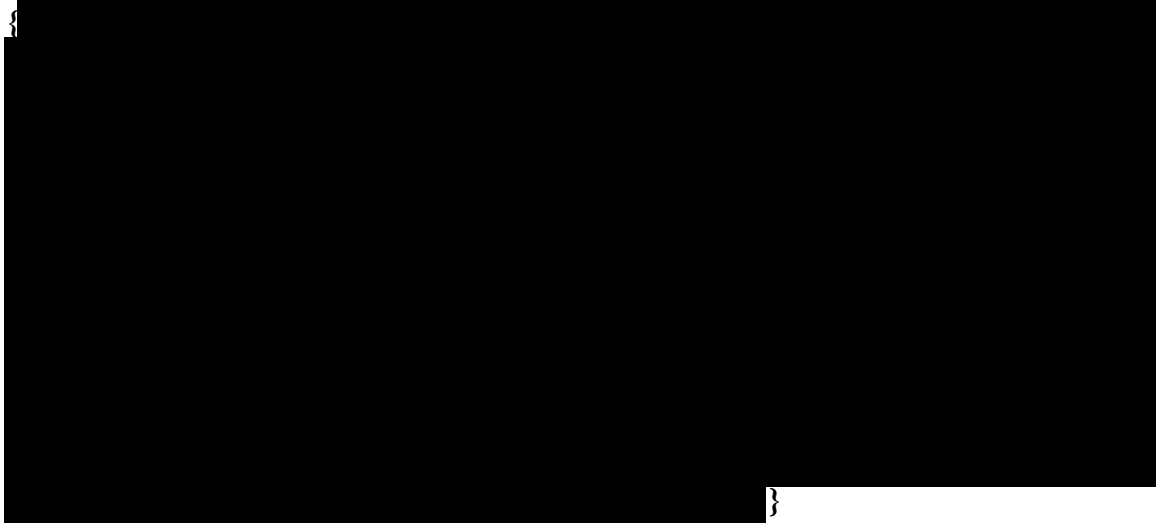
To the extent that the proposed finding claims that “[t]he gasket change was an important step toward resolving Elite’s leaking problems, but it was not going to transform Elite into a successful product because it did not remedy Elite’s lack of nicotine satisfaction,” the proposed finding is incomplete, misleading, and unreliable for the reasons cited in response to RPF 670. (See Response to RPF 670). In particular, in its October 15, 2019, narrative response, Altria attributed its decision to discontinue its e-vapor products “in large part” to “e-liquid leaking issues.” (PX0007 (Altria) at 025).

The proposed finding is also incomplete and misleading because it fails to acknowledge that Altria implemented the c1A gasket in MarkTen Elite less than one month before withdrawing the product from the market, which is not enough time to determine how the market would react to the improved product. (CCFF ¶¶ 1149, 1206-34). In October 2018, after Altria introduced the c1A gasket, e-commerce leakage complaints for MarkTen Elite plummeted while MarkTen Elite e-commerce sales grew from about 3,000 per day on October 1, 2018 to over 10,000 per day on October 25, 2018, when Altria announced the discontinuation of Elite. (CCFF ¶¶ 1220-21).

To the extent that the proposed finding claims that MarkTen Elite did not provide adequate “nicotine satisfaction” and that it did not have “the right level of nicotine and nicotine salts,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 612-14, 616, 638, 650. (See Responses to RPF ¶¶ 612-14, 616, 638, 650).

To the extent that the proposed finding attributes significance to MarkTen Elite’s leaking problem, the proposed finding is also misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (See Responses to RPF 460-77).

675. {



**Response to Finding No. 675**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that { } and { } { } the proposed finding is unreliable for the reasons cited in response to RPF 670. (See Response to RPF 670). In particular, in its October 15, 2019, narrative response, Altria attributed its decision to discontinue its e-vapor products “in large part” to “e-liquid leaking issues.” (PX0007 (Altria) at 025).

The proposed finding is incomplete and misleading because it fails to acknowledge that Altria implemented the c1A gasket in MarkTen Elite less than one month before withdrawing the product from the market, which is not enough time to determine how the market would react to the improved product. (CCFF 1149, 1206-34). In October 2018, after Altria introduced the c1A

gasket, e-commerce leakage complaints for MarkTen Elite plummeted while MarkTen Elite e-commerce sales grew from about 3,000 per day on October 1, 2018 to over 10,000 per day on October 25, 2018, when Altria announced the discontinuation of Elite. (CCFF ¶¶ 1220-21).

To the extent that the proposed finding claims that [REDACTED]

[REDACTED] } the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612-14, 616, 638, 650. (*See Responses to RPF 612-14, 616, 638, 650*).

To the extent that the proposed finding attributes significance to MarkTen Elite's leaking problem, the proposed finding is also misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 460-77. (*See Responses to RPF 460-77*).

## **2. The Scientists And Regulatory Experts Informed Leadership Of The Nu Mark Products' Failings And Poor PMTA Prospects**

676. Immediately after they were installed in their new roles, Brian Quigley, Murray Garnick, and K.C. Crosthwaite began to assess and reorient their respective organizations. They each embarked on a "deep dive" analysis—"what is the situation, and then what are the gaps, how do we think about this and then build strategic plans going forward of how you would expect to address that." (Gifford (Altria) Tr. 2757-60; *see also* Quigley (Altria) Tr. 2018-19 (describing 100-day annual planning process "called game plan")). For Quigley and Garnick, conversations with Altria's scientists revealed the full extent of the troubled state of Nu Mark's products:

### **Response to Finding No. 676**

The proposed finding is unsupported, incomplete, misleading, and contrary to the weight of the evidence.

The first and final sentences of the proposed finding are unsupported in that they cite no evidence in the record.

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The proposed finding is incomplete and misleading because it fails to note that that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

The proposed finding is contrary to the weight of the evidence. Altria's e-cigarette products were profitable and commercially successful. (CCFF ¶¶ 1088-131). Altria anticipated that its products would be profitable in the future. (CCFF ¶¶ 1083-87). The financial performance of Altria's cigalike products improved continuously from 2016 to 2018 and Altria consistently assessed that its cigalike products were doing well and meeting targets. (CCFF ¶¶ 1088-111). MarkTen Elite's sales grew continuously from the launch of the product until September 2018. (CCFF ¶¶ 1112-31). Altria thought that the in-market versions of MarkTen cigalike and MarkTen Elite could achieve PMTA approval and was planning to submit PMTAs for improved versions of the products before the PMTA deadline. (CCFF ¶¶ 1258-300).

**a. Quigley Learned That The Existing Nu Mark Products Could Not Succeed Without The Right Nicotine Salts Formula**

677. Quigley quickly determined after an initial assessment that “drastic change” was required. (Quigley (Altria) Tr. 2050; RX0451 (Altria) at 001). He saw “things [were not] going well” and that “significant change” was needed to “get things on the right path.” (Gifford (Altria) Tr. 2778-79; *see also* PX7003 Quigley (Altria) IHT at 40 (“[T]he business was worse off than I thought.”)).

**Response to Finding No. 677**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “‘drastic change’ was required” at Nu Mark, “things were not going well,” and “‘significant change’ was needed to ‘get things on the right path,’” the proposed finding is vague because it is non-specific as to the problems identified and changes purportedly needed.

The proposed finding is incomplete and misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

The proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 612, 614, 616, 676. (*See Responses to RPF ¶¶ 612, 614, 616, 676*).

678. Accordingly, Quigley revised Nu Mark’s vision and mission statements to focus on “switching” smokers. (Quigley (Altria) Tr. 2013-14; RX0371 (Altria) at 018). It was clear to him that if Nu Mark was going to succeed, it had to find a way to “ensure that the nicotine experience [was] going to be what it need[ed] to be to get a smoker to put down a pack of cigarettes and move to an e-cigarette product.” (Quigley (Altria) Tr. 2014).

#### **Response to Finding No. 678**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding implies that Nu Mark’s products were not commercially successful, could not convert smokers, or were unlikely to achieve PMTA approval, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 612, 614, 616, 676. (*See Responses to RPF ¶¶ 612, 614, 616, 676*).

679. Quigley also began meeting with Altria’s scientists like Dr. Gerd Kobal, to familiarize himself with what the scientists had learned about nicotine salts and to discuss the path forward. (Jupe (Altria) Tr. 2265-67).

#### **Response to Finding No. 679**

Complaint counsel has no specific response.

680. Dr. Kobal was an Altria scientist who ran the company’s “Sensomics department,” which studied “the senses and interaction with our products,” (Quigley (Altria) Tr. 2005), and he worked on product development within Altria’s regulatory sciences group, (Jupe (Altria) Tr. 2217). Dr. Kobal’s work involved extensive research on nicotine salts, and he “interacted with members of [Nu Mark] once he . . . figured out not only what’s the right

recipe, understanding the physics of that aerosol particle, and doing some modeling within . . . a simulated environment of how we take aerosol in and how it would go through the lung.” (Jupe (Altria) Tr. 2143; *see also supra* Part V.C.1.b.i).

### **Response to Finding No. 680**

To the extent that the proposed finding stands for the proposition that Altria had a robust scientific department staffed with individuals who were well qualified to conduct research on e-cigarettes, Complaint Counsel does not disagree.

681. Dr. Kobal’s research showed that “the products that were in the [Nu Mark] portfolio, the products that were being worked on, [and] the products that were on the shelf were inadequate to achieve this goal of converting smokers.” (Jupe (Altria) Tr. 2279). By contrast, Dr. Kobal’s analysis demonstrated that JUUL possessed an optimal formulation of nicotine salts, allowing it to mimic the nicotine delivery of a cigarette. (Jupe (Altria) Tr. 2265-68, 2271-74; Gardner (Altria) Tr. 3086-87).

### **Response to Finding No. 681**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on hearsay testimony concerning the technical views of a non-witness.

To the extent that the proposed finding claims that “the products that were in the [Nu Mark] portfolio, the products that were being worked on, [and] the products that were on the shelf were inadequate to achieve this goal of converting smokers,” and “JUUL possessed an optimal formulation of nicotine salts, allowing it to mimic the nicotine delivery of a cigarette” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612, 614, 616, 676. (*See Responses to RPF 612, 614, 616, 676*).

682. Accordingly, Altria’s scientists tried “as much as [they] could” to convey the message about nicotine satisfaction and salts to Altria leadership in the summer of 2018, (Jupe (Altria) Tr. 2283), and product development started “putting this through the communication chain to basically say, look, our recommendation is to stop working on this Elite as it is, let’s stop working on products that have no satisfaction, and let’s refocus our efforts,” (Jupe (Altria) Tr. 2280-81).

### **Response to Finding No. 682**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on hearsay testimony concerning the technical views of an undefined class of non-witnesses.

To the extent that the proposed finding implies that Nu Mark's products lacked nicotine satisfaction, could not convert smokers, could not achieve PMTA approval, or were not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612, 614, 616, 676. (*See Responses to RPF 612, 614, 616, 676*).

683. In particular, Dr. Kobal and other Altria scientists informed Quigley in June 2018 of their view on the necessity of nicotine salts. (Quigley (Altria) Tr. 2006-07; RX0419 (Altria) at 002; *see also* PX4504 (Altria) at 024; *supra* Part V.C.1.b.i).

#### **Response to Finding No. 683**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on hearsay testimony concerning the technical views of a non-witness and an undefined class of non-witnesses. None of these employees gave testimony of any kind in this matter.

To the extent that the proposed finding implies that nicotine salts are necessary for e-cigarette products to achieve PMTA approval or to be commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612, 614, 616, 676. (*See Responses to RPF 612, 614, 616, 676*).

684. When Quigley learned of this view, he too had an "aha" moment. (Quigley (Altria) Tr. 2076; *see also* Quigley (Altria) Tr. 2029 (agreeing that discovery of nicotine salts' necessity was the "eureka" moment he and Dr. Kobal had in early June)). Dr. Kobal showed Quigley the market comparison of the pH of all e-vapor products, which illustrated that none of Nu Mark's products "had enough acid to have the pH to be similar to a cigarette." (Quigley (Altria) Tr. 2007; *see also supra* Part V.C.1.b.i-ii).

#### **Response to Finding No. 684**



The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on hearsay testimony concerning the technical views of a non-witness.

The proposed finding is incomplete and misleading because it fails to note that that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding implies that a particular pH or nicotine salt level is necessary for e-cigarette products to achieve PMTA approval or to be commercially successful and claims that Altria only discovered the significance of pH and nicotine salts in June 2018, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612, 614, 616, 676. (*See Responses to RPF 612, 614, 616, 676*).

685. Quigley learned from Kobal and Jupe that there were other features desired in an e-vapor product but “at the end of the day, if you didn’t have the immediate nicotine satisfaction, you would not be successful.” (Quigley (Altria) Tr. 2013; *see also* PX4504 (Altria) at 024; RX0419 (Altria) at 002). As Quigley explained at trial, drawing on his experience “work[ing] in the diaper business,” he came to understand that an e-vapor product that does not deliver nicotine satisfaction is a like a diaper that leaks—it does not do its job. (Quigley (Altria) Tr. 2015-16 (“[Y]ou could add velcro tabs and you can make them pull up and make them more comfortable, but if your diaper is leaking, no one is going to come back and buy your diaper.”)).

### **Response to Finding No. 685**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on hearsay testimony concerning the technical views of a non-witness and a testifying witness. None of these employees gave testimony of any kind in this matter.

The proposed finding is incomplete and misleading because it fails to note that that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding implies that a certain level of “nicotine satisfaction” was necessary for an e-cigarette product to have commercial success, that Altria’s e-cigarettes lacked “nicotine satisfaction,” and that Altria’s e-cigarettes were not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612, 614, 616, 676. (See Responses to RPF 601-03, 612, 614, 616, 676).

686. “[A]t [that] moment, [Quigley] felt like [he] had learned something that was . . . the most foundational thing about [Nu Mark],” and it gave him “the foundation to know . . . the problem with all of [Nu Mark’s] products,” and “what [Nu Mark] had to do to build a plan.” (Quigley (Altria) Tr. 2008).

#### **Response to Finding No. 686**

The proposed finding is vague, incomplete, and misleading.

To the extent that the proposed finding claims that “[A]t [that] moment, [Quigley] felt like [he] had learned something that was . . . the most foundational thing about [Nu Mark],’ and it gave him ‘the foundation to know . . . the problem with all of [Nu Mark’s] products,’ and ‘what [Nu Mark] had to do to build a plan,’” the proposed finding is vague because it does not specify a timeframe or explain the “problem” to which it refers.

The proposed finding is incomplete and misleading because it fails to note that that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding was intended to refer back to or expand upon RPF 685, Complaint Counsel incorporates its response to that proposed finding herein. (*See* Response to RPF 685).

687. But realizing the importance of salts and identifying the optimal ratio of nicotine to salts was only the first step. (Quigley (Altria) Tr. 2008-09). As Jupe explained, Altria still needed to determine “[w]hat type of acid? Is it acetic acid? Is it lactic acid? Is it benzoic acid?” (Jupe (Altria) Tr. 2140). And what is the “right ratio of those three acids in combination with the right ratio of the nicotine[?]” (Jupe (Altria) Tr. 2140). “Some acids give a vinegary taste to the product, so there’s an off note associated with these acids. And so that’s one big challenge, making sure you can get it in there at a level that doesn’t give a negative note unto itself.” (PX7016 Jupe (Altria) Dep. at 333).

### **Response to Finding No. 687**

The proposed finding is incomplete, misleading, unreliable, and contrary to the weight of the evidence.

To the extent that the proposed finding implies that nicotine salts or a certain nicotine salt formula were necessary for an e-cigarette product to have commercial success, that Altria only discovered the significance of nicotine salts in mid-2018, that Altria’s e-cigarettes were not commercially successful, that Altria’s e-cigarettes could not convert smokers, or that Altria’s e-cigarettes could not achieve PMTA approval, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612, 614, 616, 676. (*See* Responses to RPF 612, 614, 616, 676).

The proposed finding is incomplete and misleading because it also fails to note that Altria conducted consumer studies on high nicotine Elite 2.0 formulas with nicotine salts in October 2018 and the results indicated that one prototype mix was well received, with participants praising the nicotine experience and smooth draw. (CCFF 1291-92).

Finally, the proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730).

The proposed finding is unreliable since it relies solely on self-serving testimony.

688. In addition, Altria would have to test the “flavor system interacting with the acids, interacting with the nicotine.” (Jupe (Altria) Tr. 2147). “There’s a whole stability of the flavor system. The flavor system now has to be designed to co-exist with the acids because you do get some negative taste aspects of the acids.” (PX7016 Jupe (Altria) Dep. at 333).

### **Response to Finding No. 688**

The proposed finding is vague and unreliable.

To the extent that the proposed finding claims that “Altria would have to test the ‘flavor system interacting with the acids, interacting with the nicotine’” and “[t]here’s a whole stability of the flavor system. The flavor system now has to be designed to co-exist with the acids because you do get some negative taste aspects of the acids,” the proposed finding is vague because it does not specify what products it is referring to, a timeframe, or the significance of the “flavor system.”

To the extent that the proposed finding was intended to refer back to or expand upon RPF ¶ 687, Complaint Counsel incorporates its response to that proposed finding herein. (*See* Response to RPF ¶ 687).

The proposed finding is unreliable since it relies solely on self-serving testimony.

689. Further, Altria would have to determine that the salts formula used would not “degrade” the components in the product: “[T]he flavor system has to survive within the pod, within a packed-down environment for at least six months to a year, such that it doesn’t interact with the metals. Amino acids, obviously interact with metals. They interact with plastics.” (PX7016 Jupe (Altria) Dep. at 333-34).

### **Response to Finding No. 689**

The proposed finding is vague and unreliable.

To the extent that the proposed finding claims that “Altria would have to determine that the salts formula used would not ‘degrade’ the components in the product: ‘[T]he flavor system has to survive within the pod, within a packed-down environment for at least six months to a year, such that it doesn’t interact with the metals. Amino acids, obviously interact with metals. They interact with plastics,” the proposed finding is vague because it does not specify what products it is referring to, a timeframe, the significance of the technical details of nicotine salt development referenced, whether Altria was able to meet the technical requirements referenced, or whether Altria had any difficulty in doing so.

To the extent that the proposed finding is intended to refer back to or expand upon RPF 687-88, Complaint Counsel incorporates its response to that proposed finding herein. (*See Responses to RPF 687-88*).

The proposed finding is unreliable since it relies solely on self-serving testimony.

690. Finally, if it managed the steps above, Nu Mark still would need put that salts formula “in a format and deliver that aerosol in a product that consumers will want to use as opposed to their cigarettes.” (PX7016 Jupe (Altria) Dep. at 334).

### **Response to Finding No. 690**

The proposed finding is misleading, unreliable, and contrary to the weight of the evidence.

To the extent that the proposed finding is intended to refer back to or expand upon RPF 687-89, Complaint Counsel incorporates its responses to those proposed findings herein. (*See Responses to RPF 687-89*).

To the extent that the proposed finding implies that a non-cigalike form factor was required for PMTA approval, to convert smokers, or for an e-cigarette to be commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 566-69, 612. (*See Responses to RPF 566-69, 612*).

In addition, the FDA is considering a possible association between the pod-based form factor and youth vaping, meaning that cigalike products could have an advantage in the PMTA process. (CCFF ¶¶ 1328-31)). And a number of e-cigarette manufacturers continue to market cigalike products. CCFF ¶¶ 1173-76.

The proposed finding is unreliable since it relies solely on self-serving testimony.

691. In sum, if Altria “kn[e]w the right ratio” of nicotine to acids, there are still “a lot more pieces to the puzzle” of designing “a successful product that has the potential to convert smokers from cigarettes to e-vapor products.” (PX7016 Jupe (Altria) Dep. at 334).

### **Response to Finding No. 691**

The proposed finding is vague, misleading, unreliable, and contrary to the weight of the evidence.

To the extent that the proposed finding implies that e-cigarette products need “the right ratio” of nicotine salts to be commercially successful, to convert smokers, or to achieve PMTA approval, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 612, 614, 616, 676. (*See Responses to RPF ¶¶ 612, 614, 616, 676*).

To the extent that the proposed finding claims that “there are still ‘a lot more pieces to the puzzle’ of designing ‘a successful product that has the potential to convert smokers from cigarettes to e-vapor products,’” the proposed finding is vague because it does not specify the “pieces to the puzzle” or explain whether Altria’s products had them or could incorporate them.

The proposed finding is unreliable since it relies solely on self-serving testimony.

Furthermore, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶ 687. (*See Response to RPF ¶ 687*).

692. And even if Altria had been able to solve all of the “pieces to the puzzle” in 2018, it still would be “two years too late because the market had [already] been locked” in place by the Deeming Rule. (Jupe (Altria) Tr. 2142; PX7016 Jupe (Altria) Dep. at 334). Altria

could not add nicotine salts to its e-vapor formulations “and commercialize it, because now that was considered a new product, and that new product would first require authorization from the agency by going through [the] PMTA pathway.” (Jupe (Altria) Tr. 2230; *see also* Jupe (Altria) Tr. 2256; Murillo (JLI/Altria) Tr. 2927-28; Begley (Altria) Tr. 1081).

### **Response to Finding No. 692**

The proposed finding is vague, unreliable, and misleading.

The proposed finding is vague because the phrase “pieces to the puzzle” is ambiguous.

To the extent that the proposed finding claims that ““the market had [already] been locked’ in place by the Deeming Rule,” the proposed finding is misleading for the reasons cited in response to RPF 573. (*See* Response to RPF 573).

To the extent that the proposed finding claims that “Altria could not add nicotine salts to its e-vapor formulations ‘and commercialize it, because now that was considered a new product, and that new product would first require authorization from the agency by going through [the] PMTA pathway,’” the proposed finding is misleading because, in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF 1257), and would have been able to keep its e-cigarette products on the market until PMTAs were ready for Altria’s next-generation e-cigarette products like Elite 2.0. (CCFF 1298-1300). Moreover, in 2018, Altria developed a version of MarkTen Elite 2.0 with an improved nicotine salt formula that it considered “approximately the right ratio needed to achieve nicotine satisfaction” and various other product improvements, and tested it on consumers. (CCFF 1282-94). Altria had plans to submit PMTAs for improved versions of its MarkTen cigalike products and MarkTen Elite 2.0 before the then-PMTA deadline. (CCFF 1295-300).

The proposed finding is unreliable since it relies solely on self-serving testimony.

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Finally, the proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730).

**b. Garnick Learned That Altria Could Not Get PMTA Approval For Nu Mark's Existing Products**

693. In his new role as head of Regulatory Sciences, Garnick also began having “a series of meetings with the scientists” on a weekly basis starting in June 2018 to understand “what the problems were” with Nu Mark’s e-vapor products. (Garnick (Altria) Tr. 1712; Jupe (Altria) Tr. 2265; *see also* Gardner (Altria) Tr. 2578-2579, 2581; PX7036 Garnick (Altria) Dep. at 69).

**Response to Finding No. 693**

The proposed finding is vague and contrary to the weight of the evidence.

To the extent that the proposed finding claims that Nu Mark’s products had “problems,” the proposed finding is vague and contrary to the weight of the evidence. The proposed finding is vague because it is non-specific as to the “problems” faced by “Nu Mark’s e-vapor products.”

The proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 612, 614, 616, 676. (*See* Responses to RPF ¶¶ 612, 614, 616, 676).

To the extent that the proposed finding claims that “[i]n his new role as head of Regulatory Sciences, Garnick also began having ‘a series of meetings with the scientists’ on a weekly basis starting in June 2018,” Complaint Counsel has no specific response.

694. The scientists presented Garnick with “a fairly dire view of the likelihood of many of our products getting FDA approval.” (Willard (Altria) Tr. 1382-83).

**Response to Finding No. 694**

The proposed finding is vague, unreliable, and contrary to the weight of the evidence.

The proposed finding is unreliable since it relies solely on self-serving testimony.

To the extent that the proposed finding claims that “scientists presented Garnick with ‘a fairly dire view of the likelihood of many of our products getting FDA approval,’” the proposed



finding is vague because it does not define a timeframe, the relevant products, the specific problems prompted the purportedly “dire” view, or whether they could be addressed.

To the extent that the proposed finding claims that Nu Mark’s products were unlikely to achieve “FDA approval,” the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 612, 614, 616, 676. (*See Responses to RPF 612, 614, 616, 676*).

695. Garnick recalled at trial that in “every single meeting there would be a new problem that we were facing, whether it was the formaldehyde issue . . . or nickel issues or other issues.” (Garnick (Altria) Tr. 1713). “[I]t was exhausting . . . .” (Garnick (Altria) Tr. 1713).

### **Response to Finding No. 695**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies only on self-serving testimony.

To the extent that the proposed finding claims that “Garnick recalled at trial that in ‘every single meeting there would be a new problem that we were facing, whether it was the formaldehyde issue . . . or nickel issues or other issues,’” the proposed finding is vague because it does not define a timeframe, does not explain which products the finding relates to, does not identify all the “problem[s] that [Altria was] facing,” does not explain whether those problems impacted the likelihood of PMTA approval, and does not explain whether the purported problems could be addressed or were addressed and what resources were necessary to address them.

To the extent that the proposed finding references a “formaldehyde issue” the proposed finding is incomplete, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 351-67. (*See Responses to RPF 351-67*). In particular, the proposed finding is incomplete and misleading because it ignores that Altria developed a replacement battery for its MarkTen cigalike products, the BVR 2.8, which incorporated “dry puff prevention” to

address the products' formaldehyde generation issue and that studies showed the BVR 2.8 was successful in reducing formaldehyde levels in the MarkTen cigalike. (CCFF ¶¶ 1277-78).

To the extent that the proposed finding references “nickel issues” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 369, 514. (*See Responses to RPF 369, 514*).

To the extent that the proposed finding claims that Nu Mark's products were unlikely to achieve FDA approval, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 612, 614, 616, 676. (*See Responses to RPF 612, 614, 616, 676*).

696. Indeed, Dr. Gardner earned the nicknames “Bad News Bill” and “Dr. Doom” because he so frequently had to raise “the challenges we had in the chemistry area early on.” (Gardner (Altria) Tr. 2581; *see also* Garnick (Altria) Tr. 1713).

#### **Response to Finding No. 696**

The proposed finding is unreliable, vague, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies solely on self-serving testimony.

To the extent that the proposed finding claims that Dr. Gardner “frequently had to raise ‘the challenges we had in the chemistry area early on,’” the proposed finding is vague because it does not specify what the purported “challenges” were, what products they related to, a specific timeframe, whether the purported challenges could be addressed or were addressed, the resources necessary to address the purported challenges, or the significance of the purported challenges to the likelihood of PMTA approval for Altria's e-cigarette products.

To the extent that the proposed finding claims that Nu Mark's products were unlikely to achieve FDA approval, the proposed finding is contrary to the weight of the evidence for the

reasons cited in response to RPF 612, 614, 616, 676. (See Responses to RPF 612, 614, 616, 676).

697. At trial Gardner agreed that his reports to his “bosses and to executives” did not “ever overstat[e] the issues with the [Nu Mark] products.” (Gardner (Altria) Tr. 2582).

#### **Response to Finding No. 697**

The proposed finding is unreliable, vague, incomplete, and misleading.

The proposed finding is unreliable to the extent that it relies only on self-serving testimony.

To the extent that the proposed finding claims that Dr. Gardner “agreed that his reports to his ‘bosses and to executives’ did not ‘ever overstat[e] the issues with the [Nu Mark] products,’” the proposed finding is vague because it does not specify which “reports” it refers to, when those reports were made, the substance of those reports, which “bosses and [] executives” the reports were issued to, what the purported “issues” were, what products they related to, a specific timeframe, whether the purported issues could be addressed or were addressed, the resources necessary to address the purported issues, or the significance of the purported issues to the likelihood of PMTA approval for Altria’s e-cigarette products.

The proposed finding is incomplete and misleading because it fails to note that on August 14, 2018 Quigley did inform Crosthwaite of his belief that the draft presentation explaining the state of Nu Mark’s e-cigarette business for the August 2018 Board of Directors meeting was telling “only the bad news version of the story.” (CCFF ¶ 1367).

698. In their meetings with Garnick, Gardner and the other scientists advised him that the consensus was that FDA would not approve any PMTA for Altria’s products on the market: “I was told that [Altria’s] e-vapor products that were on the market would not get a PMTA. I was told that by [Altria’s] scientists and I believed them. . . . In fact, I didn’t think there was anyone on the science team who thought that they could get PMTAs.” (PX7036 Garnick (Altria) Dep. at 15). Indeed, a June 18, 2018 email from an Altria scientist to Garnick specifically advised that “no one thinks we can get a PMTA on current Mark Ten product.” (PX1890 (Altria) at 001; Garnick (Altria) Tr. 1725-27).

#### **Response to Finding No. 698**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

To the extent that the proposed finding claims that the “FDA would not approve any PMTA for Altria’s products on the market,” “I didn’t think there was anyone on the science team who thought that they could get PMTAs,” and “no one thinks we can get a PMTA on current Mark Ten product,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 486-527. (*See Responses to RPF 486-527*).

699. As of summer 2018, Altria’s scientists all agreed that none of Altria’s e-vapor products could obtain a PMTA. (Gardner (Altria) Tr. 2590; *see also* PX7036 Garnick (Altria) Dep. at 15; PX7000 Garnick (Altria) IHT at 29 (“There was a problem with each of the products that we had on the market. We did not believe any of them could get a PMTA.”)).

#### **Response to Finding No. 699**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony and hearsay testimony regarding the views of an undefined class of scientists.

To the extent that the proposed finding claims that “As of summer 2018, Altria’s scientists all agreed that none of Altria’s e-vapor products could obtain a PMTA” and “[t]here was a problem with each of the products that we had on the market. We did not believe any of them could get a PMTA,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 486-527. (*See Responses to RPF 486-527*).

700. As a result of his meetings with the scientists, Garnick “developed a view that Altria should pull its e-vapor products from the market,” although this view was “not shared by others at the time.” (Garnick (Altria) Tr. 1583; *see also* PX7000 Garnick (Altria) IHT at 101-02). As he explained, “it would cost a lot of money to create a new version that would get a PMTA. And for every product, then, we would have to file two PMTAs, one to keep the current product on the market and one to introduce a new product.” (PX7036 Garnick (Altria) Dep. at 101-02). In addition, “[e]very single product on the market was losing money,” and “none of the products on the market were effective in converting smokers.” (PX7000 Garnick (Altria) IHT at 101-02).

**Response to Finding No. 700**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “it would cost a lot of money to create a new version that would get a PMTA” and “for every product, then, we would have to file two PMTAs, one to keep the current product on the market and one to introduce a new product,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 486-527. (*See Responses to RPF 486-527*).

To the extent that the proposed finding specifically implies that the “cost” of product development and PMTAs for Altria’s e-cigarette products were a significant concern for Altria, the proposed finding is misleading and contrary to the weight of the evidence because Altria had already spent billions of dollars to compete in the closed- system e-cigarette market, (CCF 427-33), Altria was willing to sacrifice short-term profits to succeed in that market, (CCF 1064-82), and Altria paid \$12.8 billion for its 35 percent interest in JLI and stuck with that investment despite writing down a loss of \$11.3 billion. (CCF 1037-40, 1389).

To the extent that the proposed finding claims that “[e]very single product on the market was losing money,” the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 566-67, 587, 676. (*See Responses to RPF 566-67, 587, 676*).

To the extent that the proposed finding claims that “none of the products on the market were effective in converting smokers,” the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 612-16. (*See Responses to RPF 612-16*).

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

To the extent that the proposed finding claims that Garnick testified that he “developed a view that Altria should pull its e-vapor products from the market,” and that “this view was ‘not shared by others at the time,’” Complaint Counsel does not disagree.

### **3. Quigley Identified “Overarching Gaps” In Nu Mark’s E-Vapor Portfolio**

701. On June 18, 2018, within three weeks of assuming their new roles on June 1, Quigley and Crosthwaite held a day-long strategy session with their teams. (RX1282 (Altria) at 001; RX0371 (Altria)).

#### **Response to Finding No. 701**

Complaint Counsel has no specific response.

702. Quigley previously had met with his immediate team in his first week, and concluded that they “did not yet fully understand what was wrong with the business.” (Quigley (Altria) Tr. 2003-04, 2010-11; *see also* Quigley (Altria) Tr. 2003 (describing meeting with Nu Mark’s leadership team as the “very first thing” he did)). The attendees at the subsequent June 18 meeting were a broader group, including all the senior people from “every function that touched [Nu Mark’s] business,” such as marketing and manufacturing. (Quigley (Altria) Tr. 2010-11).

#### **Response to Finding No. 702**

To the extent that the proposed finding implies something “was wrong with” Nu Mark, the proposed finding is vague, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (*See* Responses to RPF 601-03, 612-16, 676).

To the extent that the proposed finding claims that “Quigley previously had met with his immediate team in his first week,” and “[t]he attendees at the subsequent June 18 meeting were a broader group, including all the senior people from ‘every function that touched [Nu Mark’s] business,’ such as marketing and manufacturing,” Complaint Counsel has no specific response.

703. Quigley wanted to “start to share with them what I was learning and what we were learning[,] to share with them how I was starting to think about the future and what we wanted to accomplish with our business.” (Quigley (Altria) Tr. 2011). “I wanted to make

sure I had feedback and alignment from everybody that touched the business . . . .” (Quigley (Altria) Tr. 2011).

### **Response to Finding No. 703**

The proposed finding is incomplete and misleading because it fails to note that Quigley was given six years to turn around the U.S. Smokeless Tobacco Company, significantly more time than he was given to turn the Nu Mark business around. (CCFF ¶¶ 1152-54).

704. Quigley’s presentation was “informed” by what he “had learned with Gerd [Kobal] and Richard [Jupe],” which was that Nu Mark “had to acknowledge, with the goal of getting smokers to switch,” that “the most important thing that products had to deliver to them was an immediate nicotine experience,” adult smokers’ “#1 requirement.” (Quigley (Altria) Tr. 2012-13; RX0371 (Altria) at 010). Quigley “wanted to make . . . clear to everybody” that “at the end of the day, if you didn’t have the immediate nicotine satisfaction, you would not be successful.” (Quigley (Altria) Tr. 2013).

### **Response to Finding No. 704**

The proposed finding is misleading and contrary to the weight of the evidence.

To the extent that, in claiming “Quigley’s presentation was ‘informed’ by what he ‘had learned with Gerd [Kobal] and Richard [Jupe], which was that Nu Mark ‘had to acknowledge, with the goal of getting smokers to switch,’ that ‘the most important thing that products had to deliver to them was an immediate nicotine experience,’ adult smokers’ ‘#1 requirement,’” the proposed finding refers to RPF 677-92, Complaint Counsel incorporates its response to those proposed findings herein. (*See* Responses to RPF 677-92). The proposed finding is also misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding implies that Nu Mark’s e-cigarette products lacked adequate “nicotine satisfaction” or conversion potential to achieve PMTA approval or to be “successful,” the proposed finding is misleading and contrary to the weight of the evidence for the

reasons cited in response to RPF 601-03, 612-16, 676. (See Responses to RPF 601-03, 612-16, 676).

705. Quigley felt like Nu Mark had not been “clearly articulating what was the goal with our business,” and that it was “critically important that we had to agree . . . that our vapor business’[s] job was to switch smokers.” (Quigley (Altria) Tr. 2014). “[W]hen you use the word ‘switch,’ what we are saying is, we have to ensure that the nicotine experience is going to be what it needs to be to get a smoker to put down a pack of cigarettes and move to an e-cigarette product.” (Quigley (Altria) Tr. 2014). Everyone was encouraged to be “candid” about Nu Mark, because “there was a concern that information was not freely flowing from the scientists to upper management.” (Garnick (Altria) Tr. 1722).

#### **Response to Finding No. 705**

The proposed finding is misleading, vague, and contrary to the weight of the evidence.

The proposed finding is misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding claims that “there was a concern that information was not freely flowing from the scientists to upper management,” the proposed finding is vague because it does not specify the reason for the concerns, which “scientists” and members of “upper management” it refers to, whether the concerns were justified, what the information was, and what the significance of the purported lack of communication was.

To the extent that the proposed finding implies that Nu Mark’s e-cigarette products lacked the capacity to “switch smokers,” that they could not achieve PMTA approval, or that they were not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (See Responses to RPF 601-03, 612-16, 676).

#### **4. Senior Leadership Confronted These Challenges At A Multi-Day Organizational Review**



706. Days after Quigley’s strategy session, on June 21 and 22, Altria’s senior leadership convened for a broader organizational review known as a Level Setting meeting. (RX0221 (Altria) at 003; *see also* RX0221 (Altria) at 007 (listing attendees)).

**Response to Finding No. 706**

The proposed finding is incomplete because it fails to acknowledge that Altria made it clear both within its organization and to investors that its goal was to lead the e-vapor category. (CCFF ¶¶ 411-26, 532-44, 1042-63).

707. Because Willard was new to the CEO role, he “set up the meeting and called it enterprise level setting, and said he wanted the focus of that meeting to be to understand all of [Altria’s] products, understand where [the company was] with them, so he could assess . . . and [the leadership] could all assess where did [the company] stand. That’s why he called it level setting.” (Quigley (Altria) Tr. 2020; *see also* Willard (Altria) Tr. 1375-76 (similar)).

**Response to Finding No. 707**

The proposed finding is incomplete because it fails to acknowledge that Altria made it clear both within its organization and to investors that its goal was to lead the e-vapor category. (CCFF ¶¶ 411-26, 532-44, 1042-63).

708. The meetings included all “the operating company presidents, all the functional [senior vice presidents] and senior leaders, which we refer to as the executive leadership team, plus all of the functional VPs around product innovation, regulatory, and then, you know, probably five or ten other VPs from other functions across the company.” (Quigley (Altria) Tr. 2021). Overall there were “maybe 40 people in the room.” (Quigley (Altria) Tr. 2021).

**Response to Finding No. 708**

The proposed finding is incomplete because it fails to acknowledge that Altria made it clear both within its organization and to investors that its goal was to lead the e-vapor category. (CCFF ¶¶ 411-26, 532-44, 1042-63).

709. In his opening remarks, Willard asked the group to “speak truthfully about the hard things” with regard to “the current situation,” particularly Altria’s “fundamental product and strategy gaps.” (PX4205 (Altria) at 017).

**Response to Finding No. 709**

The proposed finding is vague and contrary to the weight of the evidence.

To the extent that the proposed finding claims, “In his opening remarks, Willard asked the group to ‘speak truthfully about the hard things’ with regard to ‘the current situation,’ particularly Altria’s ‘fundamental product and strategy gaps,’” the proposed finding is vague because the phrases “‘the hard things’ with regard to ‘the current situation’” and “‘strategy gaps’” are ambiguous.

To the extent that the proposed finding implies that Altria’s e-cigarette products could not achieve PMTA approval, were not commercially successful, or had “strategy gaps,” the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (*See Responses to RPF 601-03, 612-16, 676*).

710. As Willard explained at trial: “We wanted everybody to have kind of a level set view across the company. And we also wanted to encourage executives to -- to really spend time with and listen to the more junior individuals in the organization, because it was those individuals that were starting to speak up increasingly and say, we know why we’re not having as much success as you had hoped. And so we were really trying to understand what there was to be learned that could help us be more successful in the future.” (Willard (Altria) Tr. 1376).

### **Response to Finding No. 710**

The proposed finding is unreliable, vague, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on hearsay testimony regarding the views of an undefined class of non-testifying witnesses.

To the extent that the proposed finding claims that Altria’s e-cigarette products were “not having as much success as” hoped for, the proposed finding is vague because it does not specify what Altria’s expectations were, whether Nu Mark met those expectations, and whether those expectations had any bearing on the long-term prospects of Altria’s products.

To the extent that the proposed finding implies that Altria’s e-cigarette products could not achieve PMTA approval or were not commercially successful, the proposed finding is contrary to

the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (*See Responses to RPF 601-03, 612-16, 676*).

711. As the session unfolded, presentation after presentation highlighted the weakness of both Altria's innovative process and e-vapor product pipeline. Quigley led off with a presentation highlighting the “[o]verarching [g]aps”—i.e., “a polite way of saying . . . weakness[es]”—in Nu Mark's existing e-vapor products, including gaps in conversion and regulatory approval potential. (Willard (Altria) Tr. 1377-82; RX0450 (Altria) at 024; *see also* PX4205 (Altria) at 005 (discussing “[g]aps in developing leapfrog products”).

### **Response to Finding No. 711**

The proposed finding is unsupported, vague, misleading, and contrary to the weight of the evidence.

The first sentence of the proposed finding is unsupported in that it cites no evidence in the record.

To the extent that the proposed finding claims that “Altria's innovative process and e-cigarette product pipeline” had “weakness[es]” or “overarching gaps,” including “gaps in conversion and regulatory approval potential” and “gaps in developing leapfrog products,” the proposed finding is vague because it does not specify what the purported gaps or weaknesses were, what significance they had for the commercial or PMTA prospects of Altria's e-cigarette products, whether they could be addressed, whether they were addressed, or the resources necessary to address them. The proposed finding is also misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding implies that Altria's e-cigarette products could not achieve PMTA approval, could not convert smokers, or were not commercially successful, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (*See Responses to RPF 601-03, 612-16, 676*).

712. Quigley took the opportunity to “explain[] to [senior leadership] what Gerd [Kobal] had explained to him”—that is, the scientists’ determination that nicotine salts are “required . . . to provide nicotine satisfaction to adult tobacco consumers.” (Quigley (Altria) Tr. 2022-23, 2028-29; *see also* Jupe (Altria) Tr. 2287-88; RX0450 (Altria) at 024). Nu Mark needed to “[g]round all efforts in nicotine satisfaction first.” (Quigley (Altria) Tr. 2022; *see also* RX0450 (Altria) at 021 (same)).

### **Response to Finding No. 712**

The proposed finding is vague, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not reference a specific timeframe, specify who “senior leadership” refers to, or elaborate on “what Gerd Kobal” explained to Quigley and because the phrase “Nu Mark needed to ‘[g]round all efforts in nicotine satisfaction first,’” is ambiguous. The proposed finding is also misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that in referring to what “Gerd [Kobal] had explained to” Quigley, the proposed finding is referencing RPF ¶¶ 677-92, Complaint Counsel incorporates its responses to those proposed findings herein. (*See* Responses to RPF ¶¶ 677-92).

To the extent that the proposed finding claims that “that nicotine salts are ‘required . . . to provide nicotine satisfaction to adult tobacco consumers’” and implies that Altria’s products did not have adequate “nicotine satisfaction” to convert smokers, achieve PMTA approval, or be commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 601-03, 612-16, 676. (*See* Responses to RPF ¶¶ 601-03, 612-16, 676).

713. Quigley believed that it was “important [to] right size expectations for the current products,” (RX0419 (Altria) at 002), given that “a consumer will not repurchase” a product that does not offer “immediate nicotine satisfaction,” (PX7041 Quigley (Altria) Dep. at 147).

### **Response to Finding No. 713**

The proposed finding is vague, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “Quigley believed that it was ‘important [to] right size expectations for the current products’ . . . given that ‘a consumer will not repurchase’ a product that does not offer ‘immediate nicotine satisfaction,’” the proposed finding is vague because it does not reference a specific timeframe or specify the products referred to and because the phrase “right-size our expectations” is ambiguous. The proposed finding is also misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding claims that a specific level of “immediate nicotine satisfaction” was required for a product to be “repurchase[d]” by “consumers,” to achieve PMTA approval, or to achieve commercial success and implies that Altria’s products did not have adequate “nicotine satisfaction,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (*See Responses to RPF 601-03, 612-16, 676*).

714. Quigley provided a blunt assessment of Nu Mark’s predicament: Nu Mark’s product portfolio had “[o]verarching [g]aps,” including a lack of “[c]lear understanding of how best to deliver nicotine satisfaction,” of the “foundational science . . . necessary to ground product design,” and “of how products map to” consumer desires. (RX0450 (Altria) at 024). The takeaway was that the leadership had “limited realistic confidence in [Nu Mark’s] current portfolio.” (Quigley (Altria) Tr. 2024 (discussing PX4205 (Altria) at 005)).

#### **Response to Finding No. 714**

The proposed finding is vague, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “Quigley provided a blunt assessment of Nu Mark’s predicament: Nu Mark’s product portfolio had ‘[o]verarching [g]aps,’ including a lack of ‘[c]lear understanding of how best to deliver nicotine satisfaction,’ of the ‘foundational science . . . necessary to ground product design,’ and ‘of how products map to’ consumer desires”

and “the takeaway was that the leadership had ‘limited realistic confidence in [Nu Mark’s] current portfolio,’” the proposed finding is vague because it does not reference a specific timeframe, specify what all the purported “overarching gaps” were, explain what their significance was, explain whether Altria was able to address the gaps, explain the resources necessary to address the gaps, or explain who “leadership” refers to and because the phrases “foundational science . . . necessary to ground product design,’ “how products map to’ consumer desires,” and “limited realistic confidence” are ambiguous. The proposed finding is also misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding implies that Altria’s products did not have adequate “nicotine satisfaction” to convert smokers, achieve PMTA approval, be commercially successful, or achieve long-term commercial success, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (*See Responses to RPF 601-03, 612-16, 676*).

715. Quigley also believed that Altria and Nu Mark were not “structured appropriately” to develop innovative products. (Quigley (Altria) Tr. 2025). The companies always “approached product development like a cigarette company” and “needed to think more like a technology company and have different capabilities and different processes.” (Quigley (Altria) Tr. 2025).

### **Response to Finding No. 715**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “Altria and Nu Mark were not ‘structured appropriately’ to develop innovative products” and “[t]he companies always ‘approached product development like a cigarette company’ and ‘needed to think more like a technology company and have different capabilities and different processes,’” the proposed

finding is vague because the phrases “structured appropriately,” “different capabilities and different processes,” and “think more like a technology company” are ambiguous.

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730). The proposed finding is also incomplete because it fails to mention Altria’s efforts to expand NMI and work with third-party technology partners to augment its innovation capabilities. (CCFF ¶¶ 1527-87).

To the extent that the proposed finding implies that Altria’s e-cigarette products were not commercially successful, were not “innovative,” could not convert smokers, could not achieve PMTA approval, or were unlikely to achieve long-term commercial success, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 601-16, 676. (*See Responses to RPF ¶¶ 601-16, 676*).

To the extent that the proposed finding implies that Altria’s status as a traditional cigarette company prevented it from achieving success in the e-cigarette category, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 496, 1563. (*See Responses to RPF ¶¶ 496, 1563*).

716. In Quigley’s view, Altria had not been successful at innovating in the e-vapor space and he did not think it was well-positioned to do so going forward, which made designing a bridge plan “tougher.” (Quigley (Altria) Tr. 2043). A “bridge plan” was to be a plan to achieve leadership with FDA-approved products by 2025. (Quigley (Altria) Tr. 1956, 2041).

### **Response to Finding No. 716**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that, “[i]n Quigley’s view, Altria had not been successful at innovating in the e-vapor space and he did not think it was well-positioned to do so going forward, which made designing a bridge plan ‘tougher,’” the proposed finding is vague because it does not explain the meaning or significance of “innovating in the e-vapor space” and does not explain why Quigley thought Altria was not “well-positioned” to innovate.

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730). The proposed finding is also incomplete because it fails to mention Altria’s efforts to expand NMI and work with third-party technology partners to augment its innovation capabilities. (CCFF ¶¶ 1527-87).

To the extent that the proposed finding implies that Altria’s e-cigarette products were not “innovate[ive],” were not commercially successful, could not convert smokers, could not achieve PMTA approval, or were unlikely to achieve long-term commercial success, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (*See Responses to RPF 601-03, 612-16, 676*).

To the extent that the proposed finding claims that “[a] ‘bridge plan’ was to be a plan to achieve leadership with FDA-approved products by 2025,” Complaint Counsel has no specific response.

717. Jupe, then head of Innovative Product Development, highlighted the litany of challenges facing Nu Mark’s existing products (RX0450 (Altria) at 053):

- (a). The pod product, Elite, would not be able to “compete successfully without higher level nicotine offerings,” (RX0450 (Altria) at 068);
- (b). MarkTen Bold similarly needed a reformulated e-liquid capable of delivering nicotine satisfaction, (RX0450 (Altria) at 065 (highlighting the need for “higher NBW” and “higher acids”)); and



(c). The MarkTen cig-a-like's PMTA was contingent on a new battery to prevent dry puffing, (RX0450 (Altria) at 062-63).

**Response to Finding No. 717**

The proposed finding overstates the cited evidence and is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730). The proposed finding is also incomplete because it fails to mention Altria's efforts to expand NMI and work with third-party technology partners to augment its innovation capabilities. (CCFF ¶¶ 1527-87).

To the extent that the proposed finding claims that Elite "would not be able to 'compete successfully without higher level nicotine offerings,'" the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612. (*See* Response to RPF ¶ 612). In addition, the cited evidence notes that MarkTen Elite had "good aerosol mass" and that Altria had not "identified" any "filing gaps" with respect to the product "at this time." (RX0450 (Altria) at 068).

To the extent that the proposed finding claims that "MarkTen Bold similarly needed a reformulated e-liquid capable of delivering nicotine satisfaction," the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 638, 642. (*See* Responses to RPF ¶¶ 638, 642). The proposed finding overstates the cited evidence because the cited evidence does not say that the in-market version of MarkTen Bold did not deliver "nicotine satisfaction," but merely notes that Altria had "completed" development of "8 flavors

[of MarkTen Bold] at 4% [nicotine by weight]” and that “development for 4% [nicotine by weight] and 3% acids” was “in progress.” (RX0450 (Altria) at 065).

To the extent that the proposed finding claims that “MarkTen cig-a-like’s PMTA was contingent on a new battery to prevent dry puffing,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 486-509. (*See Responses to RPF 486-509*). In addition, the cited evidence notes in a section entitled “perspective of commercial success” that MarkTen BVR 2.8’s “likelihood based on current status” was “high” and that Altria planned to file a PMTA for the product by the “Q4 2019.” (RX0450 (Altria) at 062).

To the extent that the proposed finding implies that Altria’s e-cigarette products were not commercially successful, could not convert smokers, could not achieve PMTA approval, or were unlikely to have long-term commercial success, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (*See Responses to RPF 601-03, 612-16, 676*).

718. Based on these stark assessments, Murillo called for “[c]ompletely re-set[ting] [Nu Mark’s] product and filing plans.” (RX0671 (Altria) at 004; *see also* RX0450 (Altria) at 051 (same)). He “had no confidence in the current set of products and their filing plans, and it was a source of frustration, and [his presentation] was a somewhat perhaps unsuccessfully diplomatic way to convey to [his] colleagues that [the company] had to go back to the drawing board.” (Murillo (Altria/JLI) Tr. 2950).

### **Response to Finding No. 718**

The proposed finding is incomplete, misleading, vague, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF 1588-730).

The proposed finding is also incomplete because it fails to mention Altria's efforts to expand NMI and work with third-party technology partners to augment its innovation capabilities. (CCFF ¶¶ 1527-87).

To the extent that, in using the phrase "based on these stark assessment," the proposed finding refers back to RPF 706-17, Complaint Counsel incorporates its response to those proposed findings herein. (*See Responses to RPF 706-17*).

To the extent that the proposed finding claims that "Murillo called for "[c]ompletely reset[ing] [Nu Mark's] product and filing plans" and "[his presentation] was a somewhat perhaps unsuccessfully diplomatic way to convey to [his] colleagues that [the company] had to go back to the drawing board," the proposed finding is vague because it does not explain how Murillo proposed to reset the filing plans, whether any plans were reset in accordance with his views, or what the significance of the "reset" was for Altria's in-market products and PMTA filing schedules. In addition, the phrase "back to the drawing board" is ambiguous. The proposed finding is incomplete and misleading because Altria subsequently rescheduled the MarkTen cigalike PMTA filing date for June 17, 2020, (*see Response to RPF ¶ 489*), and Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (RX0272 (Altria) at 043; CCFF ¶¶ 1298-300; RPF ¶ 523).

To the extent that the proposed finding implies that Altria's e-cigarette products were not commercially successful, could not convert smokers, could not achieve PMTA approval, or were unlikely to have long-term commercial success, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 601-03, 612-16, 676. (*See Responses to RPF ¶¶ 601-03, 612-16, 676*).

719. Murillo also urged the leadership to “[e]mbrace what it means to be regulated and be realistic about the FDA’s approach.” (RX0450 (Altria) at 051; *see also* Murillo (Altria/JLI) Tr. 2949-50 (discussing slide)). Murillo wanted to convey to his “colleagues on the executive team that we needed to go back to first principles, that we’re a regulated company, and we can’t just run around and throw products against the wall and see which ones stick and fix them later and all that stuff. We have to be realistic about the expectations that the FDA is setting forth with respect to these products.” (Murillo (Altria/JLI) Tr. 2949; *see also* Murillo (Altria/JLI) Tr. 2948 (characterizing the enterprise as “running around like chickens with our heads cut off trying to find products in the vapor space that could be successful,” and noting “it wasn’t going so well”); PX7015 Gogova (Altria) Dep. at 102-03 (noting that the Nu Mark “business model [of] having as many products in the marketplace as possible” was not, from the scientists’ perspective, “the right model to work under within the regulatory environment”)).

### **Response to Finding No. 719**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730). The proposed finding is also incomplete because it fails to mention Altria’s efforts to expand NMI and work with third-party technology partners to augment its innovation capabilities. (CCFF ¶¶ 1527-87).

To the extent that the proposed finding implies that Altria’s e-cigarette products were unlikely to achieve PMTA approval, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (*See Responses to RPF 601-03, 612-16, 676*).

720. Much of what was presented was “new news” to Willard and the other executives in attendance. (Quigley (Altria) Tr. 2023; *see also* Garnick (Altria) Tr. 1727-28 (noting that “before June” the leaders had not realized “that [Altria’s] scientists believed that the MarkTen [cig-a-like] product would not get a PMTA” and “that in order to correct the problem with the MarkTen cigalike, [Altria] would need to get a PMTA first for the new product”)).

### **Response to Finding No. 720**

The proposed finding is incomplete, misleading, vague, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730). The proposed finding is also incomplete because it fails to mention Altria's efforts to expand NMI and work with third-party technology partners to augment its innovation capabilities. (CCFF ¶¶ 1527-87).

To the extent that the proposed finding claims that “[m]uch of what was presented was ‘new news’ to Willard and the other executives in attendance” and “‘before June’ the leaders had not realized ‘that [Altria’s] scientists believed that the MarkTen [cig-a-like] product would not get a PMTA’ and ‘that in order to correct the problem with the MarkTen cigalike, [Altria] would need to get a PMTA first for the new product,’” the proposed finding is vague because it does not specify who “the other executives in attendance” and “the leaders” were and does not specify what “the problem with the MarkTen cigalike” was.

The proposed finding is incomplete and misleading because it fails to note that in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; RPFF ¶ 523).

The proposed finding is incomplete and misleading because it also fails to note that Altria made significant progress on the PMTA for the MarkTen cigalike products. (CCFF ¶¶ 1258-66).

To the extent that the proposed finding claims that the “MarkTen [cig-a-like] product would not get a PMTA,” the proposed finding is misleading and contrary to the weight of the

evidence for the reasons cited in response to RPF 351-64, 486-509, 601-03, 612-16, 676. (See Responses to RPF 351-64, 486-509, 601-03, 612-16, 676).

721. Quigley recalled that at the end of the meeting, Willard “stood up and just said, this is a lot of information to process.” (Quigley (Altria) Tr. 2023). Willard was “glad the information was provided” and that he “got more transparency,” although “it represented a fairly dire view of the likelihood of many of [Altria’s] products getting FDA approval.” (Willard (Altria) Tr. 1383; *see also* Murillo (Altria/JLI) Tr. 2952 (describing discussion as “sobering” and recalling “some people were dismayed”)).

### **Response to Finding No. 721**

The proposed finding is incomplete, misleading, vague, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF 1588-730). The proposed finding is also incomplete because it fails to mention Altria’s efforts to expand NMI and work with third party technology partners to augment its innovation capabilities. (CCFF 1527-87).

To the extent that the proposed finding claims that “Willard was ‘glad the information was provided’ and that he ‘got more transparency,’ although it represented a fairly dire view of the likelihood of many of [Altria’s] products getting FDA approval,” the proposed finding is vague because it does not define a timeframe, does not specify the problems that prompted the “dire” view, does not explain whether the problems could be addressed, does not explain whether the problems were addressed, and does not specify the resources necessary to address the problems.

To the extent that the proposed finding claims that Nu Mark’s products were unlikely to achieve “FDA approval,” the proposed finding is misleading and contrary to the weight of the

evidence for the reasons cited in response to RPF 351-64, 486-509, 601-03, 612-16, 676. (*See Responses to RPF 351-64, 486-509, 601-03, 612-16, 676*).

722. Willard did not believe that these PMTA risks were manufactured or exaggerated. (Willard (Altria) Tr. 1382).

### **Response to Finding No. 722**

The proposed finding is vague because it does not specify a timeframe and because the phrase “PMTA risks” is ambiguous. To the extent that the phrase “PMTA risks” refers back to RPF 706-21, Complaint Counsel incorporates its response to those proposed findings herein. (*See Responses to RPF 706-21*).

723. In the near term, the company resolved to focus on the need to “[r]ationalize and prioritize current filing/development work.” (PX4205 (Altria) at 012). As Willard explained, the PMTA process was “very expensive” and “nobody had really rationalized which products should be dropped from the PMTA process and which products should continue, and we really felt like we needed to do that, because we knew a bunch of these products, that even if they got a PMTA, would fail to be profitable in the future. And . . . we increasingly were hearing from the scientific affairs organization that a bunch of them weren’t even going to get FDA approval.” (Willard (Altria) Tr. 1382; *see also* RX0450 (Altria) at 066 (noting that decision about whether to pursue PMTA for Elite 1.0 would “occur in November 2019”); Jupe (Altria) Tr. 2291 (similar)).

### **Response to Finding No. 723**

The proposed finding is incomplete, misleading, vague, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF 1588-730). The proposed finding is also incomplete because it fails to mention Altria’s efforts to expand NMI and work with third-party technology partners to augment its innovation capabilities. (CCFF 1527-87).

To the extent that the proposed finding claims that “the company resolved to focus on the need to “[r]ationalize and prioritize current filing/development work,” the proposed finding is vague because it does not specify what the practical effect of “rationaliz[ing] and prioritize[ing] current filing/development work” would be and does not specify what Altria did, if anything, to “rationalize and prioritize current filing/development work.”

To the extent that the proposed finding claims that “the PMTA process was ‘very expensive’ and ‘nobody had really rationalized which products should be dropped from the PMTA process and which products should continue, and we really felt like we needed to do that, because we knew a bunch of these products, that even if they got a PMTA, would fail to be profitable in the future” the proposed finding is vague, misleading, and contrary to the weight of the evidence.

The proposed finding is also vague because it does not specify which Altria products were and were not expected to “fail to be profitable in the future” or what the basis for that conclusion was. The proposed finding is misleading and contrary to the weight of the evidence because Altria and other tobacco companies [REDACTED] (CCFF ¶¶ 1064-82); Altria’s products already had positive marginal contribution, (CCFF ¶ 1107); Altria anticipated that its products would be profitable in the future, (CCFF ¶¶ 1083-87); and the financial performance of Altria’s cigalike products improved continuously from 2016 to 2018 and Altria consistently assessed that its products were doing well and meeting targets. (CCFF ¶¶ 1088-31).

To the extent that the proposed finding claims that “we increasingly were hearing from the scientific affairs organization that a bunch of them weren’t even going to get FDA approval,” the proposed finding is vague because it does not explain who specifically reported that Altria’s



products would not “get FDA approval,” what products the reports pertained to, when these reports were made, or what the basis for this conclusions were.

The proposed finding is also misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 351-64, 486-509, 601-03, 612-16, 676. (*See Responses to RPF 351-64, 486-509, 601-03, 612-16, 676*).

Finally, to the extent that the proposed finding claims that “decision about whether to pursue PMTA for Elite 1.0 would ‘occur in November 2019,’” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 510-12. (*See Responses to RPF 510-12*).

724. At the same time, Altria began to consider whether the company should pivot to growth or “speed” teams to try to develop new products from scratch. (PX4205 (Altria) at 012; *see* Quigley (Altria) Tr. 2025-26). Having “pretty much exhausted the availability of products” that it could introduce in the market consistent with the Deeming Rule, the Altria “team came up with this idea that the time had come to use an approach that was often used in innovative companies, which is you put your best people on these teams, small cross-functional teams, you give them tremendous support, and you allow them to develop products from scratch that they think will win in the marketplace.” (Willard (Altria) Tr. 1380). “Given the increasing evidence that the Nu Mark products that were in the market were not going to be successful, this was an emerging idea at the time for how to continue to focus on being successful in e-vapor, despite Nu Mark’s challenges with its existing products.” (Willard (Altria) Tr. 1381).

#### **Response to Finding No. 724**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF 1588-730). The proposed finding is also incomplete because it fails to mention Altria’s efforts to expand NMI and work with third-party technology partners to augment its innovation capabilities. (CCFF 1527-87).

To the extent that the proposed finding claims that Altria had “‘pretty much exhausted the availability of products’ that it could introduce in the market consistent with the Deeming Rule,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 573. (*See* Response to RPF 573).

To the extent that the proposed finding implies that Altria’s e-cigarette products were not successful, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 676. (*See* Response to RPF 676).

Finally, the proposed finding is incomplete and misleading in that it fails to note that Altria did not pull any e-cigarette products off the market until its negotiations with JLI were well advanced. (CCFF 1379-89).

**5. In Early July 2018, The Regulatory Affairs Team Began Preparing An Update For The Board On The Dismal Regulatory Prospects Of Nu Mark’s Products**

725. On July 12, 2018, soon after the Level Setting meeting, Garnick began working with his regulatory team to put together a presentation for an upcoming August Board meeting that would alert the Board to the problems with Nu Mark’s products. (RX0914 (Altria); PX1786 (Altria); RX0642 (Altria); PX7017 Magness (Altria) Dep. at 282-83).

**Response to Finding No. 725**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding refers to “the problems with Nu Mark’s products,” the proposed finding is vague because it does not specify the problems to which it refers.

The proposed finding is incomplete and misleading because it fails to note that on August 14, 2018 Quigley informed Crosthwaite of his belief that the draft presentation explaining the state of Nu Mark’s e-cigarette business for the August 2018 Board of Directors meeting was telling “only the bad news version of the story.” (CCFF 1367).

To the extent that the proposed finding implies that Nu Mark's products had "problems," the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (*See Responses to RPF 601-03, 612-16, 676*).

726. The Board already had heard that Altria was working "really, really hard" on the vapor category and associated regulatory work. But Altria's leadership "thought it was important to give [the Board] the benefit of [its] more . . . hard-nosed assessment of where [the company was]." (Murillo (Altria/JLI) Tr. 2952-53).

### **Response to Finding No. 726**

The proposed finding is vague. To the extent that the proposed finding refers to "Altria's leadership "thought it was important to give [the Board] the benefit of [its] more . . . hard-nosed assessment of where [the company was]," the proposed finding is vague because it does not specify a timeframe and because the phrase "hard-nosed assessment" is ambiguous.

To the extent that the proposed finding refers to the purported "problems" with Altria's products referenced in RPF 725, Complaint Counsel incorporates its response to that finding herein. (*See Response to RPF 725*).

To the extent that the proposed finding claims that "[t]he Board already had heard that Altria was working 'really, really hard' on the vapor category and associated regulatory work," Complaint Counsel has no specific response.

727. Garnick therefore asked the Regulatory Affairs team "to start putting together a board presentation so [the leadership] could discuss the issues as [it] saw them with the board." (Garnick (Altria) Tr. 1732; *see also* RX0914 (Altria); PX1786 (Altria); RX0642 (Altria); RX0689 (Altria)).

### **Response to Finding No. 727**

Complaint Counsel has no specific response.

728. Magness, at the time responsible for Altria's PMTA submissions, understood that Garnick "was interested in walking the board through each of the products in the e-vapor portfolio and helping them understand the regulatory questions and risks that [the regulatory team] had identified." (PX7017 Magness (Altria) Dep. at 176). Garnick expressed to Magness that he wanted to share that product-specific information because he "was concerned with

some of the product risks as [the regulatory team] had been updating him and wanted to make sure the board was clear about the regulatory risks [the team] had advised the business on.” (PX7017 Magness (Altria) Dep. at 179).

### **Response to Finding No. 728**

The proposed finding is incomplete, misleading, vague, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that on August 14, 2018, Quigley informed Crosthwaite of his belief that the draft presentation explaining the state of Nu Mark’s e-cigarette business for the August 2018 Board of Directors meeting was telling “only the bad news version of the story.” (CCFF ¶ 1367). That same day, Murillo observed that the draft regulatory slides of the presentation appeared to overstate Elite’s inability to convert smokers. (CCFF ¶ 1371).

To the extent that the proposed finding claims that “Garnick expressed to Magness that he wanted to share that product-specific information because he ‘was concerned with some of the product risks as [the regulatory team] had been updating him and wanted to make sure the board was clear about the regulatory risks [the team] had advised the business on,” the proposed finding is vague because it does not specify a timeframe or what the “regulatory risks” were in connection with Altria’s products.

To the extent that the proposed finding implies that Altria’s e-vapor products faced excessive “risks” in connection with the PMTA process, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 351-64, 486-509, 601-03, 612-16, 676. (See Responses to RPF ¶¶ 351-64, 486-509, 601-03, 612-16, 676).

729. The Regulatory Affairs team, including Magness, completed the first draft of the Board deck on July 15, 2018. (RX0689 (Altria) at 001).

### **Response to Finding No. 729**

The proposed finding is incomplete and misleading because it fails to note that on August 14, 2018, Quigley informed Crosthwaite of his belief that the draft presentation explaining the state of Nu Mark's e-cigarette business for the August 2018 Board of Directors meeting was telling "only the bad news version of the story." (CCFF ¶ 1367). That same day, Murillo observed that the draft regulatory slides of the presentation appeared to overstate Elite's inability to convert smokers. (CCFF ¶ 1371).

730. Magness had no involvement with or knowledge of any negotiations with JLI while she was in Regulatory Affairs. (PX7017 Magness (Altria) Dep. at 166-70, 284-85). In preparing the Board presentation she did not consider any potential investment in JLI. (PX7017 Magness (Altria) Dep. at 284-85). Greg Wilson and Joe Murillo, other members of the Regulatory Affairs team who also worked on the first draft of the Board presentation, similarly were not involved in the JLI negotiations. (Garnick (Altria) Tr. 1706, 1761).

#### **Response to Finding No. 730**

The proposed finding is incomplete and misleading because it fails to note that on August 14, 2018, Quigley informed Crosthwaite of his belief that the draft presentation explaining the state of Nu Mark's e-cigarette business for the August 2018 Board of Directors meeting was telling "only the bad news version of the story." (CCFF ¶ 1367). That same day, Murillo observed that the draft regulatory slides of the presentation appeared to overstate Elite's inability to convert smokers. (CCFF ¶ 1371).

731. The substantive information in the Board presentation "[came] from the scientists . . . and other technical experts in regulatory sciences." (Garnick (Altria) Tr. 1732). Like Magness, these scientists had no involvement in the deal negotiations. (PX7015 Gogova (Altria) Dep. at 203-06; *see also* PX7016 Jupe (Altria) Dep. at 242-43 ("I was not involved in any negotiations, any discussions, conversations, nor due diligence, no.")).

#### **Response to Finding No. 731**


The proposed finding is incomplete and misleading because it fails to note that on August 14, 2018, Quigley informed Crosthwaite of his belief that the draft presentation explaining the state of Nu Mark's e-cigarette business for the August 2018 Board of Directors meeting was telling

“only the bad news version of the story.” (CCFF ¶ 1367). That same day, Murillo observed that the draft regulatory slides of the presentation appeared to overstate Elite’s inability to convert smokers. (CCFF ¶ 1371).


732. As the below slides illustrate, the first draft of the Board presentation identified “key concerns” with each of Nu Mark’s products and determined that each product failed to meet requirements necessary to obtain regulatory approval. (RX0689 (Altria) at 008, 011, 015, 016, and 017):

### MarkTen® Key Concerns

- Starting assumptions about puffing conditions not reflective of actual human use data
- “Dry puff” prevention required
- Unknown chemicals and metals detected
- External lab process and data quality concerns
- Low nicotine concentration and no acids (non-Bold variants)



Manufacturing	✓
Risk Reduction	X
Adult Smoker Conversion	X
No Unintended Consequences	✓


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(RX0689 (Altria) at 008).

## MarkTen® Elite Key Concerns

- Leaking
- Aldehyde formation
- Need to conduct full product integrity assessment
- Low nicotine concentration and no acids



Manufacturing	X
Risk Reduction	X
Adult Smoker Conversion	X
No Unintended Consequences	?


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(RX0689 (Altria) at 011).

**Response to Finding No. 732**

The proposed finding overstates the cited evidence and is unreliable, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding states “each product failed to meet requirements necessary to obtain regulatory approval,” the proposed finding overstates the cited evidence and is unreliable, misleading, and contrary to the weight of the evidence. The proposed finding overstates the cited evidence because the slides do not state that the products “failed to meet requirements necessary to obtain regulatory approval,” but instead highlights “key concerns” with each product and is vague as to the ultimate significance of those concerns for regulatory approval.

To the extent that the proposed finding implies that Altria’s e-vapor products were unlikely to achieve PMTA approval, the proposed finding is misleading and contrary to the weight of the

evidence for the reasons cited in response to RPF 351-64, 486-509, 601-03, 612-16, 676. (*See Responses to RPF 351-64, 486-509, 601-03, 612-16, 676*).

The proposed finding is unreliable and misleading because Altria employees involved with transaction negotiations (Crosthwaite, Willard, and Garnick) supervised the preparation of the cited presentation, (*see PX7006 (Crosthwaite (Altria/JLI) IHT at 132-34*), and other employees not involved with transaction negotiations (Quigley and Murillo) expressed concern that the presentation showed bias against Altria's products. (CCFF ¶¶ 1367-71). Willard, Garnick, and Crosthwaite were involved in transaction negotiations, while Quigley and Murillo were not. (CCFF ¶¶ 578-88). Crosthwaite testified that he, Garnick, and Willard all provided comments on the cited exhibit. (PX7006 (Crosthwaite (Altria/JLI) IHT at 132-34). Garnick presented the relevant portions of the Altria Board presentation concerning Nu Mark's products. (Garnick (Altria) Tr. 1739-40).

Quigley agreed that Crosthwaite was accountable for making the transaction with JLI happen. (Quigley (Altria) Tr. 1971-72). In contrast, Quigley felt that it was his "responsibility, being the CEO of the vapor business, to present the facts that we had uncovered . . . [and] to share [his] plan [for Nu Mark]." (Quigley (Altria) Tr. 1971-72). Quigley testified "when I got the job [at Nu Mark], Howard [Willard] sat K.C. [Crosthwaite] and I down and said, you know, K.C., in your job, you are responsible for Project Tree [the JLI transaction] . . . and that's plan A." "Brian [Quigley], you are responsible . . . Plan B is without Tree, what do we do with our vapor business? And Brian [Quigley], I need you focused on that." (PX7003 (Quigley (Altria) IHT at 160-61)). Quigley testified that he "thought [Crosthwaite] was playing a political game to advance his agenda in the eyes of the board" meaning that Crosthwaite was "trying to kind of one-up [Quigley] for [Crosthwaite's] own gain." (CCFF ¶ 1370).



On August 14, 2018, Quigley expressed concerns to Crosthwaite regarding a draft of the presentation cited in the proposed finding for Altria's board of directors concerning Altria's e-cigarette portfolio prepared under Crosthwaite's direction. (CCFF ¶ 1367). Quigley informed Crosthwaite that while he understood why Crosthwaite was "telling the story" to the Board of Directors, the presentation was "clearly only the bad news version of the story" and that it contained some points that were "flat out incorrect." (CCFF ¶ 1367). In fact, Quigley confirmed that the draft versions of both slides that Respondents excerpt in the proposed finding were examples of providing "only the bad news version" to the board. (PX7003 (Quigley (Altria), IHT at 151-52, 155) (discussing PX1320 (Altria) at 031, 034); *see also* CCFF ¶ 1367). For example, the slide on Elite did not reflect that the new gasket would fix the leaking issue. (PX7003 (Quigley (Altria), IHT at 155 (discussing PX1320 (Altria) at 034)).

In his August 14, 2018 critique of the draft presentation to the Altria Board of Directors, Quigley reminded Crosthwaite that the MarkTen cigalike was "growing in volume" and was the "second fastest growing brand in terms of volume behind juul." (CCFF ¶ 1368). In his August 14, 2018 critique of the draft presentation to the Altria Board of Directors Quigley wrote to Crosthwaite: "I also have a few concerns about what I am hearing from your organization about vapor. What I am hearing sounds very disconnected from the latest discussions we've been having. I am hearing that 'the decision has been made to stop Nu Mark' and I know that decision has not been made." (CCFF ¶ 1369). Quigley explained that he "thought K.C. [Crosthwaite] was playing a political game to advance his agenda [to do a deal with JLI] in the eyes of the board. So what I was pointing to here is, hey, I know that you're trying to kind of one-up me, and -- for your own gain, and I was very unhappy about it." (CCFF ¶ 1370).

On August 14, 2018, Murillo provided comments to Garnick on the same draft presentation to the Altria Board of Directors, and included, with respect to Elite, the comment that “in fairness to Nu Mark, the “x” for conversion potential is an opinion based on current performance and comparison to Juul. It would be fair to have an x with a ?, especially if this encompasses possible Elite 2.0.” (CCFF ¶ 1371).

On {REDACTED}, Altria senior leadership held meetings with the Altria board at Altria’s {REDACTED} Quigley and other Altria executives were {REDACTED} during these meetings, but only Willard, Gifford, Garnick, and Crosthwaite were allowed into the meetings with the board, which was unusual. (CCFF ¶ 1372). Even though he was {REDACTED}, Quigley was not permitted to participate in the board meeting in which Nu Mark was discussed. (CCFF ¶ 1372).

733. As to the MarkTen cig-a-like, the draft conveyed that the product could not satisfy two of the four criteria necessary to obtain PMTA approval: risk reduction and adult smoker conversion. (RX0689 (Altria) at 008; *see* Murillo (Altria/JLI) Tr. 2955-58; Garnick (Altria) Tr. 1735-36).

### **Response to Finding No. 733**

The proposed finding overstates the cited evidence and is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF ¶ 732. (*See* Response to RPF ¶ 732).

734. As to MarkTen Elite, the draft conveyed that the product could not satisfy three of the four criteria necessary to obtain PMTA approval: manufacturing, risk reduction, and adult smoker conversion. (RX0689 (Altria) at 011; Murillo (Altria/JLI) Tr. 2956-58; Garnick (Altria) Tr. 1738-39). The product’s prospects as to the fourth criterion, no unintended consequences, were uncertain because of FDA’s concerns regarding underage use of pod devices. (RX0689 (Altria) at 011; Murillo (Altria/JLI) Tr. 2957).

### **Response to Finding No. 734**

The proposed finding overstates the cited evidence and is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 732. (*See* Response to RPF 732).

735. Elite overall had “three strikes and a question mark,” which reflected Murillo’s view that “it had very, very low prospects of success for a PMTA as it stood.” (Murillo (Altria/JLI) Tr. 2958; *see also* Murillo (Altria/JLI) Tr. 2954-55 (“[I]f a product is, like, super good at risk reduction and could be controlled in the manufacturing sense and so forth, but doesn’t convert smokers, then it’s a failure . . .”).

### **Response to Finding No. 735**

The proposed finding overstates the cited evidence and is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 732. (*See* Response to RPF 732).

736. Although ultimately some of these slides from the first draft were revised before Garnick made the presentation to the Board on August 23, “the significant, substantive information” from this first draft remained the same in the final presentation given to the Board. (Garnick (Altria) Tr. 1734-35; *see* PX4149 (Altria) at 033, 036, 038, 040, 042 (corresponding slides from final August 23 Board presentation); *see also* Willard (Altria) Tr. 1420-26 (discussing product performance on four criteria); Jupe (Altria) Tr. 2303-07 (similar); Gardner (Altria) Tr. 2603-07 (similar)).

### **Response to Finding No. 736**

The proposed finding overstates the cited evidence and is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 732. (*See* Response to RPF 732).

## **6. A Cross-Functional Team Of Scientists And Businesspeople Concluded That Nu Mark’s E-Vapor Products Had Low Conversion Potential**

737. During his presentation at the June 21 Level Setting meeting, Quigley announced the creation of a cross-functional team that would undertake an assessment of the Nu Mark product portfolio. (RX0450 (Altria) at 026). That team, which was led by Nu Mark’s Strategic Product Innovation (“SPI”) group, included representatives from SPI or “Brand,” as they are sometimes known, Consumer Insights, Product Development, Regulatory, Operations, Sensomics & Flavor Development, and Strategy & Business Development. (RX0450 (Altria) at 026).

**Response to Finding No. 737**

The proposed finding is incomplete because it fails to acknowledge that Quigley was responsible for Nu Mark for only six to seven months, whereas he was given six years to turn around the U.S. Smokeless Tobacco Company, significantly more time than he was given to turn around the Nu Mark business. (CCFF ¶¶ 1152-54).

738. The team presented a bleak assessment of the conversion potential of Nu Mark's products. (Gardner (Altria) Tr. 3091; RX0532 (Altria) at 001, 005-13).

**Response to Finding No. 738**

The proposed finding is vague, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “[t]he team presented a bleak assessment of the conversion potential of Nu Mark's products,” the proposed finding is vague because it does not specify a timeframe, explain who the “team” was, who the “assessment” was delivered to, what the scope of the “assessment” was, what made the assessment “bleak,” and does not explain whether the assessment had any bearing on the likelihood of PMTA approval for Altria's e-cigarette products. The term bleak is also ambiguous.

To the extent that the proposed finding implies that Nu Mark's products were unlikely to achieve PMTA approval or could not convert smokers, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 351-64, 486-509, 601-03, 612-16, 676. (*See Responses to RPF ¶¶ 351-64, 486-509, 601-03, 612-16, 676*).

739. For each product, the portfolio assessment group had collected a range of different data points, including consumer research, whether the product contained salts, market trends, and PK results. (RX0532 (Altria) at 005-13). The slides, which collected “Strengths,” “Opportunities” (corporate speak for “things they need to do better,” (Willard (Altria) Tr. 1381)), and “Red Flags,” offered an even-handed assessment of each product, (RX0532 (Altria) at 005-13).

**Response to Finding No. 739**

The proposed finding is misleading. To the extent that, in claiming that the cited exhibit “offered an even-handed assessment of each [Nu Mark] product,” the proposed finding implies that any statements in the cited exhibit that casts a negative light on the PMTA prospects of Nu Mark’s products are entitled to greater weight than any other evidence in the record, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (*See Responses to RPF 601-03, 612-16, 676*).

To the extent that the proposed finding claims that “For each product, the portfolio assessment group had collected a range of different data points, including consumer research, whether the product contained salts, market trends, and PK results” and “[t]he slides, which collected ‘Strengths,’ ‘Opportunities’ (corporate speak for ‘things they need to do better,’ and ‘Red Flags,’” Complaint Counsel has no specific response.

740. The group noted, for example, that one of Bold’s strengths was that its “PK results [were] as close as [Altria had] to a cigarette” but also that it did “not have [the] optimal ratio of nicotine and salts.” (RX0532 (Altria) at 006). Likewise, for MarkTen cig-a-like, the slide highlighted both that it has shown some conversion potential in an adult user study and that its “[n]icotine delivery may be less satisfying than other devices.” (RX0532 (Altria) at 005). The group also noted that, as to Elite, the HUT showed an impact on cigarette usage “by week 4-5” but also that it did “not appeal to those seeking immediate nicotine satisfaction.” (RX0532 (Altria) at 008).

#### **Response to Finding No. 740**

The proposed finding is vague, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that the “[n]icotine delivery [of MarkTen cigalike] may be less satisfying than other devices,” the proposed finding is vague.

To the extent that the proposed finding claims that MarkTen Bold “did ‘not have [the] optimal ratio of nicotine and salts,’” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 638, 642. (*See Responses to RPF 638, 642*).

To the extent that the proposed finding was intended to relate back to the claim in RPF 739, that the cited exhibit “offered an even-handed assessment of each [Nu Mark] product” and to imply that any statements in the cited exhibit that casts a negative light on the PMTA prospects of Nu Mark’s products are entitled to greater weight than any other evidence in the record, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 601-03, 612-16, 676. (*See Responses to RPF ¶¶ 601-03, 612-16, 676*).

To the extent that the proposed finding claims that MarkTen Elite “did ‘not appeal to those seeking immediate nicotine satisfaction,’” the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 612-16. (*See Responses to RPF ¶¶ 612-16*).

To the extent that the proposed finding claims that “one of Bold’s strengths was that its “PK results [were] as close as [Altria had] to a cigarette,” “for MarkTen cig-a-like . . . it has shown some conversion potential in an adult user study,” and “as to Elite, the HUT showed an impact on cigarette usage ‘by week 4-5,’” Complaint Counsel does not disagree.

741. Drawing on this diverse range of inputs, the group rated each of Nu Mark’s cig-a-like and hybrid products—including MarkTen cig-a-like, MarkTen Bold, Elite, Cync, and Apex—as having limited conversion potential. MarkTen cig-a-like, Elite, Cync, and Apex—which all lacked salts—were each rated as having “low” conversion potential. (RX0532 (Altria) at 005, 008, 010, 011; *see also* Gardner (Altria) Tr. 3092-94 (discussing slides for MarkTen and Elite)). MarkTen Bold, Nu Mark’s only product with salts, was deemed to have “Low-Med” conversion potential, with the caveat that it was in a declining product format and did not have the “optimal ratio of nicotine and salts” to “provide expected nicotine satisfaction.” (RX0532 (Altria) at 006).

#### **Response to Finding No. 741**

To the extent that the proposed finding was intended to relate back to the claim in RPF 739, that the cited exhibit “offered an even-handed assessment of each [Nu Mark] product” and to imply that any statements in the cited exhibit that casts a negative light on the PMTA prospects of Nu Mark’s products are entitled to greater weight than any other evidence in the record, the

proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (See Responses to RPF 601-03, 612-16, 676).

To the extent that the proposed finding implies that Nu Mark's products had insufficient conversion potential to achieve PMTA approval, convert smokers, or to be commercially successful, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (See Responses to RPF 601-03, 612-16, 676).

742. Both the brand representatives from Nu Mark and the scientists all agreed on those assessments, including the conclusion that Elite had low conversion potential for adult smokers looking to switch. (Gardner (Altria) Tr. 3092-94).

#### **Response to Finding No. 742**

To the extent that the proposed finding was intended to relate back to the claim in RPF 739, that the cited exhibit "offered an even-handed assessment of each [Nu Mark] product" and to imply that any statements in the cited exhibit that casts a negative light on the PMTA prospects of Nu Mark's products are entitled to greater weight than any other evidence in the record, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (See Responses to RPF 601-03, 612-16, 676).

To the extent that the proposed finding implies that Nu Mark's products had insufficient conversion potential to achieve PMTA approval, to convert smokers, or to be commercially successful, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 601-03, 612-16, 676. (See Responses to RPF 601-03, 612-16, 676).

743. The conclusion that Nu Mark's products had limited conversion potential reflected not only the consensus of the product assessment team, it reflected the view of every Altria witness who was asked about conversion in this proceeding:

- (a). **Howard Willard (former CEO):** Nu Mark's products "really hadn't delivered" on conversion. (Willard (Altria) Tr. 1379). MarkTen cig-a-like "wasn't having any success in the marketplace in converting adult cigarette smokers," especially once the market "expanded to include JUUL and some other products that adult cigarette smokers found more compelling." (Willard (Altria) Tr. 1421-22).

Likewise, Elite did not provide “any meaningful risk reduction because adult cigarette smokers weren’t converting to it.” (Willard (Altria) Tr. 1425).

- (b). **Billy Gifford (current CEO):** “MarkTen Elite didn’t have the nicotine experience necessary to satisfy consumers coming in from the cigarette category.” (Gifford (Altria) Tr. 2779).
- (c). **Murray Garnick (General Counsel & Head of Regulatory Affairs & Regulatory Sciences):** “[W]e had no evidence that Elite was being successful at converting smokers.” (Garnick (Altria) Tr. 1738). MarkTen “was also not converting smokers.” (Garnick (Altria) Tr. 1778).
- (d). **Joe Murillo (former Senior Vice President of Regulatory Affairs):** “[W]e didn’t think [MarkTen] was doing a great job of converting adult smokers based on the data we had, the business results, the studies we had conducted, and the way it delivered nicotine.” (Murillo (Altria/JLI) Tr. 2956). “[W]e believe[d] that [Elite] was not demonstrating . . . adult smoker conversion . . . because we were seeing sort of, you know, okay, middling performance in the market; we were seeing not so great results in the consumer studies that were being conducted. [And] [i]t did not have nicotine salts at that point.” (Murillo (Altria/JLI) Tr. 2956).
- (e). **Dr. Bill Gardner (Senior Principal Scientist):** “MarkTen was not converting adult smokers, especially compared to products that used increased nicotine salts.” (Gardner (Altria) Tr. 2644). The “MarkTen Bold products[’] nicotine salts [were] insufficient for conversion.” (Gardner (Altria) Tr. 2644). And “MarkTen Elite did not have high conversion potential. It had insufficient nicotine satisfaction due to the absence of nicotine -- due to the absence of nicotine salts.” (Gardner (Altria) Tr. 2594-95).
- (f). **Richard Jupe (Vice President of Product Development):** “We didn’t think [Elite] was going to be a product that was going to convert or switch smokers, because it lacked that nicotine satisfaction that really you can only ascertain through the introduction of salts. And, of course, Elite didn’t have that.” (Jupe (Altria) Tr. 2154). The “[c]onversion potential [of MarkTen cig-a-like] was weak.” (Jupe (Altria) Tr. 2304-05).
- (g). **Brian Quigley (former President and General Manager of Nu Mark):** “[G]iven the lack of our high nicotine formula with salts using acids,” Nu Mark did not have a “product that had the ability” to switch adult smokers. (PX7041 Quigley (Altria) Dep. at 162; *see also* Quigley (Altria) Tr. 2017 (Elite was not providing nicotine satisfaction)).
- (h). **Jody Begley (former President and General Manager of Nu Mark):** Elite “didn’t deliver the nicotine satisfaction that adult smokers were looking for to lead to conversion.” (Begley (Altria) Tr. 1097).
- (i). **Dr. Maria Gogova (Vice President of Regulatory Sciences):** “[A]cid or nicotine salt technology is critical to adult tobacco consumer conversion.” (PX7015 Gogova



(Altria) Dep. at 132). MarkTen was not optimized for adult smoker conversion. (PX7015 Gogova (Altria) Dep. at 87). “[T]he nicotine content in Elite” also was not “right for product [adoption] for adult smokers.” (PX7015 Gogova (Altria) Dep. at 97).

- (j). **Paige Magness (former Managing Director of Regulatory Affairs and current Senior Vice-President of Regulatory Affairs):** MarkTen cig-a-like “fell short [of the PMTA standard] on risk reduction and conversion. . . . With regard to adult smoker conversion, this [was] a product with a relatively low nicotine concentration and [it] did not have the presence of acids that would have improved the level of satisfaction. And . . . the cigalike platform was in decline.” (PX7017 Magness (Altria) Dep. at 290-91). Similarly, Elite fell short on conversion because “it was a product with low nicotine concentration and no acids.” (PX7017 Magness (Altria) Dep. at 293).
- (k). **Michelle Baculis (former Director of Strategy & Brand Development at Nu Mark):** “[T]he vast majority of smokers were looking for nicotine satisfaction in a vapor product that would enable them to make that switch more easily from a cigarette to a vapor [product] long term. Elite did not have that.” (PX7014 Baculis (Altria) Dep. at 174). None of Nu Mark’s products had that. (PX7014 Baculis (Altria) Dep. at 115).
- (l). **K.C. Crosthwaite (former Chief Growth Officer):** Cig-a-likes have not “demonstrated [conversion] potential.” (PX7024 Crosthwaite (Altria/JLI) Dep. at 213-14). “Elite was not designed, formulation wise, to as effectively . . . convert adult smokers as other products [that] were in the market.” (PX7024 Crosthwaite (Altria/JLI) Dep. at 219).
- (m). **Pascal Fernandez (former Senior Vice President of Consumer & Marketplace Insights):** There was mounting evidence based on consumer research that Elite was “not going to be able to be a product that was able to convert consumers.” (PX7023 Fernandez (Altria) Dep. at 85-86). “The problem we were having is the consumer[s] who intended to buy this product were more likely to be dual users and were not converting, or there was very little evidence of conversion and the product really sticking.” (PX7023 Fernandez (Altria) Dep. at 79). Elite just “didn’t satisfy to the extent it needed to satisfy” to convert smokers. (PX7023 Fernandez (Altria) Dep. at 152).
- (n). **Craig Schwartz (former Senior Vice President of Operations at Nu Mark):** Nu Mark was not going to achieve its mission of converting smokers with MarkTen and MarkTen Bold cig-a-like products. (PX7018 Schwartz (Altria) Dep. at 162). And, based on the market data, Elite had “a long ways to go” before it could convert adult smokers. (PX7018 Schwartz (Altria) Dep. at 155-56; *see also* Schwartz (Altria) Tr. 1921 (explaining that Elite’s “vapor delivery system was inefficient in the sense that the vapor stream in the absence of salts was not getting to the lower lung and up into the bloodstream,” which was a “[h]uge drawback” to providing a satiating alternative to smokers)).

- (o). **Scott Myers (President and CEO of Altria Group Distribution Company):** Retailers conveyed that Elite did not “[have] it right from a nicotine satisfaction standpoint.” (Myers (Altria) Tr. 3389).

**Response to Finding No. 743**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies only on self-serving testimony.

To the extent that the proposed finding claims that Nu Mark’s products had insufficient conversion potential to achieve PMTA approval or to be commercially successful, that nicotine salts, high nicotine strength, or a certain level of conversion potential were necessary for an e-vapor product to achieve PMTA approval or commercial success, or that Altria’s products were not commercially successful, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 564-69, 601-03, 612-16, 676. (*See Responses to RPF 564-69, 601-03, 612-16, 676*).

Nu Mark’s products, including MarkTen cigalike and MarkTen Elite, had positive sales growth and positive marginal contribution, they consistently met or exceeded Altria’s internal goals, and Altria anticipated that they would grow in profitability in the future. (CCFF 1083-31).

The FDA has not provided clear guidance on the criteria or thresholds that it will use when reviewing PMTAs to assess whether e-cigarette products have adequate conversion potential to be considered appropriate for the protection of the public health (Gardner (Altria) Tr. 2640-41), so it was impossible in 2018 to know with certainty that a product lacked adequate conversion potential to achieve PMTA approval. Notwithstanding that, Altria had evidence that its e-cigarette products did, in fact, have conversion potential. (CCFF 1310-22). Moreover, Altria thought that the in-market versions of MarkTen cigalike and MarkTen Elite could achieve PMTA approval and was

planning to submit PMTAs improved versions of the products before the PMTA deadline. (CCFF ¶¶ 1258-300).

To the extent that the proposed finding implies that sales data or market share could inform an assessment of “conversion potential,” the proposed finding is misleading and incorrect because conversion potential is a measure of the rate at which consumers that use an e-cigarette product stop smoking traditional cigarettes and sales revenue is not an input to conversion potential. (Gardner (Altria) Tr. 2644-49). An e-cigarette product could have low sales, but a high conversion rate, if the few traditional cigarette smokers that use the product readily convert. (Gardner (Altria) Tr. 2648-49). An e-cigarette product could also have high sales, but a low conversion rate, if most of its sales are to non-smokers or if the consumers purchasing the product remain dual users of both the e-cigarette product and traditional cigarettes. (Gardner (Altria) Tr. 2645-46).

To the extent that the proposed finding claims that low-nicotine strength prevented Nu Mark’s products from converting smokers or achieving commercial success, the proposed finding is contrary to the weight of the evidence and misleading. MarkTen’s cigalike products came with liquid nicotine percentages of 2.4, 3.5, and 4 percent, which was comparable to a number of closed-system e-cigarette products in the market, including JUUL, which had percentages of 5, 3, and 1 percent. (CCFF ¶¶ 1177-88, 1332-35). Notwithstanding the fact that MarkTen Elite had a nicotine percentage of 1.8 percent, lower than some of JUUL’s products, it had higher aerosol mass, meaning that its overall nicotine per puff was equal to or greater than the version of JUUL with 5 percent liquid nicotine. (CCFF ¶¶ 1189-91). Moreover, Altria subsequently nearly doubled MarkTen Elite’s aerosol mass by adding the c1A gasket to the product. (CCFF ¶¶ 1232-34). Furthermore, Altria executives believed that Elite 1.0’s lower nicotine formulas had a role in Altria’s portfolio because they appealed to certain consumers. (CCFF ¶¶ 1317-27).

To the extent that the proposed finding implies that low nicotine strength makes a product less likely to achieve PMTA approval, the proposed finding is misleading and contradicted by the weight of the evidence. The FDA is considering a possible association between high-nicotine strength and abuse liability, meaning that low nicotine strength could be an advantage in the PMTA process. (PX9112 (FDA) at 038 (“The rate and extent of nicotine delivery significantly impact product abuse liability. Higher nicotine content and faster nicotine delivery increase products’ abuse liability due to the rapid absorption of nicotine in the brain.”)). Other manufacturers have submitted PMTAs for products with nicotine strength comparable to MarkTen’s lower-strength products and continue to market products with lower nicotine strengths. (CCFF ¶¶ 1332-35, 1177-88).

To the extent that the proposed finding implies that e-cigarettes need to have “nicotine salts” to convert smokers, achieve PMTA approval, or succeed commercially, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 612. (See Response to RPF 612). In addition, the FDA is considering a possible association between nicotine salts and youth initiation, meaning that nicotine salts could be a disadvantage in the PMTA process. (CCFF ¶¶ 1336-39)). Other manufacturers continue to market and have submitted PMTAs for products without nicotine salts. (CCFF ¶¶ 1166-72).

744. This consensus reached within the company and by the portfolio assessment team was not unique to Altria. (See, e.g., RX1420 (JLI), PX2269 (JLI)). For example, JLI’s cofounder, Adam Bowen, observed that Elite “do[es]n’t provide cig-like nicotine satisfaction.” (RX1420 (JLI) at 001). He also concluded, “Bold is a terrible product – they didn’t get it right.” (PX2269 (JLI) at 001).

#### **Response to Finding No. 744**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable because Bowen’s comments were made on February 26, 2018, and March 5, 2018, respectively, days after MarkTen Elite was launched and weeks after

MarkTen Bold was launched, meaning that the comments could not have been informed by the products' market performance. (RX1420 (JLI) at 001; PX2269 (JLI) at 001; CCFF ¶¶ 1195-96, 461). In fact, Nu Mark's products, including MarkTen Bold and MarkTen Elite, had positive sales growth and positive marginal contribution, they consistently met or exceeded Altria's internal goals, and Altria anticipated that they would grow in profitability in the future. (CCFF ¶¶ 1083-1131).

To the extent that the proposed finding claims that "Adam Bowen, observed that Elite 'do[es]n't provide cig-like nicotine satisfaction'" and "Bold is a terrible product – they didn't get it right," the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 743. (*See* Response to RPF 743).

745. JLI witnesses echoed these conclusions at trial. Bob Robbins, JLI's Chief Growth Officer, testified that cig-a-likes did not "deliver[] the nicotine satisfaction that a smoker would want to convert." (Robbins (JLI) Tr. 3244). And Elite "didn't seem to be effective at converting cigarette smokers." (Robbins (JLI) Tr. 3251).

#### **Response to Finding No. 745**

To the extent that the proposed finding claims that "cig-a-likes did not 'deliver[] the nicotine satisfaction that a smoker would want to convert'" and "Elite 'didn't seem to be effective at converting cigarette smokers,'" the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 743. (*See* Response to RPF 743).

746. Similarly, Joseph O'Hara, who previously served as Senior Director for Strategic Finance and was responsible for tracking competitor products, testified that MarkTen cig-a-likes "were not viable . . . . They didn't have nicotine salts, they didn't satisfy nicotine cravings, and they were cigalikes." (O'Hara (JLI) Tr. 630). Elite also was not a viable product. (O'Hara (JLI) Tr. 641). It had "low nicotine strength" and it "was neither a salt-based nicotine nor a high-quality salt-based nicotine." (O'Hara (JLI) Tr. 521).

#### **Response to Finding No. 746**

The proposed finding is misleading and contrary to the weight of the evidence. To the extent that the proposed finding claims that "MarkTen cig-a-likes 'were not viable [because] [t]hey

didn't have nicotine salts, they didn't satisfy nicotine cravings, and they were cigalikes” and “Elite also was not a viable product [because] [i]t had ‘low nicotine strength’ and it ‘was neither a salt-based nicotine nor a high-quality salt-based nicotine,’” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 743. (*See* Response to RPF 743). Moreover, O’Hara’s testimony is contradicted by the competitive analysis framework he prepared, in which MarkTen Elite was one of only four products besides JUUL with “long term viability.” (CCFF 1522).

747. {

[REDACTED]

#### **Response to Finding No. 747**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF 1588-730). The proposed finding is also incomplete because it fails to mention Altria’s efforts to expand NMI and work with third-party technology partners to augment its innovation capabilities. (CCFF 1527-87).

To the extent that the proposed finding claims that {

[REDACTED]

[REDACTED] } the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 743. (*See* Response to RPF 743).

**D. As Altria Came To Grips With Its Weaknesses, JLI Solidified Its Dim View Of The Nu Mark Portfolio**

**1. JLI's View Of MarkTen Elite**

748. As the evidence discussed above demonstrates, the weaknesses of Nu Mark's portfolio were no secret outside the company. JLI initially contemplated that Elite could be a competitive threat based on the brand name behind it, the potential for a large marketing campaign, and Altria's strong distribution network, (PX2356 (JLI) at 017), but it changed its mind "once [it] saw how the products performed on market," (PX7039 Robbins (JLI) Dep. at 82-83).

**Response to Finding No. 748**

The proposed finding is vague, misleading, vague, unreliable, and contrary to the weight of the evidence.

JLI's own documents show that months after Elite was launched in February 2018, (CCFF ¶ 138), JLI viewed Elite as a competitor. (CCFF ¶¶ 321 (Dec. 2018), 258 (December 2018), 259 (FY2018), 313 (several dates as late as November 2018), 319 (November 2018); PX2532 (JLI) at 016 (November 2018); PX2528 (JLI) at 034 (November 2018 Board package); CCFF ¶¶ 1438 (June 2018), 1129 (discussing a May 2018 document, PX2289 (JLI)), PX2090 (JLI) at 009 (May 2018); CCFF ¶ 1470 (April 2018); PX2086 (JLI) at 001 (April 2018)). The proposed finding is unreliable because it cites to only one self-serving, after-the-fact statement by a JLI employee to support the proposed finding, rendering it unreliable.

The proposed finding is misleading and contrary to the weight of the evidence because it purports to address JLI's view of Nu Mark's portfolio, and then only addresses a single product, MarkTen Elite. Respondents ignore evidence from JLI that it viewed MarkTen cigalikes and MarkTen Elite as competitive products. (See CCFF ¶¶ 299-323, 252-59, 1470-71).

The proposed finding is misleading because it also ignores that competitors such as Reynolds viewed MarkTen Elite as a competitive product through 2018. (CCFF ¶¶ 344-45, 347; Huckabee (Reynolds) Tr. 440 { [REDACTED] }

[REDACTED]. NJOY also viewed MarkTen Elite as a competitor. (CCFF ¶ 349 (*in camera*); PX8004 at 002-03 (¶¶ 12-14)).

The proposed finding is vague as to the point in time being addressed; MarkTen Elite was only on the market for eight months between February 2018 to October 2018. (CCFF ¶¶ 138, 131).

749. Contemporaneous documents reflect JLI's low opinion of the product, (*see supra* Part III.E.3.a (discussing PX2086 (JLI) at 001); PX2274 (JLI) at 001; RX1165 (JLI) at 004)), which was confirmed by trial and deposition testimony.

#### **Response to Finding No. 749**

The proposed finding is conclusory, vague, unsupported by the cited evidence, and contrary to the weight of the evidence as described in responses to RFPP ¶¶ 748, 750-54, 479-80. (*See* Responses to RPFF ¶¶ 748, 750-54, 479-80).

750. O'Hara did not think MarkTen Elite was a product with long term viability because it was a low-strength free-base nicotine product—rather than a higher-strength nicotine-salt product like JUUL—and as a result, Elite “would not satisfy consumer smokers to the degree necessary to convert them from combustible tobacco to vapor.” (PX7033 O'Hara (JLI) Dep. at 198).

#### **Response to Finding No. 750**

The proposed finding is incomplete, misleading, unreliable, and contradicted by the weight of the evidence.

The proposed finding is incomplete and misleading because it ignores trial testimony that nicotine salts are not the only way to derive nicotine satisfaction and that there are products sold on the market without nicotine salts, including *myblu* freebase pods. (CCFF ¶¶ 1166-72, 1170-71). In addition, the proposed finding also ignores the fact that other manufacturers continue to market closed-system e-cigarettes with low nicotine strength. (CCFF ¶¶ 169, 1177-88). The proposed finding also ignores that JLI itself developed lower nicotine versions of the original JUUL product in order to meet the demands of consumers who preferred them to the higher nicotine version. (CCFF ¶¶ 1181-85).



The proposed finding is also contrary to the weight of the evidence; Respondents ignore a JLI document where O'Hara concluded that MarkTen Elite had "long-term viability." (CCFF ¶ 1129; *see also* Response to RPF 748). The proposed finding is unreliable as it cites solely to self-serving testimony of a JLI executive which was objected to by Complaint Counsel. (PX7033 O'Hara (JLI) Dep. at 198). The proposed finding is further undermined by Elite's actual sales, which were growing in 2018. (CCFF ¶¶ 1112-31).

751. Thus, although Elite was a pod-based product, JLI was not "ever too focused on how MarkTen Elite was performing." (PX7042 Danaher (JLI) Dep. at 23; *see also* PX7019 Crozier (Sheetz) Dep. at 77 (noting he did not recall JUUL seeming concerned about the introduction of Elite when he met with them to plan their promotions)). Elite did not show attachment to consumers; "retailers were not bullish on the product"; and the product attributes—low nicotine content and no salts—"would not have been attributes of a likely successful product." (Robbins (JLI) Tr. 3250-51).

#### **Response to Finding No. 751**

The proposed finding is conclusory, incomplete, misleading, unreliable, and contrary to the weight of the evidence.

The first sentence of the proposed finding is conclusory, incomplete, misleading, self-serving, and contrary to the weight of the evidence for the reasons stated in response to RPF 748; JLI documents indicate it did focus on Elite as a competitor. The after-the-fact testimony from Danaher is also self-serving and vague as to the meaning of not being "ever too focused" on Elite's performance. (*See* Response to RPF 748). In fact, the Danaher testimony appears to acknowledge that JLI in fact did focus on Elite as part of its competitive intelligence gathering. (PX7042 Danaher (JLI) Dep. at 23).

The second sentence of the proposed finding is unreliable because it is a self-serving, after-the-fact statement by Robbins from his deposition. The second sentence of the proposed finding is also incomplete, misleading, and contrary to the weight of the evidence for the reasons provided in response to RPF 750. (*See* Response to RPF 750) (regarding nicotine salts and nicotine

levels and Elite's actual growing sales). It is further contrary to the weight of the evidence from retailers, (CCFF ¶¶ 1513-14, 1158-59, 1460-61), Elite's sales in retail, (CCFF ¶¶ 1117, 1452, 1504), and testimony from Huckabee regarding the MarkTen brand (including Elite) having pockets of strength regionally in California and New York, and strength with the three largest retailers in the U.S. (Huckabee (Reynolds) Tr. 477-478). The proposed finding is further undermined by Huckabee's testimony that { [REDACTED]

[REDACTED] } It is further contradicted by Altria's actual sales of Elite pods in September 2018. (CCFF ¶ 1161 (showing MarkTen Elite's average pod sales volume per store selling the product was comparable to JUUL's and myblu's at similar stages after their respective launches)).

752. JLI observed that this assessment was borne out by Elite's market performance. Robbins testified that Elite "never caught on in market. It didn't seem to be effective at converting cigarette smokers to the product. And they sold -- I don't recall them selling many devices or pods, but when they sold devices, it did not appear that there was pod purchases afterwards, so -- and, you know, feedback from the market was negative on it, which is to say wholesalers and retailers did not see it selling well either." (Robbins (JLI) Tr. 3251).

### **Response to Finding No. 752**

The testimony of Robbins is unreliable, incomplete, misleading, and contrary to the weight of the evidence. (See Response to RPF ¶ 750 (regarding Elite's growing sales), RPF ¶ 748 (regarding JLI's continual focus on Elite in 2018 and competitor testimony regarding Elite); RPF ¶ 751 (regarding Elite's sales at retail, testimony from retailers about Elite, testimony about Elite's pockets of strength and { [REDACTED] }, and Elite's pod sales in September 2018)). In particular, as stated in response to RPF ¶ 751, as of September 7, 2018, an Altria presentation showed that MarkTen Elite's average pod sales volume per store selling the product was

comparable to JUUL's and myblu's at similar stages after their respective launches. (See Response to RPF 751; CCFF 1161).

The specific testimony from Robbins that “and, you know, feedback from the market was negative on it, which is to say wholesalers and retailers did not see it selling well either[]” is unreliable because it is self-serving hearsay that is contrary to the weight of the evidence. (See Response to RPF 751 (regarding Elite's sales at retail, testimony from retailers about Elite, testimony about Elite's pockets of strength and {REDACTED} and Elite's pod sales in September 2018)).

The first sentence in the proposed finding is conclusory and unsupported by the cited evidence. Respondents do not cite any testimony to support that one statement from Robbins represents the views of the entire company and it is not clear what “this” is that Respondents are addressing.

753. At trial, O'Hara also recounted his perception of Elite's leaking: He “thought that it was pretty clear that, you know, commercially the product was a failure, and in addition to that, the excessive leaking and product quality issues I thought had damaged the brand potentially so significantly that the brand was irreparably damaged.” (O'Hara (JLI) Tr. 556). O'Hara agreed that the “overall quality of the MarkTen Elite product was poor” and observed that the “pods were uniquely leaky.” (O'Hara (JLI) Tr. 548).

### **Response to Finding No. 753**

The proposed finding's statements about MarkTen Elite's commercial performance and quality are incomplete, misleading, conclusory, and contrary to the weight of the evidence. (See Response to RPF 750 (regarding Elite's sales growth), RPF 751 (regarding Elite's sales at retail, testimony from retailers about Elite, testimony about Elite's pockets of strength and {REDACTED} and Elite's pod sales in September 2018)). It is further contradicted by Altria's plans to expand Elite prior to withdrawing it from the market, (CCFF 1147-48), and by Altria's public and investor statements regarding Elite. (CCFF 1113).

The proposed finding's conclusion about Elite's leaking is also unsupported, misleading and contrary to the weight of the evidence. Shortly before withdrawing MarkTen Elite from the market, Altria made a product change to Elite to address a leaking issue, leaving it little time to assess the impact of the change on Elite's sales performance. (CCFF ¶¶ 1149-51, 1206-27). Leaking was a common problem for pod-based closed-system e-cigarettes, (CCFF ¶ 1222, 1489-90), and JLI, similarly made improvements to fix its leaking pods. (CCFF ¶¶ 1204-05, 1483-88).

Finally, the proposed finding is unreliable and should be given little weight because it relies solely on the self-serving, after-the-fact testimony of a current JLI employee.

754. JLI understood that "98 or 99 percent of the market was cigarettes. So . . . there was no value in gaining for MarkTen or Vuse. It was -- the whole market was cigarettes." (PX7039 Robbins (JLI) Dep. at 46). Over time, as JUUL "recruited adult smokers over into vapor, . . . it became less and less relevant at all what other vapor products were doing. It was all about how you could switch adult smokers." (PX7039 Robbins (JLI) Dep. at 58).

#### **Response to Finding No. 754**

The proposed finding is vague, incomplete, misleading, unreliable, and contrary to the weight of the evidence. The first sentence of the proposed finding is vague as what Respondents are discussing—"there was no value in gaining for MarkTen or Vuse" is an incomplete clause; the subject is missing. The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence; the evidence shows that closed-system e-cigarette suppliers found it relevant what other closed-system suppliers were doing to win customers. Respondents' documents and testimony and documents from third parties further shows that pod-based products such as JUUL competed against cigalikes, (CCFF ¶¶ 299-350), and that "JUUL Has Taken Share From Other E-Cig Players (Vuse, MarkTen & Logic)." (PX2174 (JLI) at 006). Testimony also shows JLI and other closed system suppliers were in fact focused on how other closed system e-cigarette suppliers (including pods and cigalikes) were pricing and competing. (CCFF ¶¶ 242, 244-50, 252-67, 341-350).

The proposed finding is unreliable because it is supported only by self-serving, after-the-fact testimony and is also vague as to the time frame being discussed, including but not limited to the reference to “over time.” The evidence shows JLI viewed cigalikes and MarkTen (both Elite and cigalikes), as a competing product for years and up until the transaction. (CCFF ¶¶ 299-326; Response to RPF ¶ 748 (regarding JLI views on Elite)).

## 2. JLI’s View Of MarkTen Cig-A-Like

755. JLI’s view of the MarkTen cig-a-like was no better. In April 2018, O’Hara sent his JLI colleagues an overview of a tobacco industry analysis by Wells Fargo. He explained that many retailers who responded to a Wells Fargo survey were “saying MarkTen is ‘dead’” and were “getting fed-up holding space for it on the back-bar.” (RX1461 (JLI) at 001-02).

### **Response to Finding No. 755**

The proposed finding is vague, conclusory, unsupported by the cited evidence, misleading, and contrary to the weight of the evidence.

First, JLI documents overwhelmingly show that JLI also was focused on competition from cigalikes, including MarkTen cigalikes, (CCFF ¶¶ 299-326), and that JLI competed head-to-head with both MarkTen Elite and MarkTen cigalikes. (CCFF ¶¶ 1432-40 (price competition); CCFF ¶¶ 1450-51, 1470-71, 1474-75, 1481 (non-price competition)). Joseph O’Hara specifically tracked MarkTen cigalikes when collecting competitive intelligence. (CCFF ¶ 325). Second, the quote from RX1461 (JLI) at 001-02 regarding MarkTen cigalikes “being dead” is misleading, unsupported, and contrary to the weight of the evidence for the reasons previously stated. More specifically, MarkTen cigalikes were not dead—competitors competed and priced their pod-based products against cigalikes, including MarkTen. (CCFF ¶¶ 341-50). Altria publicly told investors in July 2018 that MarkTen Bold and Elite were driving growth for Nu Mark and “getting traction with consumers,” (CCFF ¶ 1113), and that original MarkTen and MarkTen Bold cigalikes were two of the three products Altria had “in distribution at retail in large numbers of stores” (CCFF ¶

130). Willard acknowledged at the trial that MarkTen cigalikes had increased brand share of the cigalike category from 2017 to 2018. (Willard (Altria) Tr. 1365) (discussing RX0272 (Altria) at 013). In addition, the statement regarding what retailers believed is devoid of any evidence from actual retailers who were deposed in this case (e.g., from Wawa, 7-11, or Sheetz) or about their views on MarkTen cigalikes. Paul Crozier testified that even after Altria discontinued Elite, Sheetz planned to continue to sell Altria's cigalike products, and "had no plans of cutting [those] product[s]." (CCFF ¶ 1515).

The first sentence is vague and conclusory and contrary to the weight of the evidence. Assuming Respondents are comparing JLI's view of MarkTen Elite to MarkTen cigalikes, the evidence shows that JLI focused on Elite several months after its launch through it being discontinued. (Response to RPF ¶ 748).

756. And though MarkTen Bold had nicotine salts, it was no exception to the cig-a-like's generally poor performance. JLI's data showed MarkTen Bold was "losing doors" at retailers, meaning that it was not selling in particular locations and those locations showed up in the sales data as lost or not counted "doors." (RX1524 (JLI) at 001; O'Hara (JLI) Tr. 625-27).

#### **Response to Finding No. 756**

The proposed finding is vague, conclusory, unreliable, incomplete, and contrary to the weight of the evidence for the reasons stated above in response to RPF ¶ 755. (See Response to RPF ¶ 755). The first sentence is conclusory and contrary to the weight of the evidence. The proposed finding is vague as to the frame being addressed and contrary to the weight of the evidence. JLI's competitive intelligence specifically focused on MarkTen Bold, (CCFF ¶¶ 254 (January 2018), 466 (February 2018), 310 (February 2018), 252 (November 2018), 320 (November 2018)); O'Hara specifically tracked MarkTen Bold when collecting competitive intelligence for JLI. (CCFF ¶ 325). Altria also publicly confirmed Bold was selling and it was expanding Bold sales from 2017 to 2018. In November 2017, Altria told investors that MarkTen

Bold had promising early results and those results led Nu Mark to plan to expand MarkTen Bold to an additional 15,000 stores by the end of 2017. (CCFF ¶ 1102). In February 2018, Willard told investors “MarkTen Bold, which is currently in about 25,000 retail stores, uses a proprietary recipe of nicotine salts, with 4% nicotine by weight to deliver a differentiated sensory experience and nicotine satisfaction, approaching that of cigarettes.” (CCFF ¶ 465). In April 2018, “MarkTen volume sales [were] increasing, primarily driven by Bold expansion.” (CCFF ¶ 467). In July 2018, Altria’s Willard publicly told investors that MarkTen Bold and Elite were driving growth for Nu Mark and “getting traction with consumers,” (CCFF ¶ 1113), and that Bold was one of the three products Altria “had in distribution at retail in large numbers of stores.” (CCFF ¶ 130; *see also* CCFF ¶ 494).

757. O’Hara highlighted this MarkTen Bold data in a February 7, 2018 email, concluding “there are two possible reasons for this. Either 1) the product is sitting on the shelves and didn’t sell at all over this period, or 2) the retailers are actively de-stocking them. Either way, this is a high-conviction data point that MarkTen Bold is not something we should be extremely concerned about . . . . This is especially true given how publicly they’ve discussed their efforts to drive distribution on that product.” (RX1524 (JLI) at 001).

#### **Response to Finding No. 757**

The proposed finding is vague, conclusory, unsupported by the cited evidence, and contrary to the weight of the evidence for the reasons set forth in response to RPF 755-56. (*See* Responses to RPF 755-56).

758. JLI also internally circulated reports from industry analysts observing that Bold’s sales never “materially spike[d] in the way that you might expect.” (RX1425 (JLI) at 008).

#### **Response to Finding No. 758**

The proposed finding is vague, conclusory, unsupported by the cited evidence, and contrary to the weight of the evidence for the reasons set forth in response to RPF 755-56. (*See* Responses to RPF 755-56).

759. JLI's witnesses testified at trial that no one at the company believed that Altria's MarkTen cig-a-likes in general were a competitive threat. (O'Hara (JLI) Tr. 583-84, 624-28, 630; Robbins (JLI) Tr. 3245, 3248; *see also* PX7005 Danaher (JLI) IHT at 165 (“[W]e didn’t think that MarkTen was a significant competitive threat to us.”)).

#### **Response to Finding No. 759**

The proposed finding is vague, conclusory, unsupported by the cited evidence, and contrary to the weight of the evidence for the reasons set forth in response to RPF 755-56. (*See* Responses to RPF 755-56).

The proposed finding is also unreliable because it relies on self-serving, after-the-fact testimony from three JLI employees. Moreover, the proposed finding is contrary to the weight of the evidence, which shows that the principal JLI deal negotiators insisted on including all current MarkTen products, including cigalikes, in the non-compete. (CCFF 914-18).

760. As Joseph O'Hara, JLI's director of regulatory strategy testified, the MarkTen cig-a-likes simply “were not viable.” (O'Hara (JLI) Tr. 630). They “were shaped like a cigarette, which isn’t ideal for people that are trying to switch from cigarettes, but more importantly, they had a very low nicotine concentration, and the nicotine formula in there was not salt-based and it was low quality.” (O'Hara (JLI) Tr. 625; *see also* O'Hara (JLI) Tr. 630 (“They didn’t have nicotine salts, they didn’t satisfy nicotine cravings, and they were cigalikes and not pod-based products.”)). As a result, MarkTen was “[a]bsolutely not” “successful.” (O'Hara (JLI) Tr. 624).

#### **Response to Finding No. 760**

The proposed finding is vague, conclusory, unsupported by the cited evidence, and contrary to the weight of the evidence for the reasons set forth in response to RPF 755-56. (*See* Responses to RPF 755-56).

The proposed finding's statement that MarkTen cigalikes had a low nicotine concentration and no nicotine salts is misleading, inaccurate, and contrary to the weight of the evidence. MarkTen Bold was a cigalike, (CCFF 21), that had four percent nicotine by weight and nicotine salts. (CCFF 1196, 464). In November 2017, Altria told investors that its pharmacokinetic (or PK) studies showed that MarkTen Bold offered nicotine delivery at levels approaching that of



cigarettes. (CCFF ¶ 1197). The proposed finding is further incomplete and misleading because it ignores trial testimony that nicotine salts are not the only way to derive nicotine satisfaction and that there are products sold on the market without nicotine salts, including *myblu* freebase pods. (CCFF ¶¶ 1170-71, 1166-72). Furthermore, the proposed finding ignores that other manufacturers continue to market closed-system e-cigarettes with low nicotine strength. (CCFF ¶¶ 1177-88, 169).

Finally, the proposed is unreliable and should be given little weight because it relies on self-serving, after-the-fact testimony from two JLI employees.

761. O'Hara believed that the cig-a-likes were "extremely low quality" and, after a few months of tracking sales data in his new role at JLI thought it "was pretty clear" that they were "a product failure." (O'Hara (JLI) Tr. 583-84). Bob Robbins, JLI's Chief Growth Officer, shared O'Hara's dim view of the MarkTen cig-a-like: "They didn't sell well. They didn't appear to have attachment with adult smokers. They didn't really drive down cigarette use, and it didn't seem like the trade channel retailers or wholesalers had good feedback on them." (Robbins (JLI) Tr. 3245).

### **Response to Finding No. 761**

The proposed finding is vague, conclusory, unsupported by the cited evidence, and contrary to the weight of the evidence for the reasons set forth in response to RPF ¶¶ 755-56. (*See* Responses to RPF ¶¶ 755-56). The proposed finding is also unreliable and should be given little weight because it relies solely on post-hoc, self-serving testimony from two current JLI employees.

## **VI. IN JULY AND AUGUST 2018, ALTRIA AND JLI CONTINUED DISCUSSING A POSSIBLE INVESTMENT, THIS TIME WITH GREATER SPECIFICITY**

### **A. July 2018 Negotiations**

762. By July 2018, Altria recognized that "a deal that include[d] a pathway to control [was] not actionable at [that] time." (PX4347 (Altria) at 002).

### **Response to Finding No. 762**

The proposed finding is vague, incomplete, and misleading. The proposed finding is vague and misleading as to the time in "July 2018." The proposed finding cites PX4347 (Altria) at 002, which is dated July 30, 2018. The proposed finding is incomplete and misleading because

Respondents omit all communications that occurred between JLI and Altria on or before July 30, 2018. (CCFF ¶¶ 639-88, 867-913, 928-33). Specifically,

- Respondents omit that Valani and others at JLI believed “as a general precept for [] what it would take for Altria to ever have an involvement with JUUL would be that they [] couldn’t have a directly competitive offering of their own . . . .” (CCFF ¶ 869; *see* CCFF ¶¶ 879 (discussing testimony by JLI’s Danaher that JLI had “always” contemplated that Altria would be subject to a non-compete)), 870-78).
- Respondents omit testimony that JLI negotiators told Altria that it could not compete in e-cigarettes, (CCFF ¶¶ 880-91), and that JLI believed Altria understood “probably pretty early on” in the negotiations that JLI would not do a deal with Altria unless Altria agreed to compete in e-cigarettes exclusively through JLI. (CCFF ¶ 884).
- Respondents omit discussion of JLI’s initial term sheet, which it sent on July 30, 2018, where JLI proposed a minority investment by Altria, where again, JLI communicated Altria could not compete in closed-system e-cigarettes. (CCFF ¶¶ 680-88, 892-912). Respondents ignore the full series of communications between JLI and Altria in the month leading up to July 30, 2018. (CCFF ¶¶ 668-79). One such omitted communication was a July 24, 2018 planned call between Altria’s Willard and JLI’s adviser at Goldman Sachs, Peter Gross. (CCFF ¶ 673). After that, on July 27, 2018, Gross emailed Pritzker of JLI that Gross was “under the impression that [Altria] would just shut down Mark 10” (CCFF ¶ 675). At trial, Pritzker testified that he understood “Mark 10” as referring generally to Altria’s

competitive products, and understood “shut down” to mean the products would be gone and Altria no longer competing. (CCFF ¶ 971).

- Respondents further omit communications regarding Altria’s relationship with PMI and its impact on JLI negotiations. Altria’s Joint Research, Development, and Technology Sharing Agreement with PMI was set to (and did) expire in July 2020. (CCFF ¶ 927). Altria was not sure if it was permitted to sell or contribute its e-cigarette products to a third party prior to the expiration of its agreement with PMI in July 2020. (CCFF ¶ 927). In June 2018, Altria put together talking points about Altria’s relationship with PMI for Willard and Gifford to discuss with JLI. (CCFF ¶ 928). On June 27, 2018, Altria’s in-house attorney circulated talking points “for the 7/13 Tree meeting that cover the Vulcan [PMI] relationship.” (CCFF ¶ 929). Pritzker, Willard, and Valani arranged a call for July 10, 2018 after having to cancel the July 13, 2018 meeting. (CCFF ¶ 930). Evidence shows Altria told JLI about the potential issue with divesting or contributing its e-cigarette business due to PMI. (CCFF ¶¶ 931-33).

The proposed finding is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding also omits discussion of the next section in PX4347 (Altria) at 002, which poses the question, “How can we provided services without control?” the answer to which is redacted. (PX4347 (Altria) at 002).

763. Draft notes for a July 31, 2018 Altria Board of Directors call list three reasons for Altria’s decision to accept a minority investment in JLI: (1) due to “stellar performance in the marketplace,” JLI investors “are unwilling to transact at valuation levels we were proposing”; (2) “credible” interest from “a competing bidder that is open to a minority stake”; and (3) “the market is squarely convinced that every company competing in U.S. combustibles has a JUUL problem.” (PX4347 (Altria) at 002).

### **Response to Finding No. 763**

The proposed finding is incomplete, misleading, and unsupported. The proposed finding is incomplete and misleading for the reasons set forth in response to RPF 762. (See Response to RPF 762).

The proposed finding is also unsupported as to the conclusion that Altria decided to accept a minority investment. The cited document contains no reference to Altria definitively accepting a minority investment. (PX4347 (Altria) at 002). To the extent that the proposed finding stands for the proposition that other large tobacco companies faced the same threat from JLI as Altria did, Complaint Counsel does not disagree.

764. };  
see also PX8008 Huckabee (Reynolds) Decl. at 002 ¶ 5).

### **Response to Finding No. 764**

The proposed finding is vague as to the meaning of “at the time.”

765. On July 23, 2018, draft Altria talking points for a potential call with JLI pivoted to proposing a minority investment, contemplating a \$13 billion investment for a 49.9 percent stake in JLI’s U.S. business. (PX3169 (PWP) at 001).

### **Response to Finding No. 765**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF 762. (See Response to RPF 762).

766. Before July 27, JLI had discussed with Altria the treatment of Nu Mark's existing e-vapor products in the event that Altria made a minority investment in JLI. "[I]n the context of understanding that it would require regulatory oversight," JLI had "proposed" divestment of Altria's e-vapor assets. (Pritzker (JLI) Tr. 683).

### **Response to Finding No. 766**

The proposed finding is incomplete, misleading, and unreliable. The proposed finding is incomplete and misleading for the reasons set forth in response to RPF 762. (See Response to RPF 762). The proposed finding is also incomplete and misleading because it ignores evidence that JLI did not care whether Altria divested its e-cigarette business; JLI only cared that Altria found a way to no longer compete in closed-system e-cigarettes. (CCFF ¶¶ 898-905).

The proposed finding is further incomplete and misleading as to Pritzker's testimony. Pritzker testified at trial that prior to July 27, 2018, one of the options he discussed during negotiations was that Altria could sell its e-cigarette business if the FTC required it. (Pritzker (JLI) Tr. 683).

The proposed citation also misleadingly indicates that divestiture was the only option discussed. Respondents omit Pritzker's testimony that at this time, "various ideas came up as to what might be allowed or required by the FTC . . . and perhaps shut down was a possibility." (Pritzker (JLI) Tr. 686). The proposed finding is further contradicted by other evidence in the record that Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its e-vapor business. (CCFF ¶¶ 968-86). The proposed finding is further incomplete and misleading because it fails to address the reality that by the time Altria initiated the HSR review in February 2019, Altria had already pulled its pod products from the market, discontinued the

production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05).

The proposed finding is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

Finally, the proposed finding is supported exclusively by self-serving testimony from JLI and it is therefore unreliable.

## **B. July 30, 2018 Term Sheet**

### **1. Summary**

767. On July 30, 2018, JLI sent an initial term sheet to Altria proposing a potential transaction structure. (PX1300 (Altria) at 001).

#### **Response to Finding No. 767**

Complaint Counsel does not dispute that on July 30, 2018, JLI sent Altria an initial term sheet. However, as written, the proposed finding is incomplete and misleading in describing the term sheet as proposing a "potential transaction structure." The term sheet included more than simply a transaction structure. Specifically, the term sheet is titled "Summary of Terms for Potential Transaction – Richard," (PX1300 (Altria) at 002), and includes several proposals, including the requirement that Altria divest, contribute, or cease to operate its e-cigarette business and the non-compete clause. (CCFF ¶¶ 684, 686).

768. JLI was code-named "Jack" in the negotiations; Altria was code-named "Richard." (Pritzker (JLI) Tr. 687-88).

**Response to Finding No. 768**

Complaint Counsel does not disagree.

769. In the email attaching the term sheet, JLI's Pritzker confirmed plans for Pritzker, Valani, Burns, Willard, and Gifford to meet at the Park Hyatt Hotel in Washington, D.C. on August 1. (PX1300 (Altria) at 001).

**Response to Finding No. 769**

Complaint Counsel does not disagree.

770. The initial proposed term sheet by JLI contemplated that Altria would purchase a 45-percent stake in JLI's U.S. business but receive just five percent of the voting power. (PX1300 (Altria) at 002-03). In addition, JLI's proposed term sheet provided no protection against the dilution of Altria's shares, allowed JLI to sell the company or undertake an IPO without Altria's approval, and imposed a "standstill" that severely restricted Altria from increasing its ownership stake. (PX1300 (Altria) at 003 (dilution), 007 (IPO), 008-09 (standstill)).

**Response to Finding No. 770**

The proposed finding is misleading because it overstates the evidence contained in the initial term sheet without other support. (PX1300 (Altria) at 002-03, 007, 008-09). The proposed finding is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

771. For Altria, the ownership and control terms in JLI's initial term sheet were "insult[ing]," "outrageous," and "appalling." (Garnick (Altria) Tr. 1745; Gifford (Altria) Tr. 2764; *see also* Pritzker (JLI) Tr. 825 ("[Altria was] very unhappy with the term sheet.")). As Gifford testified: "[Y]ou give all of this money to get an economic interest and you really only have 5 percent of the say. I actually found it very appalling to see that." (Gifford (Altria) Tr. 2764-65).

**Response to Finding No. 771**

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is unreliable because it contains hearsay and exclusively relies on self-serving testimony from Altria and JLI. The proposed finding contains unreliable hearsay: Garnick testified regarding Gifford's reactions, (Garnick (Altria) Tr. 1745), and Pritzker testified about his impression of Altria's reaction. (Pritzker (JLI) Tr. 825). Moreover, Altria and JLI's conduct shows that, despite the proposed finding's self-serving testimony, JLI and Altria continued to negotiate for Altria to acquire a minority investment in JLI after July 30, 2018. (CCFF ¶¶ 689-866). In fact, only a few days after, on August 4, 2018, JLI sent a revised term sheet. (CCFF ¶¶ 694, 913, 976). The August 4, 2018 revision specifically added yet another reference to the "shutdown" of MarkTen and MarkTen Elite. (CCFF ¶ 694).

**2. "Antitrust Clearance Matters"**

772. JLI's initial term sheet also included two technical provisions that addressed the contemplated investment's implications for Altria's e-vapor portfolio after the transaction took place. (PX1300 (Altria) at 004-06). The first of these provisions, under a section of the term sheet entitled "Antitrust Clearance Matters," proposed steps to facilitate the required HSR clearance for the transaction. (PX1300 (Altria) at 004-05).

**Response to Finding No. 772**

The proposed finding is vague, incomplete, misleading, and unsupported. The proposed finding is vague because it fails to define what two "technical provisions" are being addressed.



Complaint Counsel assumes the two provisions (which the proposed finding qualifies as “technical,” which is vague) are the provisions that require Altria divest/contribute/cease to operate its e-cigarette business and that Altria not compete with JLI, as described below:

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; *see also* CCFF ¶¶ 894-97).

Richard agrees, for so long as it owns at least 5% of Jack's outstanding shares, to refrain from competing anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their divestiture or contribution as described above).”

(CCFF ¶ 686).

Complaint Counsel assumes that the first listed provision above, (CCFF ¶ 684), is the “first” provision addressed by the proposed finding.

The proposed finding is incomplete, misleading, and unsupported as to the purpose of the divest/contribute/cease to operate provision. The proposed finding is incomplete because it omits the fact that JLI’s ultimate purpose behind this provision in the term sheet was to communicate to Altria that it could not compete in the closed-system e-cigarette market. (CCFF ¶¶ 892-913). The proposed finding also omits the fact that JLI’s negotiators understood that a “precept” of any investment from Altria was that Altria would not compete in e-cigarettes; the fact that JLI told Altria, and Altria understood, it could not compete in e-cigarettes; and the fact that as of at least July 27, 2018, JLI was “under the impression that [Altria] would just shut down Mark 10.” (*See* Responses to RPF ¶¶ 762, 783). Respondents further ignore that the parties had specifically discussed shutting down Altria’s e-cigarette business by this time and that JLI was agnostic as to what Altria did so long as it did not compete against JLI. (*See* Response to RPF ¶ 766).

The proposed finding is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

Finally, the proposed finding is incomplete and misleading because it fails to address the reality that by the time Altria initiated the HSR review in February 2019, Altria had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05).

773. The provision proposed a ranked process for the treatment of Altria's existing e-vapor assets as part of the HSR clearance process. (PX1300 (Altria) at 005).

### **Response to Finding No. 773**

The proposed finding is unsupported and misleading. While the provision being addressed does list three actions—that “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),” (CCFF ¶¶ 684, 894)—Respondents do not cite any testimony about the “ranked” ordering they claim. To the contrary, the evidence shows JLI did not care how Altria exited e-cigarettes; JLI only cared that Altria found a way to no longer compete in closed-system e-cigarettes. (CCFF ¶¶ 898-905). Moreover, the proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-

994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is also incomplete and misleading because it fails to address the reality that by the time Altria initiated the HSR review in February 2019, Altria had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05).

774. This provision proposed that in connection with filing for HSR clearance, Altria would "divest" its existing e-vapor products. (PX1300 (Altria) at 005).

#### **Response to Finding No. 774**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF 766, 773. (See Responses to RPF 766, 773). In addition, the proposed finding omits the entire term sheet provision that requires that Altria divest/contribute/cease to operate its e-cigarette business. (CCFF ¶¶ 684, 894). In addition, Respondents further omit that in by July 30, 2018, Altria and JLI had already discussed that Altria might shut down its e-cigarette business and that Altria could not compete against JLI. (See Responses to RPF 762, 766).

The proposed finding is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

Finally, the proposed finding is incomplete and misleading because it fails to address the reality that by the time Altria initiated the HSR review in February 2019, Altria had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05).

775. As Valani explained, “the prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route” that the FTC would require as part of the HSR clearance process. (Valani (JLI) Tr. 918).

### **Response to Finding No. 775**

The proposed finding is incomplete and misleading. It fails to provide Valani’s full quote: “the prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route, and if not, a contribution, and if not, that they would find the ability to cease to operate.” (Valani (JLI) Tr. 918). The proposed finding further omits that Altria and JLI had already discussed that Altria might shut down its e-cigarette business and that Altria could not compete against JLI. (*See* Responses to RPF ¶¶ 762, 766). It further ignores that JLI did not care how Altria exited e-cigarettes; JLI only cared that Altria found a way to no longer compete in e-cigarettes. (CCFF ¶¶ 898-905).

The proposed finding is also incomplete and misleading because it fails to address the reality that by the time Altria initiated the HSR review in February 2019, Altria had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05).

Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

776. Similarly, Pritzker’s “expectation” was “that the FTC would require a divestiture and that the product would then stay in the market with a different ownership.” (Pritzker (JLI) Tr. 681).

**Response to Finding No. 776**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is also misleading and contrary to the weight of the evidence. Pritzker himself testified that he did not care which path Altria took to meet JLI’s non-compete demands as long as it achieved the goal of Altria not competing against JLI. (CCFF ¶ 898). JLI and Altria repeatedly discussed ways that Altria could fulfill its obligation not to compete, including ceasing to operate its existing e-vapor business. (CCFF ¶¶ 969-86). Altria indicated to JLI that it might take this path, (CCFF ¶¶ 969-86), and its decisions to pull Elite from the market in October 2018, in the midst of transaction negotiations, and to discontinue the production and distribution of its cigalikes in December 2018, on the eve of the transaction, were entirely consistent with taking that direction. (CCFF ¶¶ 987-94).

The proposed finding is also incomplete and misleading because it fails to address the reality that by the time Altria initiated the HSR review in February 2019, Altria had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05).

Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

777. At the time JLI sent the July 30 term sheet, Pritzker “had no reason to think” that divestiture might not be practicable. (Pritzker (JLI) Tr. 814).

**Response to Finding No. 777**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence. Pritzker's after-the-fact, self-serving testimony is unreliable and contradicted by the term sheet itself, which includes more than just a divestiture; it includes a provision that Altria divest/contribute/cease to operate its e-cigarette business. (CCFF ¶ 894; *see also* Response to RPFF ¶ 775). Pritzker's testimony is further contradicted by JLI's revised term sheet sent four days later, on August 4, 2018, which specifically added the term "shut down" to the non-compete. (CCFF ¶¶ 694, 913, 976). The proposed finding further omits that Altria and JLI had already discussed that Altria might shut down its e-cigarette business and that Altria could not compete against JLI. (*See* Responses to RPFF ¶¶ 762, 766). It further ignores that JLI did not care how Altria exited e-cigarettes; JLI only cared that Altria found a way to no longer compete in e-cigarettes. (CCFF ¶¶ 898-905). Finally, the proposed finding is incomplete and misleading because it fails to mention that Altria did inform JLI of the PMI complications relating to Altria's contributing or divesting its e-cigarette business during the course of their negotiations. (CCFF ¶¶ 925-43).

778. Nevertheless, the term sheet proposed as an alternative, only "if divestiture [were] not reasonably practicable," that Altria would "contribute" its products to JLI at no cost. (PX1300 (Altria) at 005).

**Response to Finding No. 778**

The proposed finding is incomplete, misleading, and unsupported. The term sheet states: "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) . . . ." (CCFF ¶ 894). Respondents have re-stated the specific provision in misleading way without testimony or other support. The proposed finding is misleading because it omits the fact that JLI's

ultimate purpose behind this provision in the term sheet was to communicate to Altria that it could not compete in the closed-system e-cigarette market. (CCFF ¶¶ 892-913).

779. Under this scenario, Altria would “sell or grant to JLI” its e-vapor products, and “JLI would operate them or do something with them,” if required by the FTC. (Pritzker (JLI) Tr. 690).

#### **Response to Finding No. 779**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable because it relies solely on the self-serving testimony of a JLI executive. It is also incomplete and misleading to the extent that it suggests that there were any Altria e-vapor products for JLI to “operate or do something with” by the time the FTC review process began. In fact, by the time Altria initiated the HSR review in February 2019, Altria had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05).

Furthermore, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

780. Pritzker’s “understanding [was] that [JLI] had attributed no value to owning any of [Altria’s] products.” (PX7021 Pritzker (JLI) Dep. at 87). “We didn’t care whether they contributed to us.” (PX7021 Pritzker (JLI) Dep. at 87).

#### **Response to Finding No. 780**

The first sentence of the proposed finding is unreliable in that it relies solely on the after-the-fact, self-serving testimony of a JLI executive. It is also incomplete and misleading because—Pritzker qualified his testimony by noting, “I’m no expert in the comparative virtues of different products.” (PX7021 (Pritzker (JLI), Dep. at 87)). Respondents cite to no testimony from any JLI

employee about who would have knowledge about the comparative virtues of different products. In addition, Pritzker's other testimony suggests that Altria's e-cigarette assets had value. (*See* Response to RPPF ¶ 784). The first sentence is also misleading in that it fails to note that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled "What Keeps Us Up at Night")). The second sentence is incomplete and misleading because it fails to note that Pritzker himself testified that he did not care which path Altria took to meet JLI's non-compete demands as long as it achieved the goal of Altria not competing against JLI. (CCFF ¶ 898).

781. Only if contribution also were impracticable did the term sheet propose as a last resort that Altria would "cease to operate" its e-vapor business within nine months following the transaction. (PX1300 (Altria) at 005).

#### **Response to Finding No. 781**

The proposed finding is incomplete, misleading, and unsupported. The term sheet states: "Promptly and in no event later than nine months following the purchase, 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) . . . ." (CCFF ¶ 894). Respondents have re-stated the specific provision in a misleading way without testimony or other support. The proposed finding is incomplete and misleading because it fails to mention that Altria did inform JLI of the PMI complications relating to Altria's contributing or divesting its e-cigarette business during the course of their negotiations. (CCFF ¶¶ 925-43).

The proposed finding is also incomplete and misleading because it fails to address the reality that by the time Altria initiated the HSR review in February 2019, Altria had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05).



782. As Valani testified, “the notional concept of ‘cease to operate’ was meant to be a sort of fail-safe if the other options had been exhausted.” (Valani (JLI) Tr. 918-19). In any event, “this was all in the context of it being done under the sanction of the regulator, was the intent.” (Valani (JLI) Tr. 918).

### **Response to Finding No. 782**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. The proposed finding is incomplete and misleading because it fails to mention that Altria did inform JLI of the PMI complications relating Altria contributing or divesting its e-cigarette business during the course of their negotiations. (CCFF ¶¶ 925-43).

The proposed finding is also misleading to the extent that it suggests that Respondents intended their actions to be met with the FTC’s approval. In fact, by the time Altria initiated the HSR review in February 2019, it had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05).

Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

783. The term sheet proposed that these steps to facilitate HSR clearance would be taken “[p]romptly and in no event later than nine months following the Purchase.” (PX1300 (Altria) at 005). As Pritzker testified, the “primary purpose” of this provision “was to give the regulators enough time to determine what they would allow or require as part of the [HSR] process.” (Pritzker (JLI) Tr. 692).

### **Response to Finding No. 783**

The proposed finding is misleading, unsupported, contrary to the weight of evidence, and unreliable.

The first sentence of the proposed finding is misleading and unsupported. The term sheet states: “Promptly and in no event later than nine months following the purchase, 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) . . . .” (CCFF ¶ 894). Respondents have re-stated the specific provision in a misleading way without testimony or other support.

The second sentence of the proposed finding, regarding the “primary purpose” of the provision, is misleading, unsupported, contrary to the weight of the evidence, and unreliable. Pritzker’s after-the-fact trial testimony is self-serving and therefore unreliable, and contradicted by the weight of the evidence in that the purpose of the provision was to communicate that Altria would not compete against JLI. (CCFF ¶¶ 892-913). In fact, Pritzker’s other testimony only confirms that JLI did not want Altria to compete against JLI. (CCFF ¶¶ 895-96; *see also* CCFF ¶¶ 869-71, 879).

The proposed finding is also misleading to the extent that it suggests that Respondents intended their actions to be met with the FTC’s approval. In fact, by the time Altria initiated the HSR review in February 2019, it had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05).

Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

784. In the same Antitrust Clearance Section, JLI’s initial term sheet required that both parties would use “reasonable best efforts to seek Antitrust Clearance for a period of at least nine

months after the Purchase” and would “cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria’s] non-combustible reduced-risk products business.” (PX1300 (Altria) at 005). Pritzker explained that it was critical for JLI to obtain assurances that “if the FTC required anything of Altria,” including divestiture, that Altria “would agree to those things and that they would not be able to, for example, walk away from the deal because of concessionary requirements.” (Pritzker (JLI) Tr. 818). “[W]e needed to make sure that Altria would, in fact, be willing to sell those products in the marketplace . . . at the requirement of the FTC or anything else the FTC would require, for that matter.” (Pritzker (JLI) Tr. 811).

#### **Response to Finding No. 784**

The proposed finding is misleading for the reasons set forth in response to RPF 772. (See Response to RPF 772). In addition, the last sentence of the proposed finding is missing key language that indicates that Altria’s e-cigarette assets had value. The full quote from Pritzker is: “So we needed to make sure that Altria would, in fact, be willing to sell those products in the marketplace for whatever they could get for those products at the requirement of the FTC or anything else the FTC would require, for that matter.” (Pritzker (JLI) Tr. 811). The proposed finding is also misleading to the extent that it suggests that Respondents intended their actions to be met with the FTC’s approval. In fact, by the time Altria initiated the HSR review in February 2019, it had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05).

Furthermore, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

785. Nothing about the divestiture/contribution/“cease to operate” provision was “intended to describe an obligation or something Altria would do before they even had a transaction

with JLI,” or prior to FTC review of that transaction. (Pritzker (JLI) Tr. 815; PX1300 (Altria) at 004-05; *see also* Pritzker (JLI) Tr. 854).

### **Response to Finding No. 785**

The proposed finding is contrary to the weight of the evidence to the extent that it implies there was no agreement between Altria and JLI for Altria to completely exit the closed-system e-cigarette market: JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86). And, by the time Altria initiated the HSR review in February 2019, Altria had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05).

The proposed finding is misleading and unreliable because it fails to put these term sheet terms in the proper context: that JLI’s negotiators understood that a “precept” of any investment from Altria was that Altria would not compete in e-cigarettes; that JLI told Altria it could not compete in e-cigarettes and Altria understood that; and as of at least July 27, 2018, that JLI’s adviser was “under the impression that [Altria] would just shut down Mark 10.” (*See* Responses to RPF ¶¶ 762, 766, 783). The proposed finding is also incomplete and misleading because it fails to mention that Altria did inform JLI of the PMI complications relating to Altria’s contributing or divesting its e-cigarette business during the course of their negotiations. (CCFF ¶¶ 925-43).

Finally, the proposed finding relies on the term sheet and otherwise exclusively upon self-serving testimony from Pritzker that renders the proposed finding unreliable.

786. The July 30 term sheet “was a nonbinding letter of intent” and “the terms are not very accurate.” (Pritzker (JLI) Tr. 692-93). The term sheet itself noted that “[t]he transactional

structure presented in this term sheet as the means for effecting [Altria's] investment is illustrative but not definitive.” (PX1300 (Altria) at 002 n.1; *see also* Pritzker (JLI) Tr. 814 (explaining terms in a term sheet “are fluid and subject to significant expansion and revision by business and legal teams”)).

### **Response to Finding No. 786**

The proposed is contrary to the weight of the evidence to the extent that it implies there was no agreement between Altria and JLI for Altria to completely exit the closed-system e-cigarette market. In fact, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86). The proposed finding is also incomplete and misleading because it fails to mention that Altria did inform JLI of the PMI complications relating to Altria's contributing or divesting its e-cigarette business during the course of their negotiations. (CCFF ¶¶ 925-43).

The proposed finding is also unsupported, misleading, and unreliable as to Pritzker's testimony that “the terms are not very accurate.” Respondents cite to the actual language of the term sheet that says the terms are “illustrative but not definitive” but Respondents have cited to no contemporaneous evidence that the term sheet is inaccurate, wrong, false, misleading, etc. To the extent that Respondents are trying to argue that the divestiture/contribute/cease to operate language in the term sheet provision, (CCFF ¶ 894), is inaccurate, Respondents omit that JLI sent a revised term sheet on August 4, 2018 that not only kept that language but added “shut down” to the non-compete provision. (CCFF ¶¶ 694, 913, 976). Furthermore, Respondents fail to put these term sheet terms in the proper context: that JLI's negotiators understood that a “precept” of any investment from Altria was that Altria would not compete in e-cigarettes; that JLI told Altria it

could not compete in e-cigarettes and Altria understood that; and as of at least July 27, 2018, that JLI's adviser was "under the impression that [Altria] would just shut down Mark 10." (*See* Response to RPF ¶ 762; *see* Responses to RPF ¶¶ 766, 783).

Respondents instead rely on Pritzker's self-serving testimony, which renders the finding unreliable.

### 3. Noncompete And Carve-Out

787. The second provision in JLI's initial term sheet that addressed the potential investment's implications for Altria's e-vapor portfolio was the noncompete and carve-out provision included in the "Richard Support Obligations" section of the term sheet. This section detailed various support services that JLI proposed Altria would provide to JLI, such as regulatory assistance with JLI's PMTA applications. (PX1300 (Altria) at 005-06).

#### **Response to Finding No. 787**

The proposed finding is vague and misleading. Respondents do not provide the text of the specific provision the proposed finding is addressing. Complaint Counsel assumes the term sheet language in the proposed finding is the non-compete:

Richard agrees, for so long as it owns at least 5% of Jack's outstanding shares, to refrain from competing anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their divestiture or contribution as described above).

(CCFF ¶ 686).

The proposed finding is also vague as to the term "carve out," which it uses but does not define, and it does not cite to any testimony or evidence to define this term. The proposed finding is incomplete in that it fails to mention that in the August 4 revision to the term sheet, JLI added the term "shutdown" to the section of the non-compete that dealt with MarkTen and MarkTen Elite. (CCFF ¶ 694).

788. Because those services necessarily would give Altria access to JLI's "technology, trade secrets, data," and other confidential information that would "work to the detriment of JUUL if Altria . . . appl[ie]d that information to their own product portfolio," (Pritzker

(JLI) Tr. 821), JLI's proposed term sheet called for Altria to "refrain from competing . . . in the e-vapor business," (PX1300 (Altria) at 006).

### **Response to Finding No. 788**

The proposed finding is incomplete and misleading. It is incomplete and misleading to the extent that it suggests that JLI's demand for a non-compete rested on a concern about information sharing associated with regulatory services. In fact, the final transaction permitted regulatory services to proceed before the non-compete took effect, (PX1276 (JLI) at 025-26 (Relationship Agreement); PX1275 (JLI) at 028 (Services Agreement)), as Respondents themselves appear to acknowledge. (*See* RPF ¶ 1069).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that JLI's motivation for demanding a non-compete was exclusively due to its fear of Altria's gaining access to its proprietary information. The record demonstrates that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled "What Keeps Us Up at Night")). As Valani himself testified, JLI wanted to avoid the risk that Altria would have conflicting incentives if it continued to sell its own e-vapor products concurrent with an investment in JLI. (CCFF ¶¶ 870-72; *see also* CCFF ¶ 879). Accordingly, as term sheets and other ordinary-course documents make clear, JLI insisted on a non-compete not only against products in development and future products, but also against Altria's existing e-vapor products. (CCFF ¶¶ 880-924). Indeed, JLI left no room for doubt when, in August 2018, it called out as "not acceptable to us" any attempt by Altria to continue competing with its existing MarkTen products. (CCFF ¶¶ 914-24). From that point forward, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67).

789. However, JLI's proposed noncompete provision also included a carve-out, which provided that Nu Mark could continue to sell "MarkTen and MarkTen Elite prior to their divestiture

or contribution as described above” in the Antitrust Clearance section. (PX1300 (Altria) at 006).

### **Response to Finding No. 789**

The proposed is contrary to the weight of the evidence to the extent that it implies there was no agreement between Altria and JLI for Altria to completely exit the closed-system e-cigarette market. In fact, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is also incomplete and misleading in that it fails to mention that in the August 4 revision to the term sheet, JLI added the term “shutdown” to the section of the noncompete that dealt with MarkTen and MarkTen Elite. (CCFF ¶ 694). The proposed finding is misleading because it refers to an unclear, undefined “carve out” without any support. The proposed finding is misleading because it fails to note that by the time of the transaction, Altria had already pulled Elite off the market and discontinued the production and distribution of the MarkTen cigalike. (CCFF ¶¶ 1003-04). In fact, the “carve out” permitted Altria to engage in its existing e-vapor business only “as such business is presently conducted,” which ensured that the products would remain off the market (except to the extent retailers sold off existing inventory of the cigalikes). (CCFF ¶¶ 1002, 1004).

790. The “goal” of the carve-out from the noncompete “was for those [products] to stay in the marketplace until the FTC ruled on what would happen to them.” (Pritzker (JLI) Tr. 692). JLI believed the products “would be scrutinized by the FTC,” and JLI intended for the carve-out to “allow Altria to keep those products on the market.” (Pritzker (JLI) Tr. 822).

### **Response to Finding No. 790**



The proposed finding is incomplete, misleading, and inaccurate for the reasons set forth in response to RPF 789. (See Response to RPF 789). In addition, the proposed finding fails to address the copious evidence that JLI's goal was to have Altria agree not to compete. (See Responses to RPF 762, 766, 783).

Furthermore, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF 994; Pritzker (JLI) Tr. 670-73).

791. As Pritzker explained, JLI was not concerned about competition from Altria's existing products, but feared that Altria would "use information [it was] getting from [JLI] to be able to enhance [its] product or develop *new* products that would be injurious to [JLI's] business." (PX7021 Pritzker (JLI) Dep. at 82-83 (emphasis added)).

### **Response to Finding No. 791**

Complaint Counsel does not dispute that JLI was concerned about future competition from Altria in closed-system e-cigarettes. However, as written, the proposed finding is incomplete, misleading, unreliable, and contrary to the weight of the evidence for the reasons set forth in response to RPF 789. (See Response to RPF 789). The proposed finding is also incomplete and misleading as to the characterization of Pritzker's testimony that "JLI was not concerned about competition from Altria's existing products." The proposed finding fails to provide the full quote from Pritzker, where he states he was concerned about Altria competing with its existing products as well as new products: "[I]f there was going to be a -- some kind of minority investment by Altria in Juul, it would give them access to data and information that was proprietary to Juul that it was not going to be viable for them to be spending their energies on other e-cigarette products or to use information they were getting from Juul to be able to enhance their product or develop new

products that would be injurious to Juul’s business.” (PX7021 (Pritzker (JLI), Dep. at 82-83)). In reality, Pritzker was concerned about Altria’s existing products: Pritzker testified that he would have resisted any agreement that would have allowed Altria to market its MarkTen and MarkTen Elite e-cigarettes indefinitely. (CCFF ¶ 877).

Other evidence in the record also demonstrates that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”). Moreover, in term sheets and correspondence, JLI insisted repeatedly that Altria ultimately dispose of its existing e-vapor business. (CCFF ¶¶ 880-924). The proposed finding is also incomplete and misleading because it fails to address the evidence that JLI’s goal was to have Altria agree not to compete and that JLI and Altria discussed shutting down Altria’s e-cigarette business. (*See* Responses to RPF ¶¶ 762, 766, 783; CCFF ¶¶ 868-71, 971-72; *see also* CCFF ¶ 879).

### **C. August 1, 2018 Meeting**

792. On August 1, 2018, two days after receiving JLI’s initial term sheet, Willard and Gifford from Altria met with Pritzker, Valani, and Burns from JLI at the Park Hyatt Hotel in Washington, D.C. (Willard (Altria) Tr. 1173-74).

#### **Response to Finding No. 792**

Complaint Counsel does not disagree.

793. The August 1 meeting “was not a meeting designed to go through in detail [JLI’s] term sheet.” (PX7031 Willard (Altria) Dep. at 177). Instead, the parties discussed at a high level “some of the most important terms between the two sides, . . . to assess whether or not there was enough common ground to proceed.” (PX7031 Willard (Altria) Dep. at 177-78).

#### **Response to Finding No. 793**

Complaint Counsel does not dispute that participants at the August 1, 2018 meeting at the Park Hyatt discussed the July 30, 2018 term sheet. (CCFF ¶ 691). However, the proposed finding is incomplete, misleading, and unreliable. The proposed finding is unreliable because it exclusively

relies on the self-serving testimony from one Altria executive who attended the hotel room meeting, when many other meeting participants were deposed and testified at the trial (Valani, Pritzker, Willard, and Gifford). Moreover, the proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

794. The discussion was "tense" and focused on issues of control and voting power. (RX1774 (PWP) at 001; PX7011 Valani (JLI) IHT at 85-87).

#### **Response to Finding No. 794**

The proposed finding is incomplete, misleading, and unreliable for the reasons set forth in response to RPF 793. (See Response to RPF 793). In addition, it is incomplete and misleading because the document Respondents cite, RX1774 (PWP) at 001, states that despite the "[t]ense meeting," "Howard and Billy left the meeting cautiously optimistic." (RX1774 (PWP) at 001). Moreover, the proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

795. According to Gifford, the parties "barely got past" the proposed five percent voting power for a 45 percent economic interest, which was "a huge sticking point." (PX7040 Gifford

(Altria) Dep. at 143). “[I]t basically became a stand-still. [JLI] didn’t give, and [Altria] didn’t give.” (Gifford (Altria) Tr. 2770).

### **Response to Finding No. 795**

The proposed finding is misleading for the reasons set forth in response to RPF 793, (see Response to RPF 793), and relies exclusively on self-serving testimony from an Altria executive, making it therefore also unreliable. Moreover, the proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

796. Pritzker similarly testified that Altria was “most unhappy” about “[t]he notion of buying 45 percent of the company and getting 5 percent of the vote.” (Pritzker (JLI) Tr. 825). Altria also was “not happy about no control.” (Pritzker (JLI) Tr. 826). “[T]heir goal was to acquire the company completely at some point, and [JLI was then] making it clear that that was not going to be possible.” (Pritzker (JLI) Tr. 826; PX7021 Pritzker (JLI) Dep. at 107-08).

### **Response to Finding No. 796**

The proposed finding contains unreliable hearsay. The proposed finding relies on JLI’s impression of Altria as opposed to Altria’s actual reaction. Moreover, the proposed finding is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

797. There is no evidence that the parties discussed the noncompete or the antitrust clearance provisions at the August 1 meeting. Willard does not believe the parties discussed the divest/contribute/“cease to operate” provision at all at the meeting. (PX7031 Willard (Altria) Dep. at 184-86).

#### **Response to Finding No. 797**

The first sentence of the proposed finding cites no evidence at all and is therefore unsupported. The proposed finding is contradicted by the testimony of Burns, who acknowledged that the principals did discuss the term sheet during the meeting at the Park Hyatt hotel. (PX7009 (Burns (JLI), IHT at 135-36)). In addition, the proposed finding is incomplete because it ignores that parties had already discussed Altria not competing and shutting down Altria’s e-cigarette business. (See Responses to RPF 762, 766, 783). The proposed finding further exclusively relies on Willard’s self-serving testimony and therefore it is also unreliable.

798. An August 1 email from Valani summarizing Altria’s comments from the meeting makes no mention of the noncompete. (PX2331 (JLI) at 001). Instead, Valani’s summary reflects that Altria wanted, among other things, protections against share dilution and to reduce from seven to five years the time period before which it could make an offer for a majority share of JLI. (PX2331 (JLI) at 001).

#### **Response to Finding No. 798**

The proposed finding is incomplete and potentially misleading as the cited document, PX2331 (JLI) at 001, has a privilege redaction over the sixth item in Valani’s August 1, 2018 notes. The proposed finding is incomplete and therefore misleading because it fails to note that Willard’s August 5 draft talking points specifically cited the potential for Altria to exit its own e-cigarette business as one of the reasons why Altria required certain protections of its minority investment. (PX1390 (Altria) at 003).

799. Similarly, JLI Board meeting minutes from August 3 make no reference to any discussion of the proposed noncompete or the antitrust clearance provisions. (PX2117 (JLI) at 025-26). The minutes note that Altria “responded at a high level to the non-binding Summary of Terms” without providing “granular” feedback, and that the JLI Strategic Committee, “together with management[] and outside counsel,” was “working to revise the Summary of Terms.” (PX2117 (JLI) at 026).

**Response to Finding No. 799**

The proposed finding is misleading because while there was no express reference to JLI's proposed non-compete and divest/contribute/cease to operate provision in these limited Altria Board minutes, the terms were still important, as JLI provided a revised term sheet to Altria on August 4 that had the same provisions but added the term "shut down" regarding Altria's business. (CCFF ¶ 694). The proposed finding is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

**D. August 4, 2018 Term Sheet**

800. On August 4, 2018, Pritzker sent Willard a revised proposed term sheet, (PX2570 (JLI) at 001), and explained that "[JLI] had taken [its] best shot at responding to [Altria's] concerns," (PX2387 (JLI) at 001).

**Response to Finding No. 800**

The proposed finding is incomplete and misleading because: (1) it ignores that before the August 4, 2018 term sheet was sent, Pritzker and Willard communicated about the revised term sheet, (CCFF ¶¶ 692-93); and (2) after the August 4, 2018 term sheet was sent, Pritzker and Willard had a call where Pritzker told Willard "we had taken our best shot at responding to their concerns." (PX2387 (JLI) at 001). The proposed finding is also incomplete and misleading because it fails to mention that Altria did inform JLI of the PMI complications relating to Altria's contributing or divesting its e-cigarette business during the course of their negotiations. (CCFF ¶¶ 925-43).

801. The August 4 term sheet included increased voting power for Altria (from five percent to 15 percent, plus a proportion of Altria's additional shares), the addition of an Altria-appointed nonvoting observer of JLI's Board prior to receiving HSR clearance, and other terms related to control. (PX2570 (JLI) at 002-03 (voting power), 007 (observer)).

**Response to Finding No. 801**

The proposed finding is incomplete and misleading because it fails to address that JLI's August 4, 2018 revision included adding the proposal that Altria shut down its e-cigarette business:

Richard agrees, for so long as it owns at least 5% of Jack's outstanding shares, to refrain from competing anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their divestiture, shutdown, or contribution described above).

(CCFF ¶ 694; *see* CCFF ¶¶ 913, 976).

802. The divest/contribute/"cease to operate" provision in the Antitrust Clearance Matters section of the August 4 term sheet remained unchanged from the July 30 term sheet. (PX2570 (JLI) at 005). However, the word "shutdown" was added to the noncompete provision in the August 4 draft, so that instead of carving out "MarkTen and MarkTen Elite prior to their divestiture or contribution as described above," it stated that the carve-out applied "prior to their divestiture, shutdown or contribution as described above." (PX2570 (JLI) at 007).

**Response to Finding No. 802**

The proposed finding is vague, incomplete, misleading, and unsupported. The proposed finding is vague, incomplete, and misleading because fails to provide full revised language of the non-compete:

Richard agrees, for so long as it owns at least 5% of Jack's outstanding shares, to refrain from competing anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their divestiture, shutdown, or contribution described above).

(CCFF ¶ 694).

The proposed finding is also vague, undefined, and unsupported as to the term "carve out."  
(*See* Response to RPF ¶ 789).

803. Pritzker testified that this provision was not a subject of discussion with Altria, and he did not remember why the term was added. (Pritzker (JLI) Tr. 829-30). Based on the process

of the revisions, however, Pritzker “believe[d] the lawyer that drafted it wanted to make this draft compatible” with the three ranked scenarios in the divest/contribute/“cease to operate” Antitrust Clearance provision. (Pritzker (JLI) Tr. 829-30).

### **Response to Finding No. 803**

The proposed finding is vague and unsupported as to the term “ranked scenarios,” and is misleading because it fails to include that Pritzker testified that JLI’s business people would discuss concepts and then instruct JLI’s lawyers to put those into term sheets, and that Pritzker reviewed term sheets once they were prepared. (CCFF ¶ 893).

Furthermore, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

804. This was the last proposed term sheet to make any reference to “cease to operate” or “shutdown”; those terms did not appear in any subsequent draft term sheet, draft deal document, or in the final agreement. (See PX1432 (Altria) at 021-22, 024 (Aug. 19 term sheet); PX1269 (Altria) at 006, 008 (Oct. 15 term sheet); PX2503 (JLI) at 027-28, 030 (Oct. 28 term sheet); RX0285 (Altria) at 022, 024 (Oct. 30 term sheet); RX0838 (Altria) at 327-28, 373 (Nov. 15 draft purchase agreement); PX2141 (JLI) at 036-37 (Dec. 20 final purchase agreement)). Burns does not recall the parties ever discussing “ceasing to operate” after it was removed from the term sheet. (PX7025 Burns (JLI) Dep. at 207-08).

### **Response to Finding No. 804**

The proposed finding is incomplete and misleading because it fails to address that by the August 19, 2018 term sheet, Altria and JLI had already agreed that Altria would exit e-cigarettes, and therefore there was no need to include the term in further term sheets. (See CCFF ¶¶ 945-57, 695-734). As described in detail below, on August 6, 2018, Altria talking points confirm Altria understood it was required to exit e-cigarettes if there was going to be a deal. (CCFF ¶¶ 695-702). On August 9, 2018, Altria pushed back by striking the divest/contribute/cease to operate clause



and revising the non-compete in a proposed term sheet, (CCFF ¶¶ 705-08), and a few days later on August 15, 2018, JLI reaffirmed to Altria that it was entirely unacceptable for Altria to retain the ability to compete with existing or future e-cigarette products. (CCFF ¶¶ 715-23). Willard’s August 18, 2018 talking points explained that Altria’s decision to strike the divest/contribute/cease to operate clause from the term sheet was driven by antitrust concerns and not by substantive disagreement, and provided reassurance that Altria agreed to exit e-cigarettes and be bound by a robust non-compete. (CCFF ¶¶ 730-31, 956). The terms “cease to operate” and “shut down” were no longer in dispute. (CCFF ¶¶ 732-34). The proposed finding is also incomplete and misleading because it fails to mention that Altria did inform JLI of the PMI complications relating to Altria’s contributing or divesting its e-cigarette business during the course of their negotiations. (CCFF ¶¶ 925-43).

The proposed finding is also incomplete and misleading because it omits that the parties did continue to discuss Altria “otherwise exiting” in October 2018 in term sheets and discussions. On October 5, 2018, Altria sent JLI a letter confirming its commitment not to compete in e-cigarettes, “in a manner consistent with our previous discussions.” (CCFF ¶¶ 779, 782, 961; *see also* CCFF ¶¶ 785, 962). On October 15, 2018, Altria sent JLI a term sheet that included a reference to Altria’s “otherwise exiting” the e-cigarette business. (CCFF ¶¶ 800-01, 983). Shortly after October 15, 2018, on October 25, 2018—before HSR clearance—Altria started pulling its products from the market. (CCFF ¶¶ 35, 812). On October 30, 2018, Respondents exchanged a final term sheet, which contained the same language as the October 15, 2018 term sheet referring to Altria’s “otherwise exiting the marketing and sale of [e-cigarette products].” (CCFF ¶ 828).

#### **E. August 9, 2018 Term Sheet**

805. On August 9, Altria sent JLI its first proposed term sheet. (PX2313 (JLI) at 001).

#### **Response to Finding No. 805**

Complaint Counsel does agree that Altria sent a term sheet on August 9 and notes further that this was a markup of JLI's term sheet. (CCFF ¶ 705).

806. In this term sheet, Altria proposed that it would purchase a 45 percent stake in JLI's U.S. business and receive 35 percent of the voting power. (PX2313 (JLI) at 012).

#### **Response to Finding No. 806**

Complaint Counsel has no specific response.

807. Altria's August 9 term sheet continued to propose that both parties would use "reasonable best efforts to seek Antitrust Clearance," adding that the "details relating to such efforts" were "to be discussed by the parties." (PX2313 (JLI) at 015). The term sheet also still required Altria to "cooperate with the FTC and to agree to the reasonable concessionary requirements of the FTC" in connection with changes in Altria's e-vapor business. (PX2313 (JLI) at 015). However, Altria struck the entire divestiture/contribution/"cease to operate" provision from the term sheet, instead proposing that Altria exclusively would license its e-vapor assets to JLI upon HSR approval. (PX2313 (JLI) at 014-15; Pritzker (JLI) Tr. 840-41).

#### **Response to Finding No. 807**

The proposed finding is incomplete and misleading because it fails to address (1) Altria's August 5 and 6 talking points where Altria confirms its understanding regarding JLI's instruction to exit e-cigarettes, (*see* Response to RPF ¶ 804 (citing CCFF ¶¶ 695-702)), and (2) Altria's August 18, 2018 talking points for Willard wherein he explained that that Altria's decision to strike the divest/contribute/cease to operate clause was driven by antitrust concerns and not by substantive disagreement and provided reassurance that Altria agreed to exit e-cigarettes and be bound by a robust non-compete. (*See* Response to RPF ¶ 804 (citing CCFF ¶¶ 730-31, 956)).

808. Pritzker inferred from these changes that Altria's negotiators "had a problem with the exact language" proposed by JLI but "they were okay with using reasonable best efforts to seek clearance, and they wanted to discuss the details, clean the slate and propose something else related to the efforts." (Pritzker (JLI) Tr. 841-42).

#### **Response to Finding No. 808**

To the extent that the proposed finding stands for the proposition that Altria's negotiators identified problems with the language JLI had used to convey its requirements for a noncompete

in the initial term sheets, Complaint Counsel does not disagree. Pritzker's testimony about what he inferred from Altria's revisions is contradicted by Altria's August 18, 2018 talking points for Willard wherein he explained that Altria's decision to strike the divest/contribute/cease to operate clause was driven by antitrust concerns and not by substantive disagreement and provided reassurance that Altria agreed to exit e-cigarettes and be bound by a robust non-compete. (*See* Response to RPF ¶ 804 (citing CCF ¶¶ 730-31, 956)).

809. Altria's August 9 term sheet also revised the noncompete and carve-out to say: "Richard agrees to refrain from competing anywhere in the United States in the e-vapor business (other than with respect to existing and under development products prior to the non-trademark IP license as described above)." (PX2313 (JLI) at 017). This revision retained the carve-out for MarkTen and MarkTen Elite with the language about "existing" products, and it expanded the carve-out to include "under development" products as well. (Pritzker (JLI) Tr. 844).

#### **Response to Finding No. 809**

The proposed finding is misleading, vague, incomplete, and unsupported.

The proposed finding is misleading because fails to address that Altria struck the provision in the non-compete related to "MarkTen and MarkTen Elite prior to their divestiture, shutdown or contribution." (PX2313 (JLI) at 017). This revision is similar to Altria's revision to strike the divest/contribute/cease to operate term, which Willard talking points confirm was driven by antitrust concerns and not substantive disagreement. (*See* Response to RPF ¶ 804 (citing CCF ¶¶ 730-31, 956)). Furthermore, the proposed finding is incomplete and misleading because it fails to note that the revised carve-out only permitted Altria to maintain its existing and under-development products until JLI received an IP license from Altria, which the term sheet stated would occur upon HSR clearance. (PX2313 (JLI) at 014-15, 017). The proposed finding is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCF

¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is vague, misleading, and unsupported as to the term carve-out. The proposed finding is incomplete and misleading in that, by the time the parties executed the transaction on December 20, 2018, Altria had already pulled Elite off the market and had discontinued the sale and distribution of the MarkTen cigalike. (CCFF ¶ 862). The products remained off the market (with the exception of leftover cigalike inventory selling through at retail) by the time Altria initiated the HSR review process in February 2019. (CCFF ¶ 866). In fact, the final version of the carve-out permitted Altria to engage in its existing e-vapor business only "as such business is presently conducted," which ensured that the products would remain off the market (except to the extent retailers sold off existing inventory of the cigalikes). (CCFF ¶¶ 1002, 1004).

#### **F. August 15, 2018 JLI Issues List**

810. On August 15, 2018, Valani responded to Altria's August 9 term sheet with a list of issues. (PX1012 (Altria) at 001). According to Willard, "this was a long document with a series of things that [JLI] indicated [it was] unhappy with." (Willard (Altria) Tr. 1222).

#### **Response to Finding No. 810**

The proposed finding is misleading, unsupported, and incomplete. The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is unsupported and misleading as to Willard’s testimony that this was “a long document.” PX1012 consists of nine bullets that barely run across two pages. (PX1012 (Altria) at 002-03). The proposed finding is incomplete and misleading because it fails to address that this short document included the “foundational concepts that were important to JLI,” according to Valani, and that JLI wanted to make sure that Altria was aligned with JLI on these foundational concepts prior to going forward with the August 18, 2018 meeting in San Francisco. (CCFF ¶ 721). The importance of this document was previewed by Pritzker via email on August 14: Pritzker wrote to Willard, “Tomorrow night or Thursday morning we will be sending you our position on a number of specific points to make sure you understand where we will need to draw the line before finalizing a commitment to meeting. . . .” (CCFF ¶ 715). Devitre and Valani further exchanged texts about “baking” and “icing” a cake before August 15, 2018. (CCFF ¶¶ 710-11).

811. Most issues on the list related to control and governance. For example, the first bullet stated: “We understood that you could accept not having a path to control except through a confidential offer which would be subject to approval by the non-Richard directors and stockholders. The following are inconsistent with that and are not acceptable to us”—listing, among other issues, Altria’s proposed right of first refusal on additional stock issuances, its proposal for 45 percent voting power with at least 35 percent discretionary voting right, and its proposed Board director structure. (PX1012 (Altria) at 002; *see also* PX1012 (Altria) at 002 (stating, among other issues, that Altria’s proposed valuation calculation was “not acceptable to [JLI]”; proposed indemnity provision was “not a topic for discussion”; and that Altria must agree to restrictions on its ability to transfer shares: “We need you to commit to stay in the stock as a partner for the long term[,] [which] is inconsistent with the lack of meaningful transfer restrictions in your draft”)).

### **Response to Finding No. 811**

The proposed finding is incomplete and misleading because it fails to mention that one of the “specific points” where JLI needed “to draw the line before finalizing a commitment to meeting” was Altria’s deletion of the provision committing it to divest, contribute, or cease to operate its e-vapor assets. (CCFF ¶¶ 720, 722). The proposed finding is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI

demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

812. JLI also addressed Altria's revisions to the carve-out in the noncompete and the provision for divestment: "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." (PX1012 (Altria) at 002; *see also* Pritzker (JLI) Tr. 844-45; Valani (JLI) Tr. 915, 932-34). The issues list made no mention of Altria striking the "cease to operate" language. (PX1012 (Altria)).

### **Response to Finding No. 812**

The proposed finding is incomplete, misleading, unsupported, vague, and unreliable.

The proposed finding is incomplete and misleading because it fails to state that this bullet is listed second in order, and the proposed finding fails to provide the full quote, including the first sentence, which acknowledges the importance to JLI of Altria's not competing. The full bullet is provided here:

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.

(CCFF ¶ 722).

To the extent that Respondents are trying to argue that there is some meaning behind not including the specific term "cease to operate," the proposed finding is incomplete and misleading because it ignores evidence that JLI did not care how Altria exited, only that Altria exited e-cigarettes. (CCFF ¶¶ 898-905). The proposed finding is also misleading because it fails to mention

that the provision that Altria deleted also referenced contribution of its e-vapor assets and there was no reference to that specific term either in JLI's August 15 issues list either. The proposed finding is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is vague, misleading, and unsupported as to the term "carve out." The proposed finding also is supported by self-serving testimony from Pritzker and Valani and therefore unreliable.

813. As Pritzker explained this response, because Altria's employees would be "exposed to potential trade secrets, data, technology, information, as they provided regulatory services [to JLI, during which] they would see everything, it was not acceptable . . . for Altria to be developing products that might be incorporating" JLI's information. (Pritzker (JLI) Tr. 844; *see also* Valani (JLI) Tr. 932-34 (similar)).

### **Response to Finding No. 813**

The proposed finding is incomplete and misleading because JLI had additional concerns about Altria continuing to compete.

The proposed finding is incomplete and misleading because it only focuses on one of JLI's concerns about Altria competing with future products. It ignores JLI's other concern—that Altria could compete with its existing products against JLI. (CCFF ¶¶ 921-22; *see* Response to RPF ¶ 791).

The proposed finding is incomplete and misleading because Respondents ignore evidence that JLI was concerned about Altria competing against JLI. The record demonstrates that JLI

already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”). Respondents ignore testimony that JLI did not want Altria to have greater incentives to support its own e-cigarette business post-transaction. (CCFF ¶¶ 869-71; *see also* CCFF ¶ 879). In addition, Respondents ignore evidence that JLI did not want Altria to compete, that JLI told Altria it could not compete in e-cigarettes and that Altria understood that, and that, as of at least July 27, 2018, JLI was “under the impression that [Altria] would just shut down Mark 10.” (*See* Response to RPF ¶ 762).

814. JLI did not have any insights into what kind of products Altria had under development. (Pritzker (JLI) Tr. 845).

#### **Response to Finding No. 814**

To the extent that the proposed finding stands for the proposition that JLI did not track Altria’s long-term competitive threat potential, the proposed finding is contradicted by other evidence in the record. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”).

815. Pritzker testified that his “concern was always how Altria might use information that it would obtain from JUUL after the transaction in order to use JUUL’s data and trade secrets against JUUL.” (Pritzker (JLI) Tr. 895). He “would not have been worried about competition from MarkTen or MarkTen Elite as they were at that time”; instead, his concern was whether changes “might be made to those products,” potentially as the result of confidential information Altria learned from JLI. (Pritzker (JLI) Tr. 895).

#### **Response to Finding No. 815**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF ¶¶ 791 and 813. (*See* Responses to RPF ¶¶ 791, 813). The proposed finding is also misleading because Pritzker’s cited testimony was about the October 15, 2018 term sheet—not about the August 15, 2018 issues list. (Pritzker (JLI) Tr. 891-95 (discussing PX2147 (Altria))). The proposed finding is also misleading because it fails to address JLI’s clause that it proposed



two weeks prior that Altria divest/contribute/cease to operate its e-cigarette business, which, on its face, includes Altria’s existing business. (CCFF ¶¶ 893-94).

816. Although the scope of the noncompete was referenced in Valani’s August 15 issues list, Willard does not “recall that [the] non-compete term was one that received significant face-to-face attention from [his] senior team or the JLI team.” (Willard (Altria) Tr. 1223). “[T]here were a number of items that consistently, throughout the deal negotiation process, were viewed as important enough for [the parties] to have significant face-to-face negotiations on them, but they represented a subset of what was in the documents[.]” (Willard (Altria) Tr. 1223). “[R]esolving some of the lesser issues, while they may have been included in something communicated to the whole team, was often delegated to more junior people.” (Willard (Altria) Tr. 1223).

### **Response to Finding No. 816**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence because both Pritzker and Valani testified that they discussed the non-compete issue with Willard and Gifford. (CCFF ¶¶ 885-86, 919, 955). Valani testified about the August 15, 2018 issues list that {

[REDACTED]

[REDACTED]

} Valani also thinks it is “likely” that the non-compete term was discussed at the August 18, 2018 meeting. (CCFF ¶ 954). Burns also testified that he would be “surprised if [the Altria and JLI negotiators] didn’t talk about almost all the terms” at the Park Hyatt hotel meeting. (PX7009 (Burns (JLI), IHT at 135-36)).

In addition, Willard’s testimony is contradicted by Willard’s understanding that the JLI team must have thought that the issues in the list provided by Valani to Devitre were important enough to be worth sharing with Altria. (CCFF ¶ 923). Willard’s actions further contradict the proposed finding: Willard’s August 18, 2018 talking points that address why Altria struck the divest/contribute/cease to operate language shows that Altria’s ability to compete in e-cigarettes was getting attention from the top executives at Altria. (CCFF ¶¶ 730, 956). Willard’s August 5

talking points and his October 5 letter also show that the noncompete issue did get significant attention from top Altria executives. (CCFF ¶¶ 695-99, 891).

The proposed finding is incomplete and misleading because Respondents further ignore evidence that shows that by August 15, 2018, there had already been discussions about Altria exiting: that JLI's negotiators understood that a "precept" of any investment from Altria was that Altria would not compete in e-cigarettes; that JLI told Altria it could not compete in e-cigarettes and Altria understood that; and as of at least July 27, 2018, that JLI was "under the impression that [Altria] would just shut down Mark 10." (See Responses to RPF ¶¶ 762, 766, 783). Respondents further ignore that JLI was agnostic as to what Altria did so long as it did not compete against JLI, (see Response to RPF ¶ 766)—as Valani said, "I mean, this is really their problem, not ours, you know? I mean, I think that we're [] more concerned about an end state . . . ." (CCFF ¶ 900).

817. Altria thought Valani's list had "a negative tone to it," which Altria found "upsetting." (Garnick (Altria) Tr. 1745). To put an end to the back and forth that was leaving both sides increasingly upset, Garnick suggested Altria and JLI have a meeting to "sit down and talk it through." (Garnick (Altria) Tr. 1746).

### **Response to Finding No. 817**

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The second sentence of the proposed finding is misleading and inaccurate. Garnick did not propose a meeting with JLI after receiving the August 15, 2018 issues list. By August 15, JLI and

Altria had already tentatively agreed to meet on August 18, 2018, (CCFF ¶¶ 713-18), and on August 14, Pritzker previewed that JLI would be sending an issue list “to make sure you understand where we will need to draw the line before finalizing a commitment to meeting. . . .” (CCFF ¶ 715). The purpose of the August 15, 2018 issue list was to ensure Altria was “aligned with [JLI]” before JLI finalized a commitment to meet on August 18. (CCFF ¶¶ 715, 916, 951-53).

The proposed finding exclusively relies on self-serving testimony from Garnick, and therefore it is unreliable.

### **G. August 18, 2018 Meeting**

818. Altria, JLI, and outside counsel for both parties met on August 18, 2018, at the offices of Pillsbury Winthrop Shaw Pittman (“Pillsbury”) in San Francisco. (PX1333 (Altria) at 001; PX2400 (Altria) at 001; Willard (Altria) Tr. 1403-04). Pillsbury was outside counsel for JLI, (Garnick (Altria) Tr. 1744; Willard (Altria) Tr. 1403), and “[a]ll of the meetings in San Francisco were at the Pillsbury offices,” (PX7040 Gifford (Altria) Dep. at 152).

#### **Response to Finding No. 818**

To the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

819. According to Gifford, at the August 18 meeting, the parties continued to discuss voting power and whether the potential investment would be in JLI’s domestic business only or also include the international business. (Gifford (Altria) Tr. 2772).

#### **Response to Finding No. 819**

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI

that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is misleading because it omits that JLI and Altria also discussed Altria's not competing against JLI at the August 18, 2018 meeting. (*See* Response to RPF ¶ 821). The proposed finding further omits the full testimony from Gifford, where he expressly testified they discussed "some of the details of the various terms that were on the term sheet." (Gifford (Altria) Tr. 2772).

820. As Pritzker testified, "progress was starting to be made." (Pritzker (JLI) Tr. 845). However, "the problem with valuation was really becoming a problem. . . . [I]t was clear that we were very significantly apart." (Pritzker (JLI) Tr. 845-46).

#### **Response to Finding No. 820**

The proposed finding is unsupported. Contrary to Pritzker testimony, on August 15, 2018, Willard wrote in an email to Altria's chairman, Thomas Farrell, that Altria and JLI had "agreed to 75 percent of the deal terms" ahead of the August 18, 2018 meeting. (CCFF ¶ 736). The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

821. There is no evidence that the noncompete provision was discussed at the August 18 meeting. As Willard explained, the treatment of Altria's e-vapor products was not a topic he recalled reaching during the discussions between the senior group of negotiators; rather, it was an issue "that the respective counsels at the companies were . . . focused on." (Willard (Altria) Tr. 1219; *see also* Willard (Altria) Tr. 1223-24).

#### **Response to Finding No. 821**

The proposed finding is incomplete, misleading, unreliable, and inaccurate because there is evidence JLI and Altria discussed Altria's not competing in e-cigarettes at the August 18, 2018 meeting. Willard's opening remarks for the August 18, 2018 meeting explain that Altria's removal of the term requiring it to divest, contribute, or cease to operate its e-cigarette business was driven by antitrust concerns and not by substantive disagreement. (CCFF ¶¶ 730, 956). Willard's talking points then reaffirm that upon receiving antitrust approval, Altria will contribute MarkTen to JLI and become subject to a robust non-compete. (CCFF ¶¶ 730, 956). In fact, these were Willard's first points to cover with JLI in his talking points. (CCFF ¶¶ 730, 956). Valani also thinks it is "likely" that the non-compete term was discussed at the August 18, 2018 meeting. (CCFF ¶ 954). Valani recalls Altria "acquiescing to a number of positions" during the August 18, 2018 meeting. (CCFF ¶ 955).

The proposed finding is misleading because it also fails to note that Willard's August 5 talking points and his October 5 letter show that the noncompete issue did get significant attention from top Altria executives. (CCFF ¶¶ 695-99, 891). The proposed finding further exclusively relies on self-serving testimony from Willard, which renders it unreliable.

Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

822. Meanwhile, as one of the lawyers involved in the negotiations, Garnick recalls that "in mid-August," Altria and JLI came to an understanding on the antitrust clearance and the noncompete provisions: Altria's existing products would remain in the market until the deal received HSR clearance, and then Altria would contribute the products to JLI. (PX7036 Garnick (Altria) Dep. at 53).

### **Response to Finding No. 822**

The proposed finding is contrary to the weight of the evidence to the extent that it implies there was no agreement between Altria and JLI for Altria to completely exit the closed-system e-cigarette market: JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is incomplete and misleading because Respondents fail to address that Altria never fulfilled the so-called "understanding" described by the proposed finding. Altria pulled its pod products and started to discontinue its cigalike sales, (CCFF ¶¶ 131-32), before the transaction was signed, (CCFF ¶¶ 33-34), before the HSR was filed, (CCFF ¶¶ 47-48), and before HSR clearance was ever attained. Even in the scenario set forth by the misleading proposed finding, Altria would have exited e-cigarettes post-transaction. Indeed, on December 9, 2018, two days after Altria pulled its products on December 7, Garnick personally confirmed to Masoudi that Altria was "not in the market anymore" and that it could not "get back into the market without getting a PMTA." (CCFF ¶ 851).

Furthermore, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

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The proposed finding is incomplete and misleading because Respondents fail to quote from the term sheet sent by JLI after the August 18, 2018 meeting that was meant to reflect the progress made at the meeting, and which states the terms more clearly than Garnick’s self-serving (and therefore unreliable) testimony. (CCFF ¶ 732). The August 18, 2018 revised term sheet required Altria to contribute 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:

- Richard agrees that it will contribute, upon receipt of Antitrust Clearance and at no cost to Jack, all Richard assets relating to the Field in the U.S., including all electronic nicotine delivery systems and products it acquired, developed or has under development (in each case to the extent it has the legal right to make such contribution).
- In the event Antitrust Clearance for the foregoing contribution is not obtained within nine months after the Purchase, then subject to the license referenced above, Richard will divest all such Richard assets relating to the Field in the U.S. within six months thereafter.

(CCFF ¶ 733). The non-competition clause in the revised August 18, 2018 term sheet read:

- Richard agrees to refrain, and to cause its current and future affiliates to refrain, from competing

(or preparing to compete including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above). Richard will, and will cause its current and future affiliates to, coordinate any e-vapor business efforts through Jack and Jack will be the vehicle through which Richard participates in the e-vapor business. The non-compete will terminate as set forth in “Richard Exit Right” below. Richard agrees that, as a condition to any change of control transaction in which the acquiring party is a Jack competitor, the acquiring party will agree to be bound by the foregoing non-compete as if it were Richard.

(CCFF ¶ 734).

823. JLI’s concern, Altria came to realize, was that after receiving HSR approval, Altria “would be on their board and be involved in their operations.” (PX7036 Garnick (Altria) Dep. at 53). As Garnick recalled: “[O]nce [Altria] fully understood what [JLI’s] position was and the reason for it, we could understand it and we had some agreement, some sympathy for it, and that’s why we thought we could live with a carve-out provision that allowed us to stay in the market until we got HSR approval and, at that point, we would get board seats, we would have more operational involvement into [JLI], and that would be an appropriate

time for us to contribute our e-vapor products to [JLI].” (PX7036 Garnick (Altria) Dep. at 54).

### **Response to Finding No. 823**

The proposed finding is incomplete, misleading, unreliable, and vague.

The proposed finding is incomplete, misleading, and unreliable because Respondents’ claim regarding JLI’s reaction is exclusively supported by Altria testimony. Respondents fail to cite evidence from JLI regarding its concerns.

In addition, the proposed finding is incomplete and misleading because it fails to mention JLI’s concerns about Altria as a long-term competitor. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”). In addition to having concerns about providing Altria with JLI information, JLI did not want Altria to have greater incentives to support its own e-cigarette business. (CCFF ¶¶ 869-71; *see also* CCFF ¶ 879; Response to RPF ¶ 762).

The proposed finding is also incomplete and misleading for the same reasons set forth in response to RPF ¶ 822. (*See* Response to RPF ¶ 822).

The proposed finding is also incomplete and misleading because it fails to address contemporaneous documents that show that Altria understood and did not disagree with divesting or ceasing to operate its e-cigarette business, and in all cases, exiting and not competing. The proposed finding is misleading because it also fails to note that Willard’s August 5 talking points show that Altria’s senior leadership was aware that a JLI deal would involve Altria’s “exit [of its] own vapor business.” (CCFF ¶¶ 695-702). Willard’s August 18, 2018 talking points indicated that Altria was not in any substantive disagreement with divesting/contributing/ceasing to operate its e-cigarette business. Willard’s opening remarks for the August 18, 2018 meeting explain that Altria’s removal of the term requiring it divest, contribute, or cease to operate its e-cigarette business was driven by antitrust concerns and not by substantive disagreement. (CCFF ¶¶ 730,



956). The August 18, 2018 revised term sheet required Altria to contribute 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. (CCFF ¶ 733).

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is also incomplete, misleading, and vague because Altria gained a non-voting board observer prior to receiving HSR approval, contrary to Garnick's testimony. (CCFF ¶¶ 42-43).

Finally, the proposed finding is also vague and undefined as to the term "carve out."

#### **H. August 19, 2018 Term Sheet**

824. On August 19, 2018, JLI sent proposed revisions to Altria's August 9 term sheet. (PX1432 (Altria) at 001). At trial, the August 19 term sheet was occasionally referred to as the "August 18 term sheet" (reflecting the draft stamp on the document). (Pritzker (JLI) Tr. 847). Complaint Counsel frequently skipped this term sheet in its examinations. (*See, e.g.*, Pritzker (JLI) Tr. 715-23; Willard (Altria) Tr. 1408-09).

#### **Response to Finding No. 824**

The proposed finding is vague and misleading regarding the sentence "Complaint Counsel frequently skipped this term sheet in its examinations." The term "frequently" is undefined and vague. In addition, Complaint Counsel has discussed the August 18, 2018 (or so-called August 19, 2018) term sheet in its pre-trial brief, (Complaint Counsel's Pre-Trial Brief at 24), and post-trial

brief, (Complaint Counsel’s Post-Trial Brief at 35-36), and in Complaint Counsel’s Findings of Fact. (CCFF ¶¶ 732-34, 957).

825. Like the previous term sheets, the August 19 term sheet continued to require the parties to “cooperate with the FTC” and “use reasonable best efforts to seek Antitrust Clearance,” and it required Altria to “agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria’s] e-vapor business.” (PX1432 (Altria) at 022).

### **Response to Finding No. 825**

The proposed is contrary to the weight of the evidence to the extent that it implies there was no agreement between Altria and JLI for Altria to completely exit the closed-system e-cigarette market: JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is incomplete and misleading in that, by the time the parties executed the transaction on December 20, 2018, Altria had already pulled Elite off the market and discontinued the sale and distribution of the MarkTen cigalike. (CCFF ¶ 862). The products remained off the market (with the exception of leftover cigalike inventory selling through at retail) by the time Altria initiated the HSR review process in February 2019. (CCFF ¶ 866). Indeed, on December 9, 2018, two days after Altria pulled its products on December 7, Garnick personally confirmed to Masoudi that Altria was “not in the market anymore” and that it could not “get back into the market without getting a PMTA.” (CCFF ¶ 851).

Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly

unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

826. Additionally, the August 19 term sheet proposed that Altria would (1) contribute or (2), if required, divest its existing products upon HSR clearance: “[Altria] agrees that it will contribute, upon receipt of Antitrust Clearance and at no cost to [JLI], all [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 (in each case to the extent it has the legal right to make such contribution). In the event Antitrust Clearance for the foregoing contribution is not obtained within nine months after the Purchase, then subject to the license referenced above, [Altria] will divest all such [Altria] assets relating to the Field in the U.S. within six months thereafter.” (PX1432 (Altria) at 021-22). The term sheet did not contemplate that Altria would cease to operate its existing e-vapor business. (PX1432 (Altria) at 021-22). Nothing in the term sheet suggested that Altria would take any action with regard to its e-vapor products before any transaction with JLI or before the FTC had a chance to review that transaction. (Pritzker (JLI) Tr. 853-54).

### **Response to Finding No. 826**

The proposed finding is vague, incomplete, and misleading for the reasons stated in response to RPF ¶ 822 (quoting the exact language from the term sheet). (*See* Response to RPF ¶ 822). The proposed finding is contrary to the weight of the evidence to the extent that it implies there was no agreement between Altria and JLI for Altria to completely exit the closed-system e-cigarette market: JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is incomplete and misleading as to the third and fourth sentences. Respondents omit that this August 18 (or 19) term sheet was JLI’s revision after the August 18, 2018 meeting, where Willard’s talking points confirm that Altria’s removal of the term requiring it to divest, contribute, or cease to operate its e-cigarette business was driven by antitrust concerns

and not by substantive disagreement. (CCFF ¶¶ 730, 956). The proposed finding is incomplete and misleading for the reasons stated in response to RPF 825 (regarding Altria’s agreement to stop competing and then removing its closed-system e-cigarettes before filing HSR). (*See* Response to RPF 825).

827. The August 19 term sheet also included the noncompete provision with a carve-out, proposing that Altria would “refrain . . . from competing (or preparing to compete including through research and development activities) anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above).” (PX1432 (Altria) at 024). This revision rejected Altria’s effort to expand the carve-out to include “under development products.” (PX1432 (Altria) at 024).

### **Response to Finding No. 827**

The proposed finding is misleading, vague, and incomplete for the reasons stated in response to RPF 822 (quoting the exact language from the term sheet). (*See* Response to RPF 822).

Complaint Counsel does not dispute the specific terms stated in PX1432 (Altria) at 024, but they are misleading because in reality, Altria discontinued all research and development relating to e-cigarettes, including collaborations with third parties as a result of the transaction. (CCFF ¶¶ 1006-15). The proposed finding is incomplete and misleading for the reasons stated in response to RPF 825 (regarding Altria’s agreement to stop competing and then removing its closed-system e-cigarettes before filing HSR). (*See* Response to RPF 825).

The proposed finding is also misleading, undefined, and vague as to the term “carve out.”

828. Unlike in earlier term sheets, JLI also revised the noncompete to apply to Altria’s “current and future affiliates.” (PX1432 (Altria) at 024). This issue—whether a company that acquired Altria in the future would be bound by the noncompete—became known as the upstream affiliates issue. (Willard (Altria) Tr. 1431-32).

### **Response to Finding No. 828**

The proposed finding is contrary to the weight of the evidence to the extent that it implies there was no agreement between Altria and JLI for Altria to completely exit the closed-system e-cigarette market: JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

829. In light of the August 19 term sheet's assumption that Altria would continue competing with its existing products until HSR clearance, and in order to facilitate the services agreement, JLI's August 19 draft distinguished between services Altria "could provide to JLI" upon closing—"while still being a competitor"—and those it could provide only after HSR clearance. (Garnick (Altria) Tr. 1748; *see also* PX1432 (Altria) at 022-23).

### **Response to Finding No. 829**

The proposed finding is incomplete and misleading for the reasons stated in response to RPF ¶ 825 (regarding Altria's agreement to stop competing and then removing its closed-system e-cigarettes before filing HSR). (*See* Response to RPF ¶ 825). The first clause of the proposed finding is vague, confusing, incomplete, misleading, unreliable, and unsupported. Respondents cite no support for their characterization that there was an "assumption" that Altria would continue competing with its existing products until HSR clearance. Moreover, the proposed finding is misleading because it fails to note that the October 15 revision to the term sheet added a third option besides divestiture or contribution that would enable Altria to begin providing certain services to JLI: that of Altria's "otherwise exiting" the marketing and sale of e-cigarettes. (CCFF ¶¶ 800-03). Ultimately, Altria did cease competing with its existing products prior to HSR clearance. (*See* Response to RPF ¶ 825). Additionally, the proposed finding exclusively relies on Garnick's self-serving testimony, rendering it unreliable.

830. As Garnick testified, this term sheet demonstrated to Altria that JLI “had no problem with our continuing to compete against them with the products we currently had on the market. What they wanted, though, is for that to stop once we got HSR approval and . . . participated on their board.” (Garnick (Altria) Tr. 1750). Altria “understood” this position and believed contributing upon HSR approval was “appropriate.” (PX7036 Garnick (Altria) Dep. at 54).

### **Response to Finding No. 830**

The proposed finding is incomplete, misleading, vague, unsupported, contrary to the weight of the evidence, and unreliable because Altria indicated that it might comply with JLI’s demand to stop competing by ceasing to operate its e-cigarette business. (*See* CCFE ¶¶ 968-86). Respondents fail to cite any evidence from JLI regarding its position; instead, Respondents rely on after-the-fact, self-serving testimony from an Altria executive regarding JLI’s position, rendering the proposed finding unreliable. JLI’s position was clear and conveyed to Altria: JLI did not want Altria competing against JLI. (*See* Responses to RPF ¶¶ 762, 766, 783). The proposed finding is also incomplete, misleading, and vague because Altria gained a non-voting board observer prior to receiving HSR approval, contrary to Garnick’s testimony. (CCFF ¶¶ 42-43).

831. By contrast, other revisions in the August 19 term sheet demonstrate that control and valuation remained significant issues. As Pritzker testified, JLI was “trying to capture something that would work for both parties, so it -- I can’t say I was highly optimistic at this point, but we were trying to thread the needle and come up with something that would work.” (Pritzker (JLI) Tr. 849).

### **Response to Finding No. 831**

The proposed finding is vague, misleading, and unreliable. The proposed finding is misleading and unreliable because Respondents mischaracterize Pritzker’s testimony—his specific testimony in the quote was in response to a question about sending the term sheets, and not specifically about valuation. (Pritzker (JLI) Tr. 848-49).

Furthermore, Pritzker’s testimony is vague and misleading as to the actual state of negotiations—JLI and Altria continued negotiations with calls only a few days later, on August

22, 2018, (CCFF ¶ 740), August 23, 2018, (CCFF ¶ 744), August 25, 2018, (CCFF ¶ 746), and beyond, (e.g., CCFF ¶¶ 748-50). After the August 25, 2018 call, Altria adviser Wappler reported that Pritzker indicated to Willard that “they [JLI] really want to get this deal done.” (CCFF ¶ 746).

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding further exclusively relies on Pritzker’s self-serving testimony, rendering it unreliable.

832. For example, JLI proposed that Altria would purchase a 45 percent stake in JLI’s U.S. business and receive 20 percent of the voting power—a decrease from the 35 percent Altria proposed in the August 9 term sheet. (PX1432 (Altria) at 017-18).

### **Response to Finding No. 832**

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

833. Additionally, as of mid-August, “[p]rice was still an issue.” (PX7021 Pritzker (JLI) Dep. at 119; *see also* Pritzker (JLI) Tr. 845-46). Separating the U.S. company from the international company—as Altria was proposing—was part of the pricing problem,

because JLI thought the international business was worth “significantly more” than Altria was willing to value it. “[I]n many respects the entire gap between what Altria was valuing the company at and what [JLI] might value it at was the international aspect of the company, but not if it was split from the domestic company . . . .” (Pritzker (JLI) Tr. 835; *see also supra* ¶ 561).

### **Response to Finding No. 833**

The proposed finding is vague as to the timing in “mid-August.”

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

#### **I. August 22, 2018 Joint Issues List**

834. On August 22, 2018, counsel for both parties circulated a joint issues list. (RX1783 (PWP) at 001; RX1784 (PWP) at 001).

### **Response to Finding No. 834**

The proposed finding is unsupported and vague as to the claim that counsel for both parties circulated a joint issues list. In reality, on August 21, 2018, on behalf of Altria’s Crosthwaite, Altria’s outside counsel sent JLI CEO Burns a Term Sheet Issues List based on the August 18, 2018 draft term sheet circulated by JLI. (CCFF ¶ 958). The issues list confirms that Altria agreed to exit its e-cigarette business—in that instance either by contribution to JLI or by divestiture:



No.	Topic	Jack Position	Richard Position
3.	<b>Antitrust Clearance Matters</b>	<ul style="list-style-type: none"> <li>• Richard to grant worldwide IP license concurrently with closing.</li> <li>• Upon receipt of antitrust clearance, Richard to contribute to Jack all Richard e-vapor assets at no cost to Jack.</li> <li>• If antitrust clearance for contribution is not received within nine months, Richard to divest e-vapor assets within six months.</li> <li>• Parties to use reasonable best efforts to obtain antitrust clearance for at least nine months.</li> <li>• Richard to have information rights consistent with antitrust laws.</li> </ul>	<ul style="list-style-type: none"> <li>• In general, we do not see any material substantive difference on these antitrust points. As has been discussed with antitrust counsel, we have a few suggestions for how the process might be improved, as noted in the succeeding bullets.</li> <li>• Instead of granting IP license, Richard would irrevocably waive any claims that Jack has violated any Richard IP rights.</li> <li>• Efforts obligation should last at least 18 months.</li> <li>• Parties would agree on specific information and consultation rights in the definitive transaction documents.</li> </ul>
4.	<b>Richard Support Obligations</b>	<ul style="list-style-type: none"> <li>• Support obligations pre-antitrust clearance include assisting with direct marketing programs / inserts and onserts.</li> <li>• Services provided at actual cost.</li> </ul>	<ul style="list-style-type: none"> <li>• We are generally agreed with the scope of support obligations described in Jack’s draft. Antitrust counsel advises that direct marketing should be a post-clearance service (and should not commence at closing).</li> <li>• Rather than being tied to antitrust clearance, ability to provide full suite of services would be triggered by completion of contribution / divestiture (this is more of an antitrust technical point than a substantive one).</li> <li>• Services to be provided at cost plus 5% (which is consistent with Altria intra-group services pricing)</li> </ul>

(CCFF ¶ 958). The August 21, 2018 Issues List from Altria also noted that “Rather than being tied to antitrust clearance, ability to provide full suite of services would be triggered by completion of contribution/divestiture (this is more of an antitrust technical point than a substantive one).” (CCFF ¶ 959). On August 22, 2018, JLI’s outside counsel sent to Altria a revised issues list reflecting JLI’s updated positions. (CCFF ¶ 960). Like the issues list circulated by Altria the prior day, JLI’s list contains the statement that “If antitrust clearance for contribution is not received within nine months, Richard [Altria] to divest e-vapor assets within six months.” (CCFF ¶ 960). JLI’s list also added a bullet stating “[p]arties to discuss relative advantage of divestiture v. contribution.” (CCFF ¶ 960).

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop

competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

835. This list demonstrated that the parties had reached consensus on the treatment of Altria's existing e-vapor business in the event of an investment. (RX1784 (PWP) at 002, 004).

### **Response to Finding No. 835**

To the extent that the proposed finding stands for the proposition that Respondents both understood at this point in the negotiations that Altria could not continue to compete in the closed-system e-cigarette market if there was going to be a transaction, Complaint Counsel does not disagree. The proposed finding is vague as to what was agreed upon, however. (*See* Response to RPPF ¶ 834).

836. The issues list stated that Altria and JLI were in agreement regarding the Antitrust Clearance Matters section of the August 19 term sheet. Altria wrote, "In general, we do not see any material substantive difference on these antitrust points." (RX1784 (PWP) at 002 (comparing the parties' respective positions); *see also* RX1784 (PWP) at 002-03 (describing Antitrust Clearance procedure from August 19 term sheet as: "Upon receipt of antitrust clearance, [Altria] to contribute to [JLI] all [Altria] e-vapor assets at no cost to [JLI]"; and "[i]f antitrust clearance for contribution is not received within nine months, [Altria] to divest e-vapor assets within six months")).

### **Response to Finding No. 836**

To the extent that the proposed finding stands for the proposition that Respondents both understood at this point in the negotiations that Altria could not continue to compete in the closed-system e-cigarette market, Complaint Counsel does not disagree. The proposed finding is vague and misleading because it omits the explanation that Altria had agreed to not compete in closed-system e-cigarettes. (*See* Response to RPPF ¶ 834).

837. The list further reflected the parties' understanding that MarkTen cig-a-like and MarkTen Elite were exempted from the noncompete agreement prior to HSR approval; JLI specifically asked Altria to "confirm that *except as to MarkTen and MarkTen Elite*, non-compete commences on signing." (RX1784 (PWP) at 004 (emphasis added)).

**Response to Finding No. 837**

The proposed finding is contrary to the weight of the evidence for the reasons set forth in response to RPF 789. (*See* Response to RPF 789). The proposed finding ignores that JLI's negotiators understood that a "precept" of any investment from Altria was that Altria would not compete in e-cigarettes; that JLI told Altria it could not compete in e-cigarettes and Altria understood that; and as of at least July 27, 2018, that JLI was "under the impression that [Altria] would just shut down Mark 10." (*See* Responses to RPF ¶¶ 762, 766, 783). JLI expressly contemplated that Altria could not compete with its existing closed-system e-cigarette products. (*See* Responses to RPF ¶¶ 791, 829; CCF ¶¶ 921-22). The proposed finding is contrary to the weight of the evidence to the extent that it implies there was no agreement between Altria and JLI for Altria to completely exit the closed-system e-cigarette market: JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCF ¶¶ 968-86).

The proposed finding is also misleading because it ignores that Altria did not stay on the market with its existing closed-system e-cigarettes until HSR approval was attained. The proposed finding is incomplete and misleading in that, by the time the parties executed the transaction on December 20, 2018, Altria had already pulled Elite off the market and had discontinued the sale and distribution of the MarkTen cigalike. (CCF ¶ 862). The products remained off the market (with the exception of leftover cigalike inventory selling through at retail) by the time Altria initiated the HSR review process in February 2019. (CCF ¶ 866). Indeed, on December 9, 2018,

two days after Altria pulled its products on December 7, Garnick personally confirmed to Masoudi that Altria was “not in the market anymore” and that it could not “get back into the market without getting a PMTA.” (CCFF ¶ 851).

Finally, the proposed finding exclusively relies on Garnick’s self-serving testimony, rendering it unreliable.

838. As Garnick testified, by the time of the August 22 issues list, it was “well settled” that MarkTen cig-a-like and MarkTen Elite could stay on the market until the deal received HSR approval. (Garnick (Altria) Tr. 1752).

### **Response to Finding No. 838**

The proposed finding is contrary to the weight of the evidence for the reasons set forth in response to RPF ¶ 789. (*See* Response to RPF ¶ 789). JLI’s negotiators understood that a “precept” of any investment from Altria was that Altria would not compete in e-cigarettes; that JLI told Altria it could not compete in e-cigarettes and Altria understood that; and as of at least July 27, 2018, that JLI was “under the impression that [Altria] would just shut down Mark 10.” (*See* Responses to RPF ¶¶ 762, 766, 783). JLI expressly contemplated that Altria could not compete with its existing closed-system e-cigarette products. (*See* Responses to RPF ¶¶ 791, 829; CCFF ¶¶ 921-22). The proposed finding is contrary to the weight of the evidence to the extent that it implies there was no agreement between Altria and JLI for Altria to completely exit the closed-system e-cigarette market: JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is also misleading because it ignores that Altria did not stay on the market with its existing closed-system e-cigarettes until HSR approval was attained. The proposed finding is incomplete and misleading in that, by the time the parties executed the transaction on December 20, 2018, Altria had already pulled Elite off the market and had discontinued the sale and distribution of the MarkTen cigalike. (CCFF ¶ 862). The products remained off the market (with the exception of leftover cigalike inventory selling through at retail) by the time Altria initiated the HSR review process in February 2019. (CCFF ¶ 866). Indeed, on December 9, 2018, two days after Altria pulled its products on December 7, Garnick personally confirmed to Masoudi that Altria was “not in the market anymore” and that it could not “get back into the market without getting a PMTA.” (CCFF ¶ 851).

Finally, the proposed finding exclusively relies on Garnick’s self-serving testimony, rendering it unreliable.

**VII. WHILE NEGOTIATIONS WERE ONGOING, ALTRIA, RECOGNIZING THAT IT COULD NOT COMPETE WITH ITS CURRENT PORTFOLIO, BEGAN REORIENTING ITS E-VAPOR STRATEGY AROUND FUTURE PRODUCTS**

**A. August 2, 2018: Quigley Concluded That Altria Should Shift Its Focus To Having A New Portfolio Of Products By 2025**

839. On August 2, 2018, Quigley convened a meeting with Altria’s senior management so that he could give them “an update on how [he] was thinking about the framing of [his] plan forward, and then to give an update on where [Nu Mark was] in the kind of current year performance.” (Quigley (Altria) Tr. 2029; PX1644 (Altria)).

**Response to Finding No. 839**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that Quigley’s August 3, 2018 meeting took place a few days after JLI sent Altria its July 30, 2018 term sheet containing its noncompete demands, and just two days after Willard and Gifford met with Pritzker, Valani and Burns at the Park Hyatt Hotel. (CCFF ¶¶ 681-88, 690).

The proposed finding is contrary to the weight of the evidence because, while Respondents state that the meeting occurred on August 2, 2018, which is the date that Quigley scheduled the meeting and sent the cited presentation to Willard, Gifford, Garnick, and Crosthwaite (Resps.’ Post-Trial Br. at 34), Quigley testified that the meeting was postponed and actually took place on August 3, 2018. (PX7003 (Quigley (Altria), IHT at 123)). Quigley also testified that he “called Howard [Willard] that night [of August 2, 2018] to say, hey, I just want to let you know a couple things we are going to talk about.” (PX7003 (Quigley (Altria), IHT at 123)).

840. Quigley was not involved in any JLI negotiations. (Willard (Altria) Tr. 1390-91).

#### **Response to Finding No. 840**

The proposed finding is incomplete and misleading because it fails to note that Willard, Gifford, Garnick, and Crosthwaite were the senior deal negotiators on behalf of Altria. (CCFF ¶ 578).

Moreover, on { [REDACTED] }, Altria senior leadership held meetings with the Altria board at Altria’s { [REDACTED] } Quigley and other Altria executives were { [REDACTED] } during these meetings, but only Willard, Gifford, Garnick, and Crosthwaite were allowed into the meetings with the board, which was unusual. (CCFF ¶ 1372). Even though he was { [REDACTED] }, Quigley was not permitted to participate in the board meeting in which Nu Mark was discussed. (CCFF ¶ 1372).

841. Quigley acknowledged Nu Mark’s portfolio gaps: The company “[l]ack[ed] quality pod products” and “[p]roducts that provide immediate nicotine satisfaction.” (PX1644 (Altria) at 006, 018; Willard (Altria) Tr. 1395 (discussing PX1644-018 and explaining that “Portfolio Gaps” were “things [Nu Mark’s] portfolio d[id]n’t have that you would like to have”)).

#### **Response to Finding No. 841**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “Quigley acknowledged Nu Mark’s portfolio gaps: The company ‘lacked quality pod products’ and ‘products that provide immediate nicotine satisfaction’” and that “‘Portfolio Gaps’ were ‘things [Nu Mark’s] portfolio d[id]n’t have that you would like to have,’” the proposed finding is vague because it does not define a timeframe and because the phrases “quality,” “portfolio gaps,” and “things . . . that you would like to have” are ambiguous.

The proposed finding is incomplete and misleading because it fails to note that that Quigley advocated for continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding claims that “[Nu Mark] ‘lacked quality pod products’ and ‘products that provide immediate nicotine satisfaction,’” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 596-692, 701-05. (See Responses to RPF 596-692, 701-05).

842. Quigley believed that he “needed to start distinguishing with management that the products [Nu Mark] had [at the time] were flavor forward products but not necessarily the ones that had the nicotine satisfaction.” (Quigley (Altria) Tr. 2037). As Gifford recalled, Quigley explained to leadership that “competing in vapor was going to be an uphill battle with [Nu Mark’s] portfolio” and new products likely would take “five to seven years” to bring to market because of the Deeming Rule. (Gifford (Altria) Tr. 2778).

#### **Response to Finding No. 842**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “Quigley believed that he ‘needed to start distinguishing with management that the products [Nu Mark] had [at the time] were flavor forward products but not necessarily the ones that had the nicotine satisfaction’” and “Quigley explained to leadership that ‘competing in vapor was going to be an uphill battle with [Nu Mark’s]

portfolio,” the proposed finding is vague because it does not specify a timeframe and because the phrases “not necessarily the ones that had the nicotine satisfaction” and “uphill battle” are ambiguous.

The proposed finding is unreliable because it relies only on self-serving and hearsay testimony.

The proposed finding is incomplete and misleading because, with respect to the August 3, 2018 meeting with Willard, Gifford, Crosthwaite, and Garnick, Quigley advocated at that meeting for keeping both MarkTen Elite and MarkTen cigalikes on the market, while working to develop improved products in order to achieve “leadership” by 2025. (PX1644 (Altria) at 004, 018, 023-24). Quigley testified that his “goal going into this meeting first and foremost was to save the [MarkTen] cigalike business” and to “prove to [Altria leadership] that our cig-a-like business was meaningful.” (PX7003 (Quigley (Altria), IHT at 112, 124-26)).

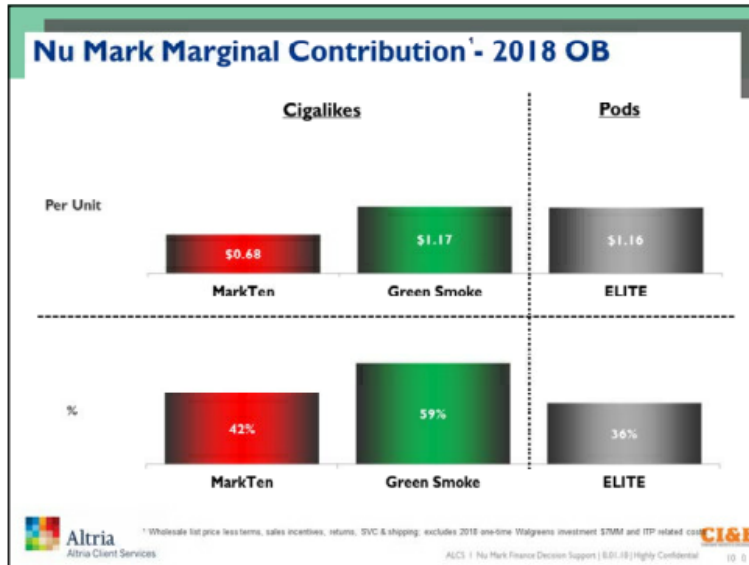
Respondents fail to mention that the night before the August 3, 2018 meeting, Quigley called Willard and told him that “it’s important that we continue to invest in Elite.” (PX7003 (Quigley (Altria), IHT at 123)). After speaking with Willard on August 2, 2018, Quigley stated to several colleagues, “I did tell Howard tonight we are going to build the [E]lite business and he agreed we should do that work.” (CCFF ¶ 1360).

Quigley’s presentation for the August 3, 2018 meeting reflected those intentions: The presentation characterized “Nu Mark’s Approach” for the “2018-2022” timeframe as “Improve our ability to compete by acquiring products and preserving select existing products, while we build capabilities and the superior product portfolio for the future.” (PX1644 (Altria) at 004).

The presentation also noted that, in 2018, MarkTen cigalike, Green Smoke, and MarkTen Elite had positive marginal contributions of 42 percent, 59 percent, and 36 percent, respectively,

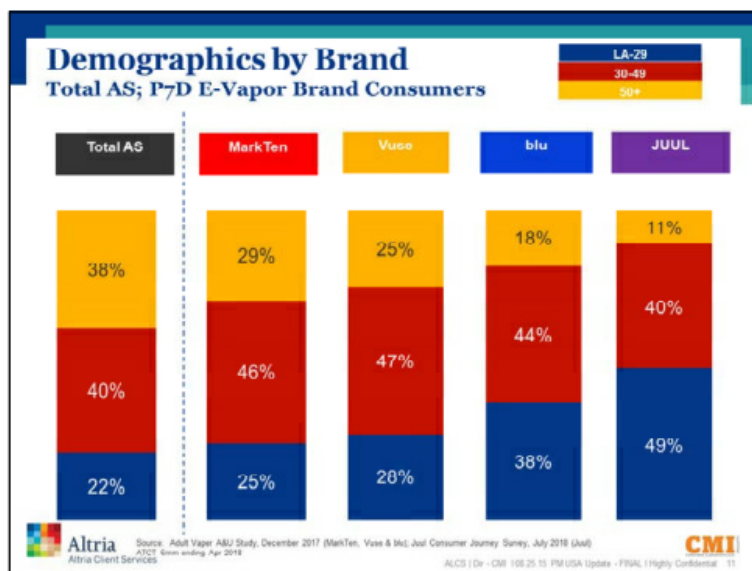


and that overall MarkTen brand sales had increased by 24 percent from 1H 2017 to 1H 2018. (PX1644 (Altria) at 011-12).



(PX1664 (Altria) at 012).

The presentation noted that, as a proportion of sales, the MarkTen brand tended to attract fewer users under 30 years of age than competing brands. (PX1664 (Altria) at 013).



(PX1664 (Altria) at 013).

A slide titled “Product Assessment Summary,” lists MarkTen cigalikes, MarkTen Bold, and “Elite (Flavor Forward)” under the category of “What We Have to Compete Today” and lists “Long-Term Potential Concepts” that included “Cig-a-like • Bold Flavors” and “Pods • Elite (Flavor Forward) • Elite (Immediate Satisfaction).” (PX1664 (Altria) at 018). As Quigley explained, based on Altria’s qualitative research, Elite 1.0 appealed to customers who wanted a flavorful vaping experience. (PX7003 (Quigley (Altria), IHT at 96-97)). Quigley confirmed that Nu Mark saw the current Elite 1.0 as a potential long-term product appealing to certain customers. (PX7003 (Quigley (Altria), IHT at 96-97)). With respect to the product called “Elite (Immediate Satisfaction),” listed under “Long-Term Potential Concepts,” Quigley explained that this was the new version of Elite with higher nicotine levels and salts, on which Altria had started development work. (PX1644 (Altria) at 018; PX7003 (Quigley (Altria), IHT at 97-98, 100)).

In slides titled “2018/2019 Nu Mark Scenario,” the presentation identified Nu Mark’s “Strategy” as “Preserve the right products from our current portfolio to compete” and listed “Actions” that included “Execute gasket change on MarkTen Elite,” “Execute MarkTen PMTA to achieve market authorization for BVR 2.8 (14-SKUs),” “Execute Elite 1.0 and 2.0 PMTA strategies with gasket modification,” and “Elite Re-launch and evaluation post gasket change.” (PX1644 (Altria) at 024-025). The presentation likewise stated that Nu Mark’s “Near Term Strategic Focus” should include “[p]reserv[ing] the right products from our current in-market portfolio to compete,” and “[e]nhance[ing] external development and acquisition strategy to address portfolio gaps.” (PX1644 (Altria) at 023).

Quigley testified that he thought the outcome of the August 3, 2018 meeting was that he had convinced Willard, Gifford, Crosthwaite, and Garnick that there was “more to the MarkTen cig-a-like business than we thought” and “[t]hat they wanted to talk more about it and hear more

about it.” (PX7003 (Quigley (Altria), IHT at 112-13)). Quigley testified that Altria leadership agreed to go forward with the MarkTen cigalike PMTA at the August 3, 2018 meeting. (PX7003 (Quigley (Altria), IHT at 127-28)). As of August 9, 2018, Nu Mark planned to submit the MarkTen cigalike PMTA in the second or third quarter of 2020. (PX7003 (Quigley (Altria) IHT at 127-28).

Quigley testified that, at the August 3, 2018 meeting, Gifford suggested possibly pulling Elite from the market, but Quigley got him to agree not to rush into that and to have Quigley “come back and share . . . what we believe to be the facts about Elite,” do a “business case and at the end of the month come back and tell [them] what, you know, we think the opportunities are for Elite.” (PX7003 (Quigley (Altria), IHT at 132-33)). Quigley testified that he was surprised that Billy, Howard, Murray, and KC were considering pulling MarkTen Elite from the market, given that Altria had “just launched it.” (PX7003 (Quigley (Altria), IHT at 133-34)). In Quigley’s experience, it is unusual to launch a product, have it grow, and then pull it. (PX7003 (Quigley (Altria), IHT at 134)). Quigley testified that the first time he heard that Altria was considering pulling MarkTen Elite from the market was at that August 3, 2018, meeting. (PX7003 (Quigley (Altria), IHT at 134)). Quigley testified that he did not understand why Altria was considering discontinuing its e-cigarette products:

“Q: We’ve already looked at some documents that show that both Mark Ten cig-a-likes and Mark Ten Elite, which had just been launched, were growing; is that right?

A: Correct.

Q: Did you understand why Howard, Billy, Murray, and K.C. might want to just shut down the business?

A: I could not understand why.

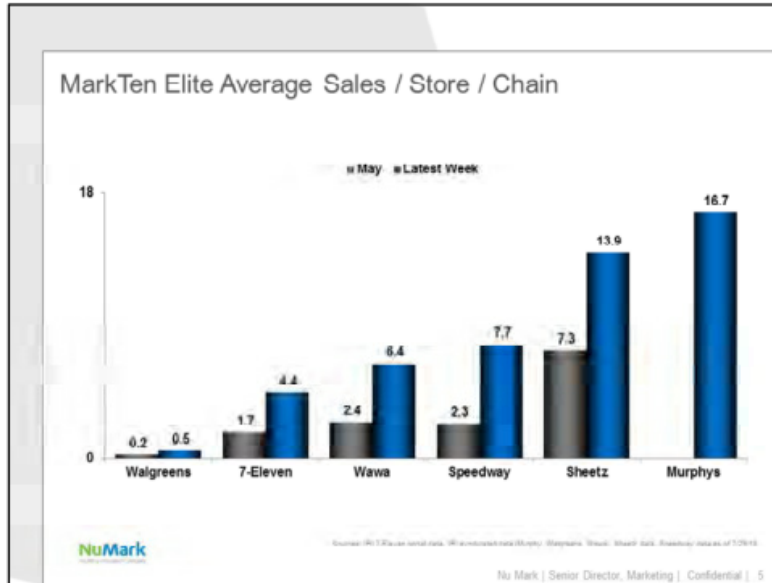
Q: Did you get some sense that’s what they wanted to do?

A: Frankly, I did not understand what was going on at the place at that point in time. [ ] I didn't know what was happening. All I knew was for some reason whatever I said seemed like the wrong answer.”

(PX7003 (Quigley (Altria), IHT at 111)).

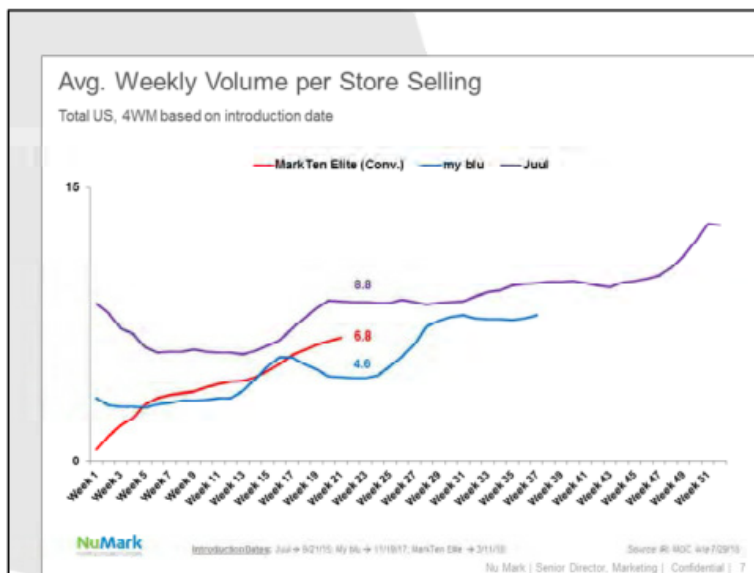
Quigley met with Willard, Gifford, Crosthwaite, and Garnick again on August 10, 2018 in order to propose filing a PMTA for MarkTen Elite and to clear up misperceptions about Elite, specifically their misperception that just “because [Elite] was a pod product that the goal should be to beat JUUL.” (PX7003 (Quigley (Altria), IHT at 129-30)). Quigley thought the goal for Elite should be “[t]o grow it profitably and to be a platform to help [Altria] learn about how to create better products with higher nicotine in the future.” (PX7003 (Quigley (Altria), IHT at 130-31)). Quigley testified that he thought “[i]t was too early to tell” whether Elite was accomplishing those goals and that “having Elite in the market would give us more insight to come up with the answer.” (PX7003 (Quigley (Altria), IHT at 131)). Quigley “believed [Elite] could grow, but it was not going to grow a thousand percent,” like JUUL. (PX7003 (Quigley (Altria), IHT at 125-26)).

An email that Quigley circulated to Willard, Gifford, Crosthwaite, and Garnick before the August 10, 2018 meeting states: “Our next round of distribution [for MarkTen Elite] begins in September, so we recommend developing the communication plan for a potential change in distribution plans while we use the Elite business case review at the end of the month to make a final decision.” (PX1013 (Altria) at 001). A presentation attached to the email showed that, since May 2018, sales of MarkTen Elite had improved at a number of stores. (PX1013 (Altria) at 007).



(PX1013 (Altria) at 007).

That presentation also noted that MarkTen Elite’s “Avg. Weekly Volume per Store Selling” was in a similar range as Juul when it first launched.



(PX1013 (Altria) at 009).

The presentation also noted that sales of MarkTen Elite were increasing while leaking complaints were declining. (PX1013 (Altria) at 011-12). Quigley testified that after he presented

this information to Willard, Gifford, Crosthwaite, and Garnick, they reacted by saying “at this point in time, JUUL is up a thousand percent and you are nowhere compared to JUUL, and you are not having any impact on JUUL. You are not slowing them down.” (PX7003 (Quigley (Altria), IHT at 137)). Quigley testified that he told them he did not think that was a fair way to assess MarkTen Elite, but that they seemed focused on Juul. (PX7003 (Quigley (Altria), IHT at 137)).

The proposed finding is also incomplete and misleading for the reasons cited in response to RPF 732. (*See* Response to RPF 732).

To the extent that the proposed finding implies that Nu Mark’s products did not have “nicotine satisfaction,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 596-692, 701-05. (*See* Responses to RPF 596-692, 701-05; CCF 1301-22, 1332-39). Altria’s own market studies showed that Nu Mark’s e-cigarettes without nicotine salts appealed to customers looking for a smoother, fuller vaping experience, as opposed to the harsher, cigarette-like experience that nicotine salts provide. (CCF 1315-16; PX4318 (Altria) at 006 (Nu Mark NPC meeting)). Indeed, Altria’s own internal documents showed that some customers preferred Altria’s e-cigarettes to JUUL. (CCF 1315-16; PX4318 (Altria) at 006 (“Nu Mark NPC Meeting”)).

To the extent that, in claiming “competing in vapor was going to be an uphill battle with [Nu Mark’s] portfolio,” the proposed finding implies that Nu Mark’s portfolio was not commercially successful, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 276-300, 431-85. (*See* Responses to RPF 276-300, 431-85). In addition, Nu Mark’s financial performance was improving and sales of Elite were growing. (CCF 1088-131). Altria anticipated that its products would be profitable in the future. (CCF 1083-87). The financial performance of Altria’s cigalike products improved continuously from

2016 to 2018, and Altria consistently assessed that its cigalike products were doing well and meeting targets. (CCFF ¶¶ 1088-111). MarkTen Elite’s sales grew continuously from the launch of the product until September 2018. (CCFF ¶¶ 1112-31).

To the extent that the proposed finding claims that “new products likely would take ‘five to seven years’ to bring to market because of the Deeming Rule,” the proposed finding is misleading for the reasons cited in response to RPF ¶ 573. (*See* Response to RPF ¶ 573). The proposed finding is also incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730).

In addition, the proposed finding is misleading because in 2018, Altria would not have needed to submit PMTAs for its e-cigarette products until almost four years later, in August 2022, (CCFF ¶ 1257), and would have been able to keep its e-cigarette products on the market until the FDA rejected the PMTAs. (CCFF ¶¶ 1298-300; *see* Response to RPF ¶ 523). In 2018, Altria had plans to submit PMTAs for improved versions of the MarkTen cigalike product and MarkTen Elite before the then-PMTA deadline. (CCFF ¶¶ 1295-300; *see* Responses to RPF ¶¶ 498-527).

The proposed finding is incomplete and misleading because it fails to note that Quigley advocated for continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

The proposed finding is incomplete and misleading because it fails to note that other e-cigarette manufacturers remained in the market despite commercial challenges. (CCFF ¶¶ 1132-43).

843. Quigley concluded that “Nu Mark is limited to competing today in the cig-a-like segment.” (PX1644 (Altria) at 006). This was problematic, because Quigley had determined by this point that the cig-a-like segment was “very small and getting smaller relative to the growth

in pods. So it was . . . not meaningful in terms of what was driving change in the tobacco landscape.” (Quigley (Altria) Tr. 2032).

### **Response to Finding No. 843**

The proposed finding is vague, incorrect, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe.

To the extent that the proposed finding claims that “Nu Mark is limited to competing today in the cig-a-like segment,” the proposed finding is incorrect because Nu Mark launched a pod-based product, MarkTen Elite, in 2018, and it was commercially successful. (CCFF ¶¶ 1112-31; *see* Responses to RPF ¶¶ 431-85).

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730).

To the extent that the proposed finding claims that “the cig-a-like segment was ‘very small and getting smaller relative to the growth in pods[, s]o it was . . . not meaningful in terms of what was driving change in the tobacco landscape,’” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 276-300. (*See* Responses to RPF ¶¶ 276-300).

To the extent that the proposed finding implies that Nu Mark’s cigalike products were not commercially successful or were unlikely to be commercially successful in the future, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶ 842. (*See* Response to RPF ¶ 842).



The proposed finding is incomplete and misleading because it fails to note that Quigley advocated for continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

844. Willard recalled Quigley had explained that, “at [that] point . . . the only products [Nu Mark] had that were at all competitive within a segment was the MarkTen cigalike, and while that might seem like a bright spot, [Altria] saw that the cigalike category was plummeting in share, and so if that was a bright spot, it was a very dim bright spot.” (Willard (Altria) Tr. 1393).

#### **Response to Finding No. 844**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe.

The proposed finding is unreliable because it contains hearsay testimony about what another testifying witness said.

The proposed finding is incomplete and misleading because it also fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730).

To the extent that the proposed finding claims that “Willard recalled Quigley had explained that, ‘at [that] point . . . the only products [Nu Mark] had that were at all competitive within a segment was the MarkTen cigalike, and while that might seem like a bright spot, [Altria] saw that the cigalike category was plummeting in share, and so if that was a bright spot, it was a very dim bright spot,’” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 276-300. (*See* Responses to RPF ¶¶ 276-300).

To the extent that the proposed finding implies that Nu Mark’s cigalike products were not commercially successful or were unlikely to be commercially successful in the future, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response

to RPF 842. (See Response to RPF 842). The proposed finding is incomplete and misleading because it fails to note that Quigley advocated for continued investment in both Elite and the MarkTen cigalikes. (CCF 1036, 1043, 1097, 1104, 1155).

845. And as to Elite, Quigley acknowledged it was not “proven to deliver broadly against [adult tobacco consumer] desires for a satisfying, enjoyable nicotine experience.” (PX1644 (Altria) at 006). Elite “was not demonstrating that it could be a competitor to JUUL.” (Quigley (Altria) Tr. 2031).

### **Response to Finding No. 845**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe and because the phrases “proven to deliver broadly against [adult tobacco consumer] desires” and “a competitor to JUUL” are ambiguous.

The proposed finding is incomplete and misleading because Altria withdrew MarkTen Elite before it had time to assess the product’s long-term potential. (CCF 1144-62). MarkTen Elite was only on the market for approximately eight months. (CCF 1144-45). Altria withdrew MarkTen Elite ahead of multiple planned waves of expansion. (CCF 1146-48).

To the extent that the proposed finding claims that “[a]nd as to Elite, Quigley acknowledged it was not ‘proven to deliver broadly against [adult tobacco consumer] desires for a satisfying, enjoyable nicotine experience’” and “Elite ‘was not demonstrating that it could be a competitor to JUUL,’” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 431-85, 596-637. (See Responses to RPF 431-85, 596-637; see also CCF 1112-31). The proposed finding is incomplete and misleading because it fails to note that Quigley advocated for continued investment in both Elite and the MarkTen cigalikes. (CCF 1036, 1043, 1097, 1104, 1155).

846. Elite “did not have the nicotine relationship and levels of nicotine that adult smokers would be looking for,” and, given the product’s “design flaws” and what Quigley had learned from Dr. Kobal and his team, he “had to acknowledge” to senior leadership “that Elite was not an important part of the product portfolio.” (Quigley (Altria) Tr. 2031-33).

#### **Response to Finding No. 846**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe and because the phrases “nicotine relationship,” “design flaws,” “what Quigley had learned from Dr. Kobal and his team,” and “important part of the product portfolio” are ambiguous.

The proposed finding is incomplete and misleading because it fails to note that Quigley advocated for continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding claims that “Elite ‘did not have the nicotine relationship and levels of nicotine that adult smokers would be looking for,’” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 612-37. (*See Responses to RPF ¶¶ 612-37; see also CCFF ¶¶ 1301-22*).

To the extent that the proposed finding claims that “Elite [had] design flaws” and to the extent that the reference to “what Quigley had learned from Dr. Kobal and his team” refers to RPF ¶¶ 676-92, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 365-67, 510-27, 652-75, 676-92. (*See Responses to RPF ¶¶ 365-67, 510-27, 652-75, 676-92; see also CCFF ¶¶ 1301-22*).

847. Again, Willard recalled Quigley had “concluded that [Nu Mark’s] attempt at making MarkTen Elite into a quality and successful pod product had failed or was on its way to failure.” (Willard (Altria) Tr. 1393-94). He understood Quigley to have been “suggesting that, you know, we needed to go back and redouble our efforts to come up with a product that might be more competitive.” (Willard (Altria) Tr. 1394).

**Response to Finding No. 847**

The proposed finding is vague, unreliable, incorrect, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe and because the phrase “might be more competitive” is ambiguous.

The proposed finding is unreliable because it contains hearsay testimony about what another testifying witness said.

To the extent that the proposed finding claims that “[Nu Mark’s] attempt at making MarkTen Elite into a quality and successful pod product had failed or was on its way to failure” and that MarkTen Elite was not “competitive,” the proposed finding is incorrect, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPFF ¶¶ 431-85, because MarkTen Elite was commercially successful, and because Altria withdrew MarkTen Elite before it had time to assess the product’s long-term performance. (*See* Responses to RPFF ¶¶ 431-85; CCFF ¶¶ 1112-31, 1144-62). MarkTen Elite was only on the market for approximately eight months. (CCFF ¶¶ 1144-45). Altria withdrew MarkTen Elite ahead of multiple planned waves of expansion. (CCFF ¶¶ 1146-48).

The proposed finding is incomplete and misleading because it fails to note that Quigley advocated for continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

848. Quigley also highlighted the talent gaps at Nu Mark, particularly the need to bring in “external talent that had more experience innovating and that had experience with electronic products.” (Willard (Altria) Tr. 1396; *see also* PX1644 (Altria) at 022 (“Need proven capabilities to develop & launch[] innovative products outside a cigarette model[.]”); Jupe (Altria) Tr. 2319 (explaining that Altria simply “didn’t have the right talent, the right skills, the right experiences” to succeed in developing innovative products); PX7041 Quigley (Altria) Dep. at 148-49 (“[Altria] had a long history of failure trying to do anything other than what [it] had proven to do successfully for decades,” using a

“cigarette model[.]”). An “electronic e-vapor product is dramatically different than a cigarette, which is essentially tobacco wrapped in paper that you light.” (Willard (Altria) Tr. 1396; *see also* PX7004 Willard (Altria) IHT at 177 (“[I]t’s actually fairly difficult to engineer a product that can pass what [Altria] expect[s] will be the FDA’s requirements for e-vapor products.”)). But as Willard explained, “[t]obacco is kind of controversial,” (Willard (Altria) Tr. 1397), and “for a number of years,” Altria had tried and failed to attract those with highly sought-after technical expertise to come to Richmond, Virginia, (PX7031 Willard (Altria) Dep. at 264). Candidates with the requisite skills and experience generally preferred to “work for a tech company in an exciting field that’s not nearly as controversial.” (Willard (Altria) Tr. 1397; *see also* PX7024 Crosthwaite (Altria/JLI) Dep. at 270 (noting that, of all the many “employees that [JLI has] had to let go as a result of the competitive environment [it is] in, [Crosthwaite] can’t think of one that’s joined a tobacco company” subsequently)). Altria tried to make do by taking “really good people from [its] cigarette business and mov[ing] them over [to Nu Mark], but [those people] lacked an experience set certainly like the JUUL group had.” (Willard (Altria) Tr. 1397).

### **Response to Finding No. 848**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony and hearsay testimony.

The proposed finding is vague because the phrases “experience with electronic products” and “the right talent, the right skills” are ambiguous.

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730).

To the extent that the proposed finding implies that Altria did not have the employees and resources to achieve PMTA approval for its e-cigarette products or to compete in the closed-system e-cigarette market, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 596-747, 842. (*See Responses to RPF 596-747, 842*).

To the extent that the proposed finding claims that Altria did not or could not hire the employees needed to achieve PMTA approval or to compete in the closed-system e-cigarette

market, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence for the reasons cited and below in response to RPF 496, 715-16, 977, 1563. (*See Responses to RPF 496, 715-16, 977, 1563*).

To the extent that the proposed finding implies that Nu Mark's products were not commercially successful, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 842. (*See Response to RPF 842*).

849. Others at Altria had undertaken similar assessments and reached bleak conclusions. In advance of the August 2 meeting, Elizabeth Mountjoy, then-Vice President of Corporate Strategy, circulated her "preliminary evaluation," which was "that Nu Mark does not have any products that merit a full-blown PMTA." (RX0199 (Altria) at 001; *see also* PX7034 Mountjoy (Altria) Dep. at 147). Mountjoy advised that "[t]he current portfolio should continue to be in market but with limited resources and applications. There needs to be (i) rapid advancement of our innovation system to develop a robust pipeline and (ii) an intense scrutiny of the people and roles supporting these efforts." (RX0199 (Altria) at 001).

#### **Response to Finding No. 849**

The proposed finding is unsupported, incomplete, misleading, unreliable, and contrary to the weight of the evidence.

The first sentence of the proposed finding is unsupported in that it cites no evidence in the record.

The proposed finding is incomplete and misleading because it fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF 1588-730).

To the extent that the proposed finding claims that "Elizabeth Mountjoy, then-Vice President of Corporate Strategy, circulated her 'preliminary evaluation,' which was 'that Nu Mark does not have any products that merit a full-blown PMTA,'" and that "Mountjoy advised that '[t]he current portfolio should continue to be in market but with limited resources and applications,'" and "[t]here needs to be (i) rapid advancement of our innovation system to develop a robust pipeline

and (ii) an intense scrutiny of the people and roles supporting these efforts,” the proposed finding is unreliable because neither the cited exhibit nor the cited testimony includes any support or rationale for the conclusion: The cited exhibit merely contains a proposed organizational chart. (RX0199 (Altria) at 002-03). When asked whether she based her conclusion on sales figures for Nu Mark’s products, Mountjoy testified “I don’t recall specifically what I looked at to reach this conclusion.” (PX7034 (Mountjoy (Altria), Dep. at 147)).

To the extent that the proposed finding implies that Nu Mark’s products were not commercially successful, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 842. (*See* Response to RPF 842).

850. To redirect Nu Mark going forward, at the August 2 meeting, Quigley proposed a “bridge plan,” under which Nu Mark would struggle for the foreseeable future with its in-market products and any other products it might be able to acquire, with the hope of potentially “achiev[ing] leadership” with FDA-approved products “[b]y 2025”—in other words, seven years later. (PX1644 (Altria) at 004; Quigley (Altria) Tr. 1956). Quigley knew that if Nu Mark was to achieve leadership, it “needed to have new products that [Nu Mark] did not have authorized to sell in the market, because [the existing products] didn’t have the nicotine salt. And at [that] point, [he] pegged 2025 as when [he] thought [Nu Mark] could be in a position . . . to achieve leadership.” (Quigley (Altria) Tr. 2041; *see also* Willard (Altria) Tr. 1392-93 (Willard recalled Quigley conveying, “in the short run, I can’t do much better than we’re doing today, but if you need us to be doing something in the here and now in the market, that’s kind of the best I can do. And then he was saying, but I am willing to sign up to build a better capability going forward, but it’s going to take a while.”)).

### **Response to Finding No. 850**

The proposed finding is unsupported, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unsupported and misleading because the slide that Respondents cite for the “bridge plan” does not discuss the bridge plan at all. (PX1644 (Altria) at 004).

To the extent that the proposed finding attributes significance to Quigley’s “bridge plan” and Quigley’s “hope of potentially ‘achiev[ing] leadership’ with FDA-approved products ‘[b]y

2025,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 573, 716, 842. (*See Responses to RPF 573, 716, 842*). Furthermore, the purpose of the bridge plan was to ensure that Altria continued to have a pod product on the market. (PX7003 (Quigley (Altria), IHT at 120-21)).

To the extent that the proposed finding claims that “[Nu Mark’s existing products] didn’t have the nicotine salt,” the proposed finding is incorrect and misleading. The proposed finding is incorrect because MarkTen Bold had nicotine salts. (CCFF ¶ 461). The proposed finding is misleading to the extent that it claims that nicotine salts were necessary for commercial success or PMTA approval for the reasons cited in response to RPF 596-651. (*See Responses to RPF 596-651*). The proposed finding is also misleading because Altria was developing a version of MarkTen Elite with nicotine salts and had a plan to submit a PMTA for it. (CCFF ¶¶ 1281-300).

To the extent that, in claiming, “Nu Mark would struggle for the foreseeable future with its in-market products and any other products it might be able to acquire,” and “in the short run, I can’t do much better than we’re doing today, but if you need us to be doing something in the here and now in the market, that’s kind of the best I can do,” the proposed finding implies that Nu Mark’s products were not commercially successful or that Altria did not expect them to be commercially successful in the future, the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF 842. (*See Response to RPF 842*).

The proposed finding is incomplete and misleading because it also fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF ¶¶ 1588-730).

851. As Quigley admitted, his bridge plan was “a very long plan” that required “five to seven years’ worth of work.” (Quigley (Altria) Tr. 2032). “[I]t was going to be a long plan and an expensive plan, and there was a lot of risk on the science. We had learned, even when we thought we had a formula, we would be doing tox testing and it would fail. So



[everyone] understood that this was going to be a long endeavor.” (Quigley (Altria) Tr. 2042). Quigley acknowledged that even this plan was a “long shot,” (PX7003 Quigley (Altria) IHT at 118-19), and a “risky approach,” (Quigley (Altria) Tr. 2066).

### **Response to Finding No. 851**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe and does not explain what “bridge plan” it references, and because the phrases “long plan,” “expensive plan,” “a lot of risk,” “long shot,” and “risky approach” are ambiguous.

The proposed finding is unreliable because it relies only on self-serving testimony.

To the extent that the proposed finding refers back to the “bridge plan” discussed in RPF 850, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 842, 850. (*See Responses to RPF 842, 850*).

The proposed finding is incomplete and misleading because it also fails to note that Altria had alternative pathways to launching new closed-system e-cigarette products in the market, such as the JRDTA with PMI and potential collaborations with other third parties. (CCFF 1588-730).

852. In response to Quigley’s presentation, Gifford asked whether Altria should consider pulling Elite from the market. (PX7041 Quigley (Altria) Dep. at 33-34). Quigley recalled that Gifford observed at the time that Altria was “losing money” and did not “have the nicotine we need,” and so he wondered “why are we continuing to lose money on this piece of business.” (PX7041 Quigley (Altria) Dep. at 33-34).

### **Response to Finding No. 852**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe for the cited statements.

The proposed finding is unreliable because it relies only on self-serving testimony and hearsay concerning the statements of another testifying witness.

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 839-40. (*See* Responses to RPF 839-40).

To the extent that the proposed finding claims that “Gifford observed at the time that Altria was ‘losing money’ and did not ‘have the nicotine we need,’ and so he wondered ‘why are we continuing to lose money on this piece of business,’” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 842, 850. (*See* Responses to RPF 842, 850).

The proposed finding is incomplete and misleading because it fails to note that Quigley was surprised when he first learned that Altria executives were considering discontinuing MarkTen Elite so soon after it had been launched and after it had shown growth. (CCFF 1151).

853. And Gifford was not the only one; as Quigley explained, the question of what to do with Elite “was a question on almost everybody’s mind” and it was being asked “across the organization,” including “by regulatory affairs, product development, the [Leadership Team], [and] [Quigley’s] team.” (PX7041 Quigley (Altria) Dep. at 173; *see also* Quigley (Altria) Tr. 2073 (agreeing that the question of what to do with Elite was “a reasonable question” that was “being asked by people throughout the organization”)).

### **Response to Finding No. 853**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe for the cited statements and because the phrase “the question of what to do with Elite” is ambiguous.

The proposed finding is unreliable because it relies only on self-serving testimony and hearsay concerning the views of undefined classes of persons.

The proposed finding is also incomplete and misleading because it fails to note that Quigley advocated for continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

To the extent that the proposed finding implies that MarkTen Elite was not commercially successful, that it was unlikely to achieve PMTA approval, or that Altria had not decided to pursue a PMTA for MarkTen Elite, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 486-527, 842. (See Responses to RPF 486-527, 842).

854. Though Quigley was not anticipating the question of Elite's fate to come to a head yet, Gifford's questions made sense to Quigley in light of "the[] fundamental business gaps" that Quigley had highlighted. (Quigley (Altria) Tr. 1958-59). He knew that nicotine satisfaction "was the most important thing [Nu Mark] needed in [its] products and [Nu Mark] didn't have it." (Quigley (Altria) Tr. 1959, 2031-32).

#### **Response to Finding No. 854**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe or identify the "fundamental business gaps' that Quigley had highlighted."

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 839-40. (See Responses to RPF 839-40).

The proposed finding is also incomplete and misleading because it fails to note that Quigley advocated for continued investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

The proposed finding is incomplete and misleading because it also fails to note that Quigley was surprised when he first learned that Altria executives were considering discontinuing MarkTen Elite so soon after it had been launched and after it had shown growth. (CCFF ¶ 1151).

To the extent that the proposed finding claims that Altria's e-cigarette products did not have the "nicotine satisfaction" necessary to achieve commercial success or that a certain level of "nicotine satisfaction" was necessary to achieve commercial success or PMTA approval, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 842. (*See* Response to RPF 842).

855. For this reason, at this point, Gifford was "really pushing, even on the cigalike, was it worth investing in a space that was greatly declining." (Gifford (Altria) Tr. 2781). In his view, "[f]rom a financial standpoint, you always want to put your resources, because they are limited, both people resources and financial resources, against those areas where you think you can have the biggest bang for those dollars and people resources. And what we were seeing here is that we had significant gaps. Certainly we should invest to get ready for the future, but from this standpoint, what we had in the marketplace wasn't appearing to work." (Gifford (Altria) Tr. 2781-82).

#### **Response to Finding No. 855**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe and because the phrases "significant gaps" and "what we had in the marketplace wasn't appearing to work" are ambiguous.

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 839-40. (*See* Responses to RPF 839-40).

The proposed finding is incomplete and misleading because it also fails to note that Quigley was surprised when he first learned that Altria executives were considering discontinuing MarkTen Elite so soon after it had been launched and after it had shown growth. (CCFF 1151).

To the extent that the proposed finding claims that the "cigalike . . . space . . . was greatly declining," the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 276-300, 843. (*See* Responses to RPF 276-300, 843).

To the extent that the proposed finding implies that Nu Mark's e-cigarette products were not commercially successful or that Altria did not expect them to be successful in the future, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 842. (*See* Response to RPF 842).

856. Given the continued delays in the profitability projections and Nu Mark's capability gaps, Gifford thought Altria "really needed to assess whether [it] needed to free up those people and financial resources and invest them elsewhere." (Gifford (Altria) Tr. 2782).

### **Response to Finding No. 856**

The proposed finding is vague, incorrect, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe and because the phrase "capability gaps" is ambiguous.

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 839-40. (*See* Responses to RPF 839-40).

To the extent that the proposed finding implies that Nu Mark's e-cigarette products were not profitable or commercially successful, had failed to meet "profitability projections," or that Altria did not expect them to be profitable or successful in the future, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 842. (*See* Response to RPF 842).

857. Nevertheless, Willard told Quigley to keep working on Elite for the time being. (Quigley (Altria) Tr. 2049-50).

### **Response to Finding No. 857**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe for the cited statement and because the phrase “the time being” is ambiguous.

The proposed finding is unreliable because it relies only on hearsay concerning the statements of another testifying witness.

The proposed finding is incomplete because it fails to note that, but for the transaction, Altria would be competing in the closed-system e-cigarette market. (CCFF ¶¶ 867-1407).

To the extent that, in claiming “Willard told Quigley to keep working on Elite for the time being,” the proposed finding implies that Altria was considering stopping work on a PMTA for MarkTen Elite or discontinuing the product, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 486-527. (*See Responses to RPF ¶¶ 486-527*).

**B. August 23, 2018: Garnick Presented The Regulatory Assessment To The Board And The Board Directed Leadership To Try To Resolve Disputes With JLI**

858. Just under two weeks later, on August 23, 2018, General Counsel Murray Garnick presented to Altria’s Board the assessment of Nu Mark’s regulatory prospects that the Regulatory Affairs team had begun preparing in early July. (*See Willard (Altria) Tr. 1417; RX0689 (Altria) at 001; see also supra Part V.C.5*).

**Response to Finding No. 858**

To the extent that the proposed finding refers back to the August 23, 2018, assessment discussed in RPF ¶¶ 725-36, Complaint Counsel incorporates its responses to those proposed findings herein. (*See Responses to RPF ¶¶ 725-36*).

859. As Garnick agreed at trial, the purpose of the presentation was to give the Board of Directors “a full and complete briefing on the regulatory issues the company was facing with [its] e-vapor products.” (Garnick (Altria) Tr. 1743).

**Response to Finding No. 859**

To the extent that the proposed finding refers back to the August 23, 2018, assessment discussed in RPF 725-36, Complaint Counsel incorporates its responses to those proposed findings herein. (*See Responses to RPF 725-36*).

860. In advance of the meeting, Garnick and Willard discussed “that some of the board [might] be unhappy that [Nu Mark] hadn’t had a better outcome,” but they agreed “that the board needed to know the facts about what [Garnick] had found in his regulatory review.” (Willard (Altria) Tr. 1422; *see also* Willard (Altria) Tr. 1422 (explaining he believed it was necessary to “share the bad news”); Gifford (Altria) Tr. 2787-88 (explaining that Altria’s leadership informed the Board about the products’ regulatory issues “[b]ecause we really needed to, one, be honest with the board, but two, you had to level-set about -- we had to change directions in where we were headed, that what we were doing was not working, and even if it were working, there were significant regulatory hurdles to get through”)).

### **Response to Finding No. 860**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence

The proposed finding is vague because it does not specify a timeframe for the cited statements or identify which “meeting” it refers to, and because the phrases “bad news,” “change directions in where we were headed,” “what we were doing was not working,” “significant regulatory hurdles” are ambiguous.

The proposed finding is unreliable because it relies only on self-serving testimony.

To the extent that the proposed finding refers back to the August 23, 2018, assessment discussed in RPF 725-36, Complaint Counsel incorporates its responses to those proposed findings herein. (*See Responses to RPF 725-36*).

The proposed finding is also incomplete and misleading because it fails to note that Willard had emailed Farrell on August 15, 2018 that Altria and JLI had “agreed to 75 percent of the deal terms,” and [REDACTED]

[REDACTED] { [REDACTED] }

To the extent that the proposed finding implies that Nu Mark's products were not commercially successful or were unlikely to achieve PMTA approval, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 596-747, 842. (*See Responses to RPF 596-747, 842*).

861. At the meeting, Garnick explained to the Board FDA's expectations for reduced-risk products, the "[o]nerous and costly PMTA requirements," and that each of Nu Mark's products had significant regulatory red flags that likely would prevent FDA authorization. (PX4149 (Altria) at 027-041). The primary problem, shared by all of Nu Mark's products, was lack of smoker conversion. (PX4149 (Altria) at 030, 033, 036; *see also* Willard (Altria) Tr. 1420-26; Jupe (Altria) Tr. 2303-07; Gardner (Altria) Tr. 2603-07).

### **Response to Finding No. 861**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe for the cited statements or identify the "meeting" to which it refers. To the extent that the proposed finding refers back to the August 23, 2018, meeting discussed in RPF 725-36, 858, Complaint Counsel incorporates its responses to those findings herein. (*See Responses to RPF 725-36, 858*).

Specifically, the proposed finding is unreliable and misleading because Altria employees involved with transaction negotiations (Crosthwaite, Willard, and Garnick) supervised the preparation of the part of the meeting presentation concerning Nu Mark's products, and because other employees not involved with transaction negotiations (Quigley and Murillo) expressed concern that the presentation showed bias against Altria's products. (CCFF 1367-71; PX7006 (Crosthwaite (Altria/JLI), IHT. at 132-34)). Willard, Garnick, and Crosthwaite were involved in transaction negotiations, while Quigley and Murillo were not. (CCFF 578-88). Crosthwaite testified that he, Garnick, and Willard all provided comments on the presentation. (PX7006 (Crosthwaite (Altria/JLI), IHT at 132-34)). Garnick presented the portions of the presentation



concerning Nu Mark's products to Altria's board. (Garnick (Altria) Tr. 1739-40). Quigley and other Altria executives were [REDACTED] during these meetings, but only Willard, Gifford, Garnick, and Crosthwaite were allowed into the meetings with the board, which was unusual. (CCFF ¶ 1372). Even though he was [REDACTED], Quigley was not permitted to participate in the board meeting in which Nu Mark was discussed. (CCFF ¶ 1372).

Quigley agreed that Crosthwaite was accountable for making the transaction with JLI happen. (Quigley (Altria) Tr. 1971-72). In contrast, Quigley felt that it was his "responsibility being the CEO of the vapor business to present the facts that we had uncovered . . . [and] to share [his] plan [for Nu Mark]." (Quigley (Altria) Tr. 1971-72). Quigley testified "[w]hen I got the job [at Nu Mark], Howard [Willard] sat K.C. [Crosthwaite] and I down and said, you know, K.C., in your job, you are responsible for Project Tree [the JLI transaction] . . . and that's plan A. . . . Plan B is without Tree, what do we do with our vapor business? And Brian [Quigley], I need you focused on that." (PX7003 (Quigley (Altria), IHT at 160-61)). Quigley testified that he "thought K.C. [Crosthwaite] was playing a political game to advance his agenda in the eyes of the board" meaning that Crosthwaite was "trying to kind of one-up [Quigley] . . . for [Crosthwaite's] own gain." (CCFF ¶ 1370).

On August 14, 2018, Quigley expressed concerns to Crosthwaite regarding a draft of the meeting presentation concerning Altria's e-cigarette portfolio prepared under Crosthwaite's direction. (CCFF ¶ 1367). Quigley informed Crosthwaite that while he understood why Crosthwaite was "telling the story" to the Board of Directors, the presentation was "clearly only the bad news version of the story" and that it contained some points that were "flat out incorrect." (CCFF ¶ 1367).

In his August 14, 2018 critique of the draft presentation to the Altria Board of Directors, Quigley reminded Crosthwaite that the MarkTen cigalike was “growing in volume” and was the “second fastest growing brand in terms of volume behind juul.” (CCFF ¶ 1368). In his August 14, 2018 critique of the draft presentation to the Altria Board of Directors, Quigley wrote to Crosthwaite: “I also have a few concerns about what I am hearing from your organization about vapor. What I am hearing sounds very disconnected from the latest discussions we’ve been having. I am hearing that ‘the decision has been made to stop Nu Mark’ and I know that decision has not been made.” (CCFF ¶ 1369).

On August 14, 2018, Murillo provided comments to Garnick on the same draft presentation to the Altria Board of Directors, and included, with respect to Elite, the comment that “in fairness to Nu Mark, the ‘x’ for conversion potential is an opinion based on current performance and comparison to Juul. It would be fair to have an x with a ?, especially if this encompasses possible Elite 2.0.” (CCFF ¶ 1371).

The proposed finding is incomplete and misleading because it fails to note that Willard had emailed Farrell on August 15, 2018 that Altria and JLI had “agreed to 75 percent of the deal terms,”

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To the extent that the proposed finding claims that “each of Nu Mark’s products had significant regulatory red flags that likely would prevent FDA authorization” and that Nu Mark’s products lacked “smoker conversion,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 351-67, 596-747. (*See* Responses to RPF 351-67, 596-747).

862. The regulatory assessments for MarkTen cig-a-like and Elite regarding “Manufacturing,” “Risk Reduction,” “Adult Smoker Conversion,” and “No Unintended Consequences” that

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Garnick presented to the Board at the meeting, (*see* PX4149 (Altria) at 033, 036), are identical to those contained in the first draft of the presentation prepared by the Regulatory Affairs team in mid-July, (*see* RX0689 (Altria) at 008, 011; *see also supra* Part V.C.5).

### **Response to Finding No. 862**

To the extent that the proposed finding refers back to the August 23, 2018, meeting discussed in RPF 725-36, 861, Complaint Counsel incorporates its responses to those findings herein. (*See* Responses to RPF 725-36, 861).

863. During the meeting, Willard reported that Altria was still in discussions with JLI, and the Board asked that he keep working on the deal. (Willard (Altria) Tr. 1417-18; *see also* [REDACTED]). The Board told Altria's leadership to "really look at what were all of the options available to [Altria] to improve how [it was] competing in the e-vapor space," and it said to continue negotiations with JLI to try to make an investment. (Gifford (Altria) Tr. 2797-98; *see also* [REDACTED]).

### **Response to Finding No. 863**

The proposed finding is incomplete and misleading because it fails to note that Willard had emailed Farrell on August 15, 2018 that Altria and JLI had "agreed to 75 percent of the deal terms,"

[REDACTED]  
[REDACTED] }

To the extent that the proposed finding refers back to the August 23, 2018, meeting discussed in RPF 725-36, 861, Complaint Counsel incorporates its responses to those findings herein. (*See* Responses to RPF 725-36, 861).

864. Overall, it "wasn't a very fun meeting," because Altria's leaders were "delivering bad news to the board." (Gifford (Altria) Tr. 2786-87). Willard testified that although the Board members "appreciated the update" and felt like it "was the kind of information that they . . . needed to receive," they were "frankly, frustrated" with Nu Mark's performance. (Willard (Altria) Tr. 1427). Willard shared this frustration. (Willard (Altria) Tr. 1428).

### **Response to Finding No. 864**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe for the cited statements or identify which “meeting” it refers to and because the phrases “wasn’t a very fun meeting,” “bad news,” and “frustrated” are ambiguous.

The proposed finding is also incomplete and misleading because it fails to note that Willard had emailed Farrell on August 15, 2018 that Altria and JLI had “agreed to 75 percent of the deal terms,” {

[REDACTED]

To the extent that the proposed finding refers back to the August 23, 2018, meeting discussed in RPF 725-36, 861, Complaint Counsel incorporates its responses to those findings herein. (See Responses to RPF 725-36, 861).

865. At and before trial, Complaint Counsel has attacked the credibility of the final August 23 presentation and contended that it overstated the problems with Nu Mark’s products in order to provide a justification for withdrawing the products in response to JLI’s supposed demand in the July 30, 2018 term sheet that Altria exit the market. (See, e.g., Willard (Altria) Tr. 1426-27). As shown below, this assertion is refuted by the record evidence.

#### **Response to Finding No. 865**

To the extent that the proposed finding claims that “[a]t and before trial, Complaint Counsel has attacked the credibility of the final August 23 presentation and contended that it overstated the problems with Nu Mark’s products in order to provide a justification for withdrawing the products in response to JLI’s supposed demand in the July 30, 2018 term sheet that Altria exit the market,” Complaint Counsel does not disagree.

To the extent that the proposed finding claims that “[a]s shown below, this assertion is refuted by the record evidence,” the proposed finding should be disregarded because it contains no citations to the record.

866. As an initial matter, the presentation was prepared starting on July 12, weeks before Altria and JLI exchanged the first term sheet, and it was consistent with months’ worth of internal investigation and inquiry. (See *supra* Part V.C.5).

**Response to Finding No. 866**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 732, 861. (*See* Responses to RPF 732, 861).

The proposed finding is also incomplete and misleading because it fails to note that JLI had raised the issue of what was to be done with Altria's competitive e-cigarette products in the event of a deal as early as April 20, 2018. (CCFF ¶ 651).

To the extent that the proposed finding refers back to RPF Part V.C.5, Complaint Counsel incorporates its responses to those findings herein. (*See* Responses to RPF 725-36).

867. The conclusions in the deck regarding the Nu Mark products' problems and regulatory prospects "[came] from the scientists . . . and other technical experts in regulatory sciences," who were not involved in the Altria/JLI investment negotiations. (Garnick (Altria) Tr. 1732-33; *see also supra* ¶ 730-31).

**Response to Finding No. 867**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 732, 861. (*See* Responses to RPF 732, 861).

The proposed finding is also unreliable because it relies only on self-serving testimony.

To the extent that the proposed finding refers back to RPF 730-31, Complaint Counsel incorporates its responses to those findings herein. (*See* Responses to RPF 730-31).

868. Moreover, every Altria employee who was asked about it at trial or in a deposition—including employees who were not involved in the JLI negotiations—affirmed that the presentation was both accurate and complete. (Willard (Altria) Tr. 1427; Garnick (Altria) Tr. 1743; Jupe (Altria) Tr. 2305-07; Gardner (Altria) Tr. 2604-07; Murillo (Altria/JLI) Tr. 2961; PX7017 Magness (Altria) Dep. at 285-86, 290-94):

**Response to Finding No. 868**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies only on self-serving testimony.

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 732, 861. (*See Responses to RPF 732, 861*).

869. Willard testified that Complaint Counsel’s statement that “Altria executives . . . gave the impression that Nu Mark’s products were doing worse than they actually were” at this meeting is “completely false.” (Willard (Altria) Tr. 1427). To the contrary, the executives “were doing [their] best to portray an accurate view of the results that [they] had found from [their] scientific assessment.” (Willard (Altria) Tr. 1427).

#### **Response to Finding No. 869**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies only on self-serving testimony.

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 732, 861. (*See Responses to RPF 732, 861*).

870. Garnick testified that he believes he accomplished his goal of giving the Board a full and complete briefing on the regulatory issues the company was facing with their e-vapor products. (Garnick (Altria) Tr. 1743).

#### **Response to Finding No. 870**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies only on self-serving testimony.

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 732, 861. (*See Responses to RPF 732, 861*).

871. Murillo confirmed that he saw Garnick’s final presentation and believed it to be accurate and complete. (Murillo (Altria/JLI) Tr. 2961).

#### **Response to Finding No. 871**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies only on self-serving testimony.

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 732, 861. (*See Responses to RPF 732, 861*).

872. Jupe agreed that the presentation's depiction of the problems with MarkTen cig-a-like and Elite were accurate. (Jupe (Altria) Tr. 2305-07).

**Response to Finding No. 872**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies only on self-serving testimony.

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 732, 861. (*See Responses to RPF 732, 861*).

873. Gardner concurred, indicating that the problems conveyed in the Board presentation regarding MarkTen cig-a-like and Elite were accurate and not overstated. (Gardner (Altria) Tr. 2604-07).

**Response to Finding No. 873**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies only on self-serving testimony.

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 732, 861. (*See Responses to RPF 732, 861*).

874. Magness confirmed that the evaluations in the Board presentation reflected her assessment at the time of the regulatory prospects of Nu Mark's products. (PX7017 Magness (Altria) Dep. at 285-86, 290-94).

**Response to Finding No. 874**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies only on self-serving testimony.

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 732, 861. (*See Responses to RPF 732, 861*).

875. Complaint Counsel has emphasized an email that Quigley sent calling a draft of the Board deck the "bad news version of the story," (CC Pretrial Br. at 23 (citing PX1008 (Altria) at 002)), but Quigley himself acknowledges that "ultimately . . . the facts in the deck were accurate," (PX7041 Quigley (Altria) Dep. at 155-56). Quigley's chief complaint in his email was that the deck stated that "mark ten cig a like platform is declining," which he called "incorrect." (Quigley (Altria) Tr. 2061; PX1008 (Altria) at 001). As Quigley has

clarified, however, “[r]elative to the overall category, [MarkTen cig-a-like] was underperforming significantly,” and—with respect to the objection in his email—a subsequent draft of the deck made clear that the cig-a-like platform was “growing in absolute terms,” even if only marginally. (PX7041 Quigley (Altria) Dep. at 157; *see also* Quigley (Altria) Tr. 2061-62 (similar)). Quigley did not raise any concerns regarding the deck’s ultimate conclusion that the product could not get FDA approval. (PX1008 (Altria) at 001).

### **Response to Finding No. 875**

The proposed finding is unreliable, incorrect, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on the self-serving trial testimony from a former Altria executive, who currently serves on the Board of Directors of a company partially owned by Altria and with ongoing business ties to Altria. (CCFF ¶ 2039). Quigley is currently the Chief Operating Officer of Respira Technologies, a medical device company, and serves as a member of the Board of Directors of Lexaria Nicotine, one of the companies associated with Lexaria Biosciences, of which Altria is a partial owner. (CCFF ¶¶ 2037-39). Quigley emailed Altria before joining Lexaria’s board in 2019 “to tell them I was asked to join the board and if that was okay.” (Quigley (Altria) Tr. 1928). In his role at Respira, Quigley reached out to Altria to inquire about Altria’s interest in doing business with Respira. (PX7041 (Quigley (Altria), Dep. at 139)).

The proposed finding is incomplete because it fails to mention that on the same day that Quigley sent his email to Crosthwaite, Murillo observed that the draft regulatory slides of the presentation appeared to overstate Elite’s inability to convert smokers. (CCFF ¶ 1371).

To the extent that the proposed finding claims that “Quigley himself acknowledges that ‘ultimately . . . the facts in the deck were accurate,’” the proposed finding is unreliable because it relies only on self-serving testimony, and is contrary to the weight of the evidence for the reasons cited in response to RPF 725-36. (*See* Responses to RPF 725-36).



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To the extent that the proposed finding claims that “Quigley’s chief complaint in his email was that the deck stated that ‘mark ten cig a like platform is declining,’ which he called ‘incorrect,’” the proposed finding is incorrect, incomplete, and misleading because the cited complaint was just one example that Quigley cited and the proposed finding does not include the other complaints expressed in Quigley’s email. Quigley’s full email is copied below for completeness:

**From:** "Quigley, Brian W. (Nu Mark)" <[Brian.W.Quigley@nu-mark.com](mailto:Brian.W.Quigley@nu-mark.com)>  
**Date:** August 14, 2018 at 8:38:55 AM EDT  
**To:** "Crosthwaite, Kevin C. Jr (ALCS)" <[Kevin.C.Crosthwaite@altria.com](mailto:Kevin.C.Crosthwaite@altria.com)>  
**Subject: Re: BOD**

Give me a call. I understand why you are telling the story you are telling to the BOD however, I have a few concerns about it. 1) It is clearly only the bad news version of the story 2) some of the points are flat out incorrect (e.g. mark ten cig a like platform is declining). It is growing volume is the second fastest growing brand in terms of volume behind juul.

I also have a few concerns about what I am hearing from your organization about vapor. What I am hearing sounds very disconnected from the latest discussions we’ve been having. I am hearing that “the decision has been made to stop NuMark” and I know that decision has not been made.

I had a discussion with Howard this weekend where he agreed it doesn’t make sense to close up shop while we build for the future. Hence, the gasket and continuing with PMTA.

So, I want to get on the same page.

BQ

Sent from my iPhone

(PX1008 (Altria) at 001).

To the extent that the proposed finding claims that “Quigley has clarified, however, ‘[r]elative to the overall category, [MarkTen cig-a-like] was underperforming significantly,’ and— with respect to the objection in his email—a subsequent draft of the deck made clear that the cig-a-like platform was ‘growing in absolute terms, ’ even if only marginally,” the proposed finding

is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 844. (See Response to RPF 844).

To the extent that, in claiming “Quigley did not raise any concerns regarding the deck’s ultimate conclusion that the product could not get FDA approval,” the proposed finding implies that Nu Mark’s products “could not get FDA approval,” the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 732, 842. (See Responses to RPF 732, 842).

To the extent that the proposed finding claims that “Complaint Counsel has emphasized an email that Quigley sent calling a draft of the Board deck the ‘bad news version of the story,’” Complaint Counsel does not disagree.

876. At trial, Quigley further explained that he was critical of the presentation when he reviewed it because he was upset that then-Chief Growth Officer Crosthwaite was “working on a deck on [Quigley’s] business,” and he thought that Crosthwaite was trying to “make himself look better in the eyes of the board and negatively hurt [Quigley’s] career.” (Quigley (Altria) Tr. 2060). Quigley “wanted to make a point to K.C. that [he] was pissed at him.” (PX7041 Quigley (Altria) Dep. at 156). But Quigley does not actually know whether Crosthwaite had any involvement in making the presentation, (Quigley (Altria) Tr. 2061), and in fact the substance of the regulatory update did not come from Crosthwaite but came from Altria’s scientists and other technical experts, (Garnick (Altria) Tr. 1732-33).

### **Response to Finding No. 876**

The proposed finding is unreliable and misleading.

The proposed finding is unreliable to the extent that it relies on the self-serving trial testimony from a former Altria executive, who currently serves on the Board of Directors of a company partially owned by Altria and with ongoing business ties to Altria. (CCFF 2039).

To the extent that the proposed finding claims that “Quigley does not actually know whether Crosthwaite had any involvement in making the presentation” and “the substance of the regulatory update did not come from Crosthwaite but came from Altria’s scientists and other

technical experts,” the proposed finding is misleading because, regardless of who prepared each slide in the August 23, 2018 board presentation, Crosthwaite testified that he, Garnick, and Willard all supervised the preparation of the document by reviewing it and providing comments. (PX7006 (Crosthwaite (Altria/JLI), IHT at 132-34)). Garnick delivered the relevant portions of the presentation concerning Nu Mark’s products. (Garnick (Altria) Tr. 1739-40). Willard, Garnick, and Crosthwaite were all involved in transaction negotiations in the weeks leading up to the August 23, 2018, board meeting. (CCFF ¶¶ 578-88, 668-744).

Quigley agreed that Crosthwaite was accountable for making the transaction with JLI happen. (Quigley (Altria) Tr. 1971-72). In contrast, Quigley felt that it was his “responsibility, being the CEO of the vapor business, to present the facts that we had uncovered . . . [and] to share [his] plan [for Nu Mark].” (Quigley (Altria) Tr. 1971-72). Quigley testified “when I got the job [at Nu Mark], Howard [Willard] sat K.C. [Crosthwaite] and I down and said, you know, K.C., in your job, you are responsible for Project Tree [the JLI transaction] . . . and that’s plan A. . . . Plan B is without Tree, what do we do with our vapor business? And Brian [Quigley], I need you focused on that.” (PX7003 (Quigley (Altria), IHT at 160-61)). Quigley testified that he “thought K.C. [Crosthwaite] was playing a political game to advance his agenda in the eyes of the board” meaning that Crosthwaite was “trying to kind of one-up [Quigley] . . . for [Crosthwaite’s] own gain.” (CCFF ¶ 1370; *see also* Responses to RPF ¶¶ 732, 861).

877. Moreover, if Quigley had had the opportunity to present to the Board, he, too, would “have told the board the bad news about [Nu Mark]” that was reflected in the deck. (Quigley (Altria) Tr. 2066).

### **Response to Finding No. 877**

The proposed finding overstates the cited evidence and is vague, unreliable, and incomplete.

The proposed finding overstates the cited evidence because the cited testimony does not reference “bad news” that was “reflected in the deck.” Quigley was asked, “[R]ecognizing that you would have liked to have been the one to present on your business to the board, would you have told the board the bad news about your business?” and Quigley replied, “Yes.” (Altria) Tr. 2066).

The proposed finding is vague because the phrase “bad news” is ambiguous.

The proposed finding is unreliable to the extent that it relies on the self-serving trial testimony of a former Altria executive, who currently serves on the Board of Directors of a company partially owned by Altria and with ongoing business ties to Altria. (CCFF ¶ 2039).

The proposed finding is also incomplete in that it fails to acknowledge that Quigley and other Altria executives were ██████████ during these meetings, but only Willard, Gifford, Garnick, and Crosthwaite were allowed into the meetings with the board, which was unusual. (CCFF ¶ 1372). Even though he was ██████████, Quigley was not permitted to participate in the board meeting in which Nu Mark was discussed. (CCFF ¶ 1372; *see also* Responses to RPF ¶¶ 732, 861).

### **VIII. DESPITE THE PARTIES REACHING A CONSENSUS ON THE TREATMENT OF ALTRIA’S EXISTING E-VAPOR BUSINESS IN THE EVENT OF AN INVESTMENT, NEGOTIATIONS ULTIMATELY BROKE DOWN OVER OTHER ISSUES**

878. In late August 2018, the parties realized they “had reached an impasse” in the negotiations, (Garnick (Altria) Tr. 1753), and discussions “broke down,” (Willard (Altria) Tr. 1419).

#### **Response to Finding No. 878**

The proposed finding is vague, unreliable, and contrary to the weight of the evidence.

The proposed finding is vague because the terms “impasse” and “broke down” are ambiguous.

The proposed finding is unreliable to the extent that it relies only on self-serving testimony.

The proposed finding is contrary to the weight of the evidence because negotiations between Respondents, and their agents, concerning the transaction, as well as internal deliberations on the transaction, continued in late August 2018, through September 2018, and from October 1, 2018, to October 5, 2018. (CCFF ¶¶ 735-79).

The proposed finding is misleading because regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

On August 29, 2018, Willard sent a note to Altria's board stating: "We are still in discussions on the Tree [JLI] Opportunity. We have hit some setbacks and given the unavailability of one the investors for two weeks we will likely have a break in the negotiations. If we have material developments, we will send a note or have a call." (CCFF ¶ 751). An Altria presentation dated September 2018 and titled "Project Tree Board Update," which was circulated on September 10, 2018, to the Altria Board of Directors, included a slide stating, "Parties met on August 27th to continue negotiations . . . Further discussions have been on hold due to the availability of a Tree principal . . . Parties are discussing time frames for continuing negotiations." (CCFF ¶ 760).

879. On August 27, Altria, JLI, and their respective outside counsel met at Wachtell, Lipton, Rosen & Katz's offices in New York to try to resolve outstanding issues. (Willard (Altria) Tr. 1418). Wachtell Lipton was outside counsel for Altria. (Valani (JLI) Tr. 945; Willard (Altria) Tr. 1402-03).

#### **Response to Finding No. 879**

To the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

880. The August 27 meeting “didn’t go well” and was “fairly quickly . . . dissolved.” (Willard (Altria) Tr. 1418).

#### **Response to Finding No. 880**

The proposed finding is incomplete and misleading because it fails to note that negotiations between Respondents, and their agents, concerning the transaction, as well as internal deliberations on the transaction, continued in late August 2018, through September 2018, and from October 1, 2018, to October 5, 2018. (CCFF ¶¶ 735-79).

The proposed finding is misleading because regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

881. The impasse continued through September 2018, and there were “no substantive negotiations” between Altria and JLI during this time. (Garnick (Altria) Tr. 1753; *see also* [REDACTED]). There were no term sheets exchanged, and Altria had “no meetings with JLI people in September.” (Garnick (Altria) Tr. 1754-55).

#### **Response to Finding No. 881**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies only on self-serving testimony.

The proposed finding is vague because the terms “substantive negotiations” and “meetings with JLI people” are ambiguous. In a response to a “Request For Admission,” Respondents took the position that the term “meetings” refers only to “in person” meetings. (PX0020 at 004 (JLI Response to Request for Admission No. 7) (“JLI understands ‘meeting’ to refer to an in-person meeting.”)).

To the extent that the proposed finding claims that “[t]he impasse continued through September 2018, and there were ‘no substantive negotiations’ between Altria and JLI during this time,” the proposed finding is misleading because during September 2018, there were multiple communications between Altria and JLI representatives concerning the transaction, and Altria conducted internal deliberations regarding the transaction. (CCFF ¶¶ 752-72).

To the extent that the proposed finding claims that there was an “impasse” in transaction negotiations, the proposed finding is vague, unreliable, and contrary to the weight of the evidence for the reasons cited in response to RPF ¶ 878. (*See* Response to RPF ¶ 878).

To the extent that the proposed finding claims that “[t]here were no term sheets exchanged in [September 2018],” the proposed finding is misleading because Altria representatives deliberated internally on edits to the transaction term sheet in September 2018. (CCFF ¶¶ 762-64).

The proposed finding is misleading because regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

882. As Garnick agreed at trial, this impasse did not “have anything to do with whether [Altria] could keep MarkTen or MarkTen Elite on the market” until receiving HSR clearance. (Garnick (Altria) Tr. 1753).

**Response to Finding No. 882**

The proposed finding is vague, unreliable, and contrary to the weight of the evidence

To the extent that the proposed finding implies that there was an “impasse” in transaction negotiations in late-August and September 2018, the proposed finding is vague, unreliable, and contrary to the weight of the evidence for the reasons cited in response to RPF 878, 881. (*See Responses to RPF 878, 881*).

To the extent that the proposed finding implies that, before late-August 2018, Respondents agreed on transaction terms concerning “whether [Altria] could keep MarkTen or MarkTen Elite on the market,” Complaint Counsel does not disagree.

883. Instead, negotiations stalled over disputes around valuation, deal structure, and control. (Garnick (Altria) Tr. 1826-27; Pritzker (JLI) Tr. 807-08, 856; PX7011 Valani (JLI) IHT at 110-11).

**Response to Finding No. 883**

The proposed finding is vague, misleading, unreliable, and contrary to the weight of the evidence.

The proposed finding is vague because the phrase “stalled” is ambiguous.

To the extent that the proposed finding claims that Respondents had “disputes around valuation, deal structure, and control,” the proposed finding is misleading because, regardless of other deal issues that needed to be negotiated, by this time, JLI had demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF 867-993). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF 945-67),



and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

To the extent that the proposed finding implies that transaction "negotiations stalled" in late-August and September 2018, the proposed finding is vague, unreliable, and contrary to the weight of the evidence for the reasons cited in response to RPFF ¶¶ 878, 881. (*See Responses to RPFF ¶¶ 878, 881*).

884. A core issue that caused the impasse was whether Altria would agree to a simultaneous sign-and-close transaction. (Garnick (Altria) Tr. 1826-27; PX7032 Valani (JLI) Dep. at 87-90). Under this structure, Altria would purchase nonvoting shares of JLI that would convert to voting shares upon HSR clearance, as opposed to providing a smaller upfront investment pending antitrust review or purchasing voting shares outright following HSR clearance. (Pritzker (JLI) Tr. 860-61).

#### **Response to Finding No. 884**

The proposed finding is misleading, vague, unreliable, and contrary to the weight of the evidence

To the extent that the proposed finding claims that, by late-August and September 2018, Altria and JLI had not resolved "whether Altria would agree to a simultaneous sign-and-close transaction," that the resolution of that issue was a "core issue," and that "[u]nder this structure, Altria would purchase nonvoting shares of JLI that would convert to voting shares upon HSR clearance, as opposed to providing a smaller upfront investment pending antitrust review or purchasing voting shares outright following HSR clearance," the proposed finding is misleading because, regardless of other deal issues that needed to be negotiated, by this time, JLI had demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette

market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

To the extent that the proposed finding implies that there was an “impasse” in transaction negotiations in late-August and September 2018, the proposed finding is vague, unreliable, and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 878, 881. (*See Responses to RPF ¶¶ 878, 881*).

885. As James Wappler, a partner at Perella Weinberg Partners and Altria's financial advisor, explained sign-and-close transactions: “Oftentimes, in M&A transactions, you sign an agreement [with] an investor to acquire another company. You await antitrust approval and then you close and wire the funds at the time of close.” (PX7028 Wappler (PWP) Dep. at 75-76). By contrast, in a simultaneous sign-and-close deal, “you sign, simultaneously close and transfer the money and then seek antitrust approval.” (PX7028 Wappler (PWP) Dep. at 76).

#### **Response to Finding No. 885**

The proposed finding is misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

886. At the August 27 meeting, JLI indicated that if Altria would not agree to a sign-and-close transaction, JLI could not “bear the risk, and that was that.” (PX7032 Valani (JLI) Dep. at 90).

#### **Response to Finding No. 886**

The proposed finding is vague, misleading, unreliable, and contrary to the weight of the evidence.

The proposed finding is vague because the phrase “that was that” is ambiguous.

The proposed finding is misleading because regardless of other deal issues that needed to be negotiated, by this time, JLI had demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

The proposed finding is unreliable to the extent that it relies only on self-serving testimony.

To the extent that the proposed finding was intended to support the claims in RPF 878-97 that there was an "impasse" in transaction negotiations in late-August and September 2018, the proposed finding is vague, unreliable, and contrary to the weight of the evidence for the reasons cited in response to RPF 878, 881. (*See Responses to RPF 878, 881*).

To the extent that the proposed finding stands for the proposition that JLI recognized the serious antitrust risk that the transaction posed, Complaint Counsel does not disagree.

887. Valani recalls that, at the meeting, "[t]here was a discussion around payment structure, that there was a question of whether or not they would buy nonvoting shares to start and then convert them, you know, post receiving HSR approval. And again, I'm not an antitrust expert, but, you know, the notion that the company would be -- that [JLI] would be bearing the risk in a transaction was something that we just could not entertain, because it would mean the company was in limbo and it was kind of a questionable association with them as opposed to knowing that it was, yeah, delivered, so we thought we'd be taking a lot of heat and not getting any benefit and it could be really bad for the company. And so they said that they -- you know, before, they were very comfortable with the idea of buying nonvoting shares first, and then they said they couldn't do it." (PX7011 Valani (JLI) IHT at 110-11).

### **Response to Finding No. 887**

The proposed finding is misleading because, regardless of other deal issues that needed to be negotiated, by this time, JLI had demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system

e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

To the extent that the proposed finding stands for the proposition that JLI recognized the serious antitrust risk that the transaction posed, Complaint Counsel does not disagree.

888. JLI insisted on the sign-and-close because it would be “really difficult” for JLI “to enter into a transaction and then wait nine months or more” to find out if it would receive the full investment. (PX7032 Valani (JLI) Dep. at 89). As Valani explained, “[i]t was difficult because the company was going to raise capital from somewhere, and if it wasn’t Altria, it would have been financial investors. . . . [I]f [JLI] decided on this route, [the Altria investment,] it almost . . . foreclosed any other options. And so, to foreclose all those other options and to be left in limbo with a lot of explaining to do, in terms of how this is all supposed to work, felt like a very tenuous position for the company to be [in].” (PX7032 Valani (JLI) Dep. at 89; *see also* PX7032 Valani (JLI) Dep. at 89-90 (explaining that the Altria investment “foreclosed any other options” because “[y]ou’re either selling equity to them or you’re selling equity to someone else[,] [i]t’s . . . one or the other”)).

### **Response to Finding No. 888**

The proposed finding is misleading because, regardless of other deal issues that needed to be negotiated, by this time, JLI had demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

To the extent that the proposed finding stands for the proposition that JLI recognized the serious antitrust risk that the transaction posed, Complaint Counsel does not disagree.

889. In describing the August 27 meeting, Garnick recalled, “[m]y understanding is that we did not want to pay [until] after HSR approval. . . . [W]e were far from any kind of an

agreement. We were at a fundamental odds and there was an impasse.” (PX7036 Garnick (Altria) Dep. at 49).

### **Response to Finding No. 889**

The proposed finding is vague, unreliable, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “there was an impasse” in transaction negotiations in late-August and September 2018, the proposed finding is vague, unreliable, and contrary to the weight of the evidence for the reasons cited in response to RPF 878, 881. (*See* Responses to RPF 878, 881).

To the extent that the proposed finding claims that on August 27, 2018, “[Respondents] were at a fundamental odds” and “[Respondents] were far from any kind of an agreement,” the proposed finding is misleading and contrary to the weight of the evidence. Notwithstanding the fact that Respondents were still negotiating some terms, transaction negotiations were well-advanced by August 27, 2018. (CCFF 629-747). JLI had already demanded that Altria exit the e-cigarette business as part of the transaction. (CCFF 867-924). Altria had already agreed to JLI’s demand to exit the e-cigarette market. (CCFF 944-82). Merely two months later, on October 29, 2018, Respondents substantially agreed on Transaction terms. (CCFF 811-30).

890. On August 28, the day after the meeting, the JLI Board concluded that, “in light of the wholly unsatisfactory nature of recent discussions with [Altria]” the negotiations were “highly unlikely to result in an investment by, or strategic relationship with, [Altria].” (PX2117 (JLI) at 031-32). Pritzker explained that “wholly unsatisfactory” was a reference to pricing. (PX7021 Pritzker (JLI) Dep. at 123). The companies “still were very far apart on what a reasonable price would be,” in part because of “a failure by Altria to recognize the value of the international company”—which Altria wanted to exclude from the transaction—and JLI’s concern that a 45 percent interest was “too close to 51 percent,” as Altria might “somehow figure out how to get a controlling position.” (PX7021 Pritzker (JLI) Dep. at 123-24).

### **Response to Finding No. 890**

The proposed finding is vague, unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because the phrases “wholly unsatisfactory” and “pricing” are ambiguous.

To the extent that, in claiming “[t]he companies ‘still were very far apart on what a reasonable price would be,’ in part because of ‘a failure by Altria to recognize the value of the international company’—which Altria wanted to exclude from the transaction—and JLI’s concern that a 45 percent interest was ‘too close to 51 percent,’ as Altria might ‘somehow figure out how to get a controlling position,’” the proposed finding implies that on August 28, 2018, transaction negotiations were tentative or preliminary, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 889. (*See* Response to RPF 889).

The proposed finding is misleading because, regardless of other deal issues that needed to be negotiated, by this time, JLI had demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCF 867-993). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCF 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCF 968-86).

To the extent that the proposed finding was intended to support the claims in RPF 878-97 that there was an “impasse” in transaction negotiations in late-August and September 2018, the proposed finding is vague, unreliable, and contrary to the weight of the evidence for the reasons cited in response to RPF 878, 881. (*See* Responses to RPF 878, 881).

891. At the end of August and into September, Gifford thought that the deal with JLI “was off.” (Gifford (Altria) Tr. 2798).

### **Response to Finding No. 891**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies solely on the self-serving trial testimony of a current Altria executive.

To the extent that the proposed finding claims that “[a]t the end of August and into September, Gifford thought that the deal with JLI ‘was off,’” the proposed finding is vague, unreliable, and contrary to the weight of the evidence for the reasons cited in response to RPF 878, 881, 889. (*See Responses to RPF 878, 881, 889*).

The proposed finding is misleading because, regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria’s exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCF 867-993). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCF 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCF 968-86).

892. As of September 5, Pritzker “thought [they] were done” with negotiations. “We didn’t have a transaction. The reasons, the frustrations that I described before, were still there, that being price, separation of the companies, timing of payments.” (PX7021 Pritzker (JLI) Dep. at 132).

### **Response to Finding No. 892**

The proposed finding is vague, unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is vague, unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 878, 881, 889. (*See Responses to RPF 878, 881, 889*).

The proposed finding is also misleading because regardless of other deal issues that needed to be negotiated, JLI demanded, and Altria understood, that any deal had to result in Altria's exiting its existing e-cigarette business and not competing in the future in closed-system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

893. On September 8, JLI's Strategic Committee, composed of Pritzker and Valani, informed the JLI Board that "[the Committee] was frustrated with the progress that was being made with Altria and recommend[ed] that conversations cease for reasons that are listed" in the Board's meeting minutes. (Pritzker (JLI) Tr. 855-56 (discussing PX2117 (JLI) at 041)). The Committee was concerned about the gap in valuation, the distraction to the company, and the risk that the fact of negotiations would leak and "be reputationally harmful to the company." (Pritzker (JLI) Tr. 856).

#### **Response to Finding No. 893**

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 878, 881, 889. (See Responses to RPF 878, 881, 889).

894. The JLI Board agreed with the Strategic Committee's recommendation. After an update on "certain legal discussions between counsel to the parties," the Board concluded that, "[i]n light of the (i) lack of progress in the negotiations, (ii) the number of remaining, significant, unresolved outstanding issues between the parties, (iii) the ongoing distraction and burden on the Company's management of further negotiations with Richard at a time when the Company was experiencing extraordinary growth, and (iv) the increase in valuation of the Company during the course of its discussions with Richard and its prospects for future growth and further increases in valuation (independent of any transaction with Richard), which were not adequately reflected in the Richard investment offer, . . . the Company should cease discussions of an investment or strategic relationship with Richard." (PX2117 (JLI) at 041; see also PX7021 Pritzker (JLI) Dep. at 131 ("[W]e were no longer talking to Altria about the deal . . . [and] we determined at the board [meeting] that this was just not going to happen.")).

#### **Response to Finding No. 894**

The proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF 878, 881, 889. (See Responses to RPF 878, 881, 889).



895. By September 11, JLI decided to pursue different financing than the Altria investment, and Pritzker “wanted to just get that done and move on.” (PX7021 Pritzker (JLI) Dep. at 132; *see also* PX3154 (PWP) at 001). “[Valani] had communicated to [Dinyar Devitre, an Altria Board member] that [JLI was] planning on pursuing a different path.” (PX7028 Wappler (PWP) Dep. at 124-25).

#### **Response to Finding No. 895**

To the extent that the proposed finding claims that “JLI decided to pursue different financing” and “[Valani] had communicated to [Dinyar Devitre, an Altria Board member] that [JLI was] planning on pursuing a different path,” the proposed finding is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPPF ¶¶ 878, 881, 889. (*See Responses to RPPF ¶¶ 878, 881, 889*).

896. The “different path” was a tender offer that JLI was pursuing in early September during the impasse. (PX3154 (PWP) at 001). As a result, Wappler was “very pessimistic” about the chances of renewed negotiations. (PX7028 Wappler (PWP) Dep. at 125; *see also* PX7028 Wappler (PWP) Dep. at 78-79).

#### **Response to Finding No. 896**

The proposed finding is vague, unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because the phrase “‘very pessimistic’ about the chances of renewed negotiations” is ambiguous.

To the extent that the proposed finding claims that “[t]he ‘different path’ was a tender offer that JLI was pursuing in early September during the impasse,” and “[a]s a result, Wappler was ‘very pessimistic’ about the chances of renewed negotiations,” the proposed finding is unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPPF ¶¶ 878, 881, 889. (*See Responses to RPPF ¶¶ 878, 881, 889*).

897. Due to the impasse, negotiations remained stagnant through September and into October, (PX7031 Willard (Altria) Dep. at 178-79), and there were no further substantive negotiations after the August 27 meeting until Willard sent a letter to JLI on October 5, (Willard (Altria) Tr. 1418-19).

**Response to Finding No. 897**

The proposed finding is vague, unreliable, misleading, and contrary to the weight of the evidence for the reasons cited in response to RPF 878, 881, 889. (See Responses to RPF 878, 881, 889).

**IX. HAVING CONCLUDED ITS EXISTING PRODUCTS WOULD NOT SUCCEED, NU MARK SHIFTED ITS FOCUS TO NEW OPPORTUNITIES****A. In Early September 2018, Altria—Setting Its Sights On 2025—Began Planning For The Growth Teams**

898. By the start of September 2018, Altria “had learned a lot about the e-vapor business and what was good about it and what was bad about it.” (Willard (Altria) Tr. 1433).

**Response to Finding No. 898**

The proposed finding is incomplete and misleading to the extent that it implies that Altria did not understand the e-vapor business prior to September 2018. (CCFF 411-544).

899. Each September, Altria customarily begins putting together its plans for the upcoming year, and September 2018 was no exception: Altria “had to decide what [it was] going to do in the next year’s plan.” (Willard (Altria) Tr. 1433).

**Response to Finding No. 899**

The proposed finding is incomplete and misleading to the extent that it implies that, at this time, Altria did not know that exiting closed-system e-cigarettes was a requirement of any deal with JLI. JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF 944-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF 968-86).

900. At this point, Altria “had concluded that many of the existing Nu Mark products -- actually, all of the existing Nu Mark products -- had failed to be successful in the marketplace,” and that a “different approach” was needed. (Willard (Altria) Tr. 1434). Everyone agreed that Nu Mark “didn’t have products in the marketplace . . . that [it] felt like could be

successful.” (Gifford (Altria) Tr. 2798; *see also* Quigley (Altria) Tr. 2070-71 (agreeing Altria had “very little confidence” to “no confidence” in Nu Mark’s current portfolio and its existing business approach to innovative products); Jupe (Altria) Tr. 2183 (“[Y]ou . . . have got to be clever to know when you fold up your cards.”); PX7031 Willard (Altria) Dep. at 268-69 (“[U]ltimately, we decided that, really, none of the MarkTen products had a reasonable likelihood of future success as measured by adult smoker conversion or profitability or, frankly, even being able to stay on the market, and we decided to take a different approach, which was . . . take everything we had learned, start over again with what we called growth teams, and acknowledge that it was probably going to be, I don’t know, five or six years before the products that were designed by those teams . . . could go on the market . . . . And so we decided that the growth teams [were] a long shot, it was going to be slow, but that was the best path forward.”); PX7036 Garnick (Altria) Dep. at 173-74 (“As it became clear to the company that our products were not converting smokers and were not going to get a PMTA and were not profitable, we clearly needed to think about the future and what we would be doing in the future in the e-vaping market.”); PX7041 Quigley (Altria) Dep. at 23 (“[T]he Cync and Elite products we felt were not competitive with the JUUL[,] Vuse Alto[,] and blu Intense.”); PX7003 Quigley (Altria) IHT at 104-05 (“[Altria] didn’t believe that there were any other products. That work had already been completed.”); RX1149 (Altria) at 001 (indicating Altria needed “to course correct all of Numark’s activity”)).

### **Response to Finding No. 900**

The proposed finding is incomplete, misleading, contrary to the weight of the evidence, and unreliable. Respondents cite to a single contemporaneous document that indicates only that Nu Mark needed to “course correct” in the context of a re-organization of reporting lines, (RX1149 (Altria) at 001), and they otherwise rely on self-serving, after-the-fact testimony from Altria executives that is unreliable. Respondents ignore that Altria had recognized and touted Nu Mark, MarkTen, and MarkTen Elite to the public and investors since 2016, (CCFF ¶¶ 93-108, 130, 411-26, 480-92), and heavily investing in e-cigarettes. (CCFF ¶¶ 410, 413, 427-43). Nu Mark’s financial performance { [REDACTED] }, and before it was pulled from the market in 2018, Elite’s sales were growing. (CCFF ¶¶ 1112-31). Toward the end of September 2018, Altria indicated that it planned to continue with MarkTen and MarkTen Elite. (CCFF ¶ 1374). Specific examples of evidence from 2018 that contradict the self-serving testimony proffered by Respondents include:

- { [REDACTED] }  
[REDACTED] }
- In February 2018, Altria accelerated Elite’s launch in February 2018. (CCFF ¶¶ 138-39).
- By mid-2018, “Nu Mark grew volume by approximately 16% in the quarter and 23% for the first half, primarily driven by expanded distribution. Most recently, Nu Mark expanded MarkTen Elite from over 6,000 stores in the first quarter to more than 23,000 stores by the end of the second quarter.” (CCFF ¶ 487). On July 26, 2018, Willard stated to investors on an earnings call that “Nu Mark grew volume by approximately 16% in the quarter and 23% for the first half, primarily driven by expanded distribution” and that MarkTen Elite and MarkTen Bold were “[t]he drivers of the growth in second quarter and first half” and were “getting traction with consumers.” (CCFF ¶ 1113).
- From July 2018 to September 2018, MarkTen Elite’s same store sales grew 38 percent, with “[a]ccelerated development in stores with premium space/positioning.” (CCFF ¶ 1123).
- In late August 2018, a presentation attached to an email projected positive and growing margins and sales volume for MarkTen Elite for 2019 and 2020, as well as declining promotional spending. (CCFF ¶ 1130).
- Nu Mark was able to take Elite from zero retail stores to 25,000 retail stores between February and September of 2018. (CCFF ¶ 1124).
- A September 7, 2018, Altria presentation circulated by Craig Schwartz showed that both MarkTen Elite and Altria’s cigalike franchise had a positive marginal

contribution, 21 percent and 42 percent respectively, and Schwartz stated that the information in the presentation “could support a decision to further invest in MarkTen Elite 1.0 – if that’s what we decide to do . . . .” (CCFF ¶ 1107).

- On September 22, 2018, Crosthwaite sent Quigley a draft “RHP [Reduced Harm Product] Ranch Presentation” for Altria’s board of directors, which had a slide titled “Nu Mark – 2019 work realignment” which included a column “Continues” with entries for “Optimized MarkTen Support,” “MarkTen cig-a-like PMTA,” and “Elite 2.0 HUT [Home Use Test],” and a column titled “Stops/Changes” with entries for “Apex,” “VIM,” “Cync,” and “Hudson” development, but made no mention of ceasing commercialization or PMTA development for MarkTen’s cigalike products or MarkTen Elite. (CCFF ¶ 1374).
- [REDACTED]

The proposed finding is further contrary to the weight of the evidence that shows that competitors were focused on Nu Mark’s products (MarkTen and/or MarkTen Elite) during and after September 2018: JLI, (CCFF ¶¶ 313, 319-22, 325), [REDACTED] (CCFF ¶¶ 344-45, 348), and NJOY, (CCFF ¶ 349; PX8004 at 002-03 (¶¶ 12-14) (Farrell (NJOY), Decl.)). And while Nu Mark’s competitors faced commercial challenges with their e-cigarettes, they did not exit the market. (CCFF ¶¶ 1132-43).

The proposed finding is further incomplete and misleading because it ignores the evidence demonstrating that Respondents’ claim that the product characteristics of Altria’s e-cigarette products made them commercially unviable is implausible. (CCFF ¶¶ 1166-91).

The proposed finding is further incomplete and misleading with respect to Altria's growth teams as set forth in response to RPF 902. (*See* Response to RPF 902).

901. As of September 2018, "it didn't look like anything would come through with JLI." (Gifford (Altria) Tr. 2798; *see also* PX7036 Garnick (Altria) Dep. at 173-74, { }; *supra* Part VIII).

### **Response to Finding No. 901**

The proposed finding is incomplete, misleading, contrary to the weight of the evidence, and unreliable. Respondents ignore the continual stream of internal and joint communications between JLI and Altria between late August 2018 and the end of September 2018, and nowhere in those communications does anyone from Altria indicate that nothing "would come through with JLI" as Gifford's self-serving testimony suggests. (CCFF ¶¶ 735-72). Specifically, Respondents fail to address that in September 2018, Altria told its Board that continued negotiations were planned with JLI. (CCFF ¶ 760 ("Parties met on August 27th to continue negotiations . . . Further discussions have been on hold due to the availability of a Tree principal . . . Parties are discussing time frames for continuing negotiations.")).

## Negotiation update

- Parties met on August 27<sup>th</sup> to continue negotiations
- Further discussions have been on hold due to the availability of a Tree principal
- Parties are discussing time frames for continuing negotiations

### Current Altria Proposal

- \$12.6 BN for non-voting shares representing a 45% economic interest and 1 independent Board seat
- Hart-Scott-Rodino filing plan
- Two-year option to convert to 20% voting interest

(CCFF ¶ 760 (depicting PX4467 (Altria) at 004)).

Respondents further ignore that in that same September Board Update, “Altria non-compete” was listed as one of the “[k]ey terms for further negotiation.” (CCFF ¶ 761). Respondents cite no evidence that the Board was provided anything other than the “negotiation update” in September 2018. (*See Responses to RPF Part VIII*).

The proposed finding is unreliable because it relies only on self-serving testimony from Altria executives.

902. Altria therefore decided that it “needed to put in place growth teams to get started right away, knowing that [it] would be out on the market, call it, . . . five to seven years to get through the FDA process.” (Gifford (Altria) Tr. 2799; *see also* Willard (Altria) Tr. 1380-81, 1434 (discussing PX1182 (Altria) at 001); Jupe (Altria) Tr. 2307-08; § [REDACTED]).

### Response to Finding No. 902

The proposed finding is incomplete, misleading, contrary to the weight of the evidence, and unreliable.

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence because it ignores Altria's development efforts to improve its e-cigarette business around this time. Prior to entering the transaction with JLI, Altria continued to improve its existing products, (CCFF ¶¶ 1538-52); Altria worked to develop next-generation e-cigarette products, (CCFF ¶¶ 1553-76); Altria collaborated with PMI through their Joint Research, Development, and Technology Sharing Agreement, (CCFF ¶¶ 1588-619, 515-31); and that Altria then continued investing into its growth teams starting in October. (CCFF ¶¶ 1577-87).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence as to Respondents' indication that Altria did not have access to viable products and needed to develop new products. (*See generally* CCFF ¶¶ 1166-91). First, Respondents ignore the success that MarkTen and MarkTen Elite were enjoying in 2018, (*see* Response to RPF ¶ 900), and evidence showing that Altria's claim that it could not obtain PMTA approval for those products is pre-textual. (CCFF ¶¶ 1254-300). Second, Respondents fail to address the existence of the pod-based products Altria had access to via the JRDTA with PMI: APEX and VEEV. (CCFF ¶¶ 1620-93). PMI was working to improve APEX, (CCFF ¶¶ 1636-37), and Altria could submit a PMTA quickly for VEEV and obtain regulatory approval. (CCFF ¶¶ 1692-93; 1708-10). In 2018, Altria was also planning to allocate funds for product { [REDACTED] } In addition, Altria had the opportunity to collaborate with a number of other third parties on electronic cigarettes. (CCFF ¶¶ 1719-30). Third, Respondents ignore that Altria had extensive product development resources (as noted in the preceding paragraph) and that Altria was working on getting PMTA approval for its existing



products at the time of the transaction. (CCFF ¶¶ 1256-300). Fourth, Respondents ignore that as late as October 2018, Altria was specifically working on an improved version of MarkTen Elite—Elite 2.0. (CCFF ¶¶ 1281-94). Fifth, Respondents ignore evidence that Altria projected its growth teams would have a new product ready by 2020, and acknowledged the possibility that a new platform or acquired products could be in place in 2019. (CCFF ¶ 1581). Even according to Respondents’ proposed findings, Altria had the capability and mindset to improve acquired products and launch them. (*See* RPF ¶¶ 168, 330; *see also* CCFF ¶ 1531).

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence regarding Respondents’ claim that there was { [REDACTED] }  
[REDACTED] }

The proposed finding is also incomplete to the extent that it fails to disclose that the formation of the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

Finally, the proposed finding is unreliable because it relies on self-serving testimony from Altria executives.

903. The “Growth Teams” were designed to be “small teams” of individuals that would be “empowered . . . to move quickly” in pursuit of developing new “satisfying, innovative products.” (RX0842 (Altria) at 002; *see also* Quigley (Altria) Tr. 2070 (recalling that the Growth Teams “would be empowered to make all the decisions going forward about what work continued and what work [Altria] needed to go do”). The goal was to develop new products that “had the potential to leapfrog the JUUL product, which was at the time the superior product in the marketplace.” (Willard (Altria) Tr. 1275). “[L]eapfrog products” are “traditionally viewed as products that are not a little bit better than the products that are out in the marketplace but that are so much better that they become a break-through leader when they’re put in the market.” (Willard (Altria) Tr. 1378).

### **Response to Finding No. 903**

The proposed finding is incomplete and misleading because the growth teams had broader authority than Respondents suggest. The growth teams could acquire new products, continue to innovate on existing products, and could develop new products. (CCFF ¶¶ 1581, 1578). In addition, the growth teams could have continued or restarted R&D efforts on any of Altria's existing or discontinued products, if the growth teams thought that those efforts would be worthwhile. (CCFF ¶¶ 1578, 1541). Furthermore, to the extent that the proposed finding stands for the proposition that the growth teams were responsible for the decision to discontinue Elite and the MarkTen cigalikes, it is contradicted by evidence in the record that the growth teams did not have such authority. (PX7016 (Jupe (Altria), Dep. at 209)).

The proposed finding is also incomplete to the extent that it fails to disclose that the formation of the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

904. The Growth Teams would be the culmination of the 100-day review that had started in May 2018 and led primarily by Quigley. (Quigley (Altria) Tr. 2079-80; *see also* PX7003 Quigley (Altria) IHT at 89-90). Originally, Quigley proposed that Nu Mark run the Growth Teams, but Altria decided instead to staff the teams with “different people who [had] a fresh perspective.” (Quigley (Altria) Tr. 2068-69). “[T]he idea [was] to start from scratch and build the expertise.” (PX7000 Garnick (Altria) IHT at 87).

#### **Response to Finding No. 904**

The proposed finding is incomplete and misleading because the growth teams were not “starting from scratch.” The growth teams could acquire new products, in addition to developing new products. (CCFF ¶¶ 1581, 1578). In addition, the growth teams could have continued or restarted R&D efforts on any of Altria's existing or discontinued products, if the growth teams thought that those efforts would be worthwhile. (CCFF ¶¶ 1578, 1541). Moreover, Altria had a significant number of existing products, improvement projects, and collaborations to draw from.

(See Response to RPF 902). Furthermore, to the extent that the proposed finding stands for the proposition that the growth teams were responsible for the decision to discontinue Elite and the MarkTen cigalikes, it is contradicted by evidence in the record that the growth teams did not have such authority. (PX7016 (Jupe) (Altria) Dep. at 209). The first sentence of the proposed finding is also misleading because it fails to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes. (CCFF 1036, 1043, 1097, 1104, 1155).

Finally, the proposed finding is incomplete to the extent that it fails to disclose that the formation of the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF 1408-15; *see also* CCFF 411-544).

905. There was no way to know how long it would take the Growth Teams to get a new product in the market, but everyone at Altria agreed any new product that the Growth Teams would come up with would be many years away: “[Altria] would be out on the market, call it, . . . five to seven years to get through the FDA process.” (Gifford (Altria) Tr. 2799; *see also* Jupe (Altria) Tr. 2313 (describing the goal of getting a competitive product on the market by 2023 as a “really optimistic, aggressive goal,” even “overly optimistic”); Garnick (Altria) Tr. 1662 (explaining it “would have taken five to ten years” before any product developed by the Growth Teams could have received FDA approval and been placed on the market); Willard (Altria) Tr. 1436 (“It [would] . . . likely . . . take a number of years before their product could be introduced into the marketplace to compete . . .”); PX7031 Willard (Altria) Dep. at 268-69 (“[I]t was probably going to be, I don’t know, five or six years before the products that were designed by those teams and applied for to enter the market by -- for FDA authorization, it would probably be five or six years before they could go on the market . . .”); PX7000 Garnick (Altria) IHT at 86 (explaining the aspiration was to “think about the next generation of products that would be available 10 or 15 years down the line and try to start from scratch and try to work on those products”); PX7016 Jupe (Altria) Dep. at 326-27 (“[Altria was] years away, with the approach that [it was] taking, [from] having a consumer viable product that would be relevant in the market.”)).

### **Response to Finding No. 905**

The proposed finding is incomplete, misleading, and unreliable.

The proposed finding is incomplete and misleading because it fails to address all of the existing products, R&D, and collaboration resources Altria had at its disposal to develop new

products and improve its existing products. (*See* Response to RPF 902). The growth teams could have continued or restarted R&D efforts on any of Altria's existing or discontinued products, if the growth teams thought that those efforts would be worthwhile. (CCFF ¶¶ 1541, 1578). Respondents ignore evidence that Altria projected its growth teams would have a new product ready by 2020, and acknowledged the possibility that a new platform or acquired products could be in place in 2019. (CCFF ¶ 1581).

The proposed finding is incomplete and misleading because it does not address that Altria could have acquired a new product, (CCFF ¶ 1581), and that even according to Respondents' proposed findings, Altria had the capability and mindset to improve acquired products and launch them. (*See* RPF ¶¶ 168, 330; *see also* CCFF ¶ 1531).

The proposed finding is also incomplete to the extent that it fails to disclose that the formation of the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

Finally, the proposed finding is unreliable because it is exclusively supported by self-serving testimony from Altria executives.

906. Making the transition to Growth Teams was "a big undertaking." (Gifford (Altria) Tr. 2800). Altria needed to "identify the best talent to go on the teams" and replace those people in their prior roles, as well as design the teams. (Gifford (Altria) Tr. 2799-2800).

### **Response to Finding No. 906**

To the extent that the proposed finding stands for the proposition that Altria had talented employees that it could move onto the growth teams, Complaint Counsel does not disagree. The proposed finding is incomplete to the extent that it fails to disclose that the formation of the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would

still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

907. In this effort, everyone agreed Altria was hamstrung by the shortcomings in its existing, cigarette-oriented expertise and its inability to recruit outside talent with experience in innovation, electronics, and product chemistry. (Willard (Altria) Tr. 1397; *see also* Quigley (Altria) Tr. 2295-96; Jupe (Altria) Tr. 2316-19; PX7024 Crosthwaite (Altria/JLI) Dep. at 268-70, 279; PX7031 Willard (Altria) Dep. at 262-64; PX7000 Garnick (Altria) IHT at 86-87; PX7016 Jupe (Altria) Dep. at 182-83; PX7017 Magness (Altria) Dep. at 202). As Jupe explained, you cannot turn “a knob” and “all of a sudden you’re an innovative company.” (PX7016 Jupe (Altria) Dep. at 212).

### **Response to Finding No. 907**

The proposed finding is incomplete, misleading, and unreliable.

The proposed finding is incomplete and misleading because it fails to address all of the existing products, R&D, and collaboration resources Altria had at its disposal to develop new products and improve existing products, or acquire additional products. (*See* Responses to RPF ¶¶ 902-03). In fact, prior to the transaction, Altria had 40-50 people focused on e-cigarette product development. (CCFF ¶ 1539). Altria had access to its \$350 million Center for Research and Technology, which housed over 400 scientists, physicians, product developers, and engineers working on innovative products. (CCFF ¶ 452). NMI provided Altria with technology scouting and prototyping capabilities, which Altria sought to expand. (CCFF ¶¶ 15-19).

The proposed finding is misleading as to Jupe’s testimony in the last sentence of the proposed finding. Contrary to Jupe’s position, Altria considered Nu Mark an “innovation business” and an “innovation company” (CCFF ¶¶ 10, 1048; *see* CCFF ¶ 563).

The proposed finding is incomplete to the extent that it fails to disclose that the formation of the growth teams and other evidence demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

Finally, the proposed finding is unreliable because it is exclusively supported by self-serving testimony from JLI and Altria executives.

908. Beyond finding and reallocating the right talent, Altria also needed to free up resources to facilitate the Growth Teams' work. In order to "fund" and "focus on" the Growth Teams, Altria "would have to stop a lot of work, and that's what [it was] planning to do." (Jupe (Altria) Tr. 2311; *see also* Jupe (Altria) Tr. 2243 (explaining organizations have to "make tradeoffs as far as where your resources, . . . your skills are being applied"); Quigley (Altria) Tr. 2069-71, 2078 (explaining that as a result of the Growth Teams, Altria was going to "downsize the Nu Mark business"); RX1292 (Altria) at 055 ("Resources are constrained, spread across all Nu Mark initiatives and impacted by other operating companies.")).

### **Response to Finding No. 908**

The proposed finding is incomplete, misleading, unreliable, and unsupported.

The proposed finding is incomplete and misleading because it ignores the steady-stream of product improvement, product development, and collaborations Altria had undertaken, and that the growth teams were a next step in that process. (*See* Response to RPF 902). Altria chose to augment Altria's product development capabilities by mimicking the faster design cycles of software firms and told the growth teams that budget would not be a constraint, and that they could retain any third parties or hire any new talent that they needed to develop new e-cigarette products. (CCFF ¶¶ 1578-79; *see* CCFF ¶ 437). Garnick testified Altria would have committed up to \$100 million for growth teams. (CCFF ¶ 438).

The proposed finding further ignores evidence demonstrating that the growth teams could have continued or restarted R&D efforts on any of Altria's existing or discontinued products, if the growth teams thought that those efforts would be worthwhile. (CCFF ¶¶ 1578, 1541). The proposed finding is incomplete and misleading because it does not address that Altria could have acquired a new product, (CCFF ¶ 1581), and that even according to Respondents' proposed findings, Altria had the capability and mindset to improve acquired products and launch them. (*See* RPF 168, 330; *see also* CCFF ¶ 1531).

The proposed finding is further incomplete and misleading because to the extent Altria wanted to free up money, the choice was to free up money for growth teams or to fund the JLI investment. (CCFF ¶¶ 1584-86, 438). In addition, the proposed finding is misleading because it fails to note that the decisions to remove Elite from the market and discontinue the MarkTen cigalikes were both announced after the transaction negotiations entered their final stages and the parties had reached an agreement that Altria would not compete in the closed-system e-cigarette market. (CCFF ¶¶ 779-830, 839-61, 987, 989).

The proposed finding is unsupported by a January 2018 document that Respondents cite, (RX1292 (Altria) at 055), to support its argument regarding the fall of 2018. Excluding that irrelevant document, the proposed finding is unreliable because it relies exclusively on self-serving testimony from Altria executives.

Finally, the proposed finding is incomplete to the extent that it fails to disclose that the formation of the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

909. As Jupe explained at trial, the most important question was “what needed to be stopped.” “[Y]ou want to take your best talent, move them to these teams, which means you have to stop additional work, and you would hit bottlenecks downstream if you were continuing to do all this work. So you had to focus your work and start putting your resources on the projects that made the most sense.” (Jupe (Altria) Tr. 2308).

### **Response to Finding No. 909**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF ¶¶ 907-08. (*See* Responses to RPF ¶¶ 907-08).

910. On September 10, the regulatory team took an inventory of ongoing projects for this purpose, (Jupe (Altria) Tr. 2310; *see also* RX0828 (Altria); PX1585 (Altria)), while Quigley undertook a similar effort from the Nu Mark perspective, (PX7003 Quigley (Altria) IHT at 166-69).

**Response to Finding No. 910**

The proposed finding is misleading because it fails to note that the decisions to remove Elite from the market and discontinue the MarkTen cigalikes were both announced after the transaction negotiations entered their final stages and the parties had reached an agreement that Altria would not compete in the closed-system e-cigarette market. (CCFF ¶¶ 779-830, 839-61, 987, 989).

911. The regulatory team was in agreement that work on all current and future iterations of Elite—including PMTA work—should be discontinued, along with development work on MarkTen Bold line extensions and other internal development projects. (RX0701 (Altria) at 001; *see also* PX7015 Gogova (Altria) Dep. at 100-01).

**Response to Finding No. 911**

The proposed finding is misleading and unreliable because Respondents have mischaracterized the email, RX0701 (Altria) at 001, as to any agreement among the regulatory team, and as to the scope of what work Altria was considering stopping. In the September 12, 2018 email, Garnick writes Murillo, “So, if the decision to go forward with the PMTA for MarkTen and to support the PMTA and MRTP already filed for Verve and Copenhagen ... and nothing else for now, we would discontinue the following projects: . . . MarkTen Bold line extensions: Elite 1.0 . . . Elite 2.0, Elite 3.0.” Murillo wrote back, “That’s about right. We have a couple of foundational pieces under way that I wouldn’t stop abruptly and then assess others.” (RX0701 (Altria) at 001). This email exchange says nothing about any sort of agreement among Altria’s regulatory group for specific products, and Murillo indicates that work should not stop abruptly. In fact, the email from Garnick indicates his plan for Elite only becomes effective if Altria pursues the plan to continue work on the PMTAs for MarkTen, Verve, and Copenhagen. (RX0701 (Altria) at 001). Complaint Counsel also notes that this email says nothing about removing Elite and MarkTen from the market. (RX0701 (Altria) at 001).



The proposed finding is also incomplete and misleading because it ignores that just before September, in August 2018, Altria remained focused on getting a PMTA for Elite 1.0 while focusing on getting an improved Elite 2.0 product through the PMTA process. (CCFF ¶¶ 1155, 1286-90, 1295-300). In fact, as of August 30, 2018, Altria planned to submit a PMTA for MarkTen Elite 2.0 in January 2022. (CCFF ¶ 1299). Altria continued to develop Elite 2.0 into at least October. (CCFF ¶¶ 1291-94). Moreover, the proposed finding also ignores the fact that the decisions to remove Elite from the market and discontinue the MarkTen cigalikes were both announced after the transaction negotiations entered their final stages and the parties had reached an agreement that Altria would not compete in the closed-system e-cigarette market. (CCFF ¶¶ 779-830, 839-61, 987, 989).

The proposed finding further ignores that the growth teams could have continued R&D efforts on any of Altria's existing or discontinued products if the growth teams thought that those efforts would be worthwhile. (CCFF ¶¶ 1578, 1541). The proposed finding is incomplete and misleading because it does not address that Altria could have acquired a new product, (CCFF ¶ 1581), and that even according to Respondents' proposed findings, Altria had the capability and mindset to improve acquired products and launch them. (*See* RPF ¶¶ 168, 330; *see also* CCFF ¶ 1531).

Finally, the proposed finding is incomplete to the extent that it fails to disclose that the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

912. A few days later, Quigley advised Garnick that “[w]e should stop ALL work around the [Elite] pmta.” (RX0319 (Altria) at 001; *see also* Quigley (Altria) Tr. 2070-71 (agreeing that all work for the Elite PMTA should stop)).

### **Response to Finding No. 912**

The proposed finding is misleading and unreliable because Respondents fail to provide the full context of the email, (RX0319 (Altria) at 001), which shows Quigley advised Garnick to continue to develop Elite. In this email, Quigley wrote, “In my work assessment the only work I think we need to do is complete the elite high nic formula development by the end of the year and conduct the hut. This would give valuable learnings to the new team.” (RX0319 (Altria) at 001). Furthermore, while Garnick did suggest stopping work on the Elite PMTA, he also noted that he wanted to “shut down the work in such a way to minimize the disruption if [Altria had] to start it back up again.” (RX0319 (Altria) at 001). Altria had also just introduced its new gasket fix for MarkTen Elite into the U.S. market. (CCFF ¶¶ 1206-18, 1043; *see* CCFF ¶¶ 1219-34). This all supports that but for the transaction, Altria would continue to compete in the closed system e-vapor market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

The proposed finding is incomplete and misleading because it fails to note that Garnick and Quigley did not discuss pulling MarkTen Elite off the market in the September 14, 2018 email exchange. (RX0319 (Altria) at 001).

The proposed finding is also incomplete and misleading because it ignores that by this time, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 944-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

Moreover, the proposed finding ignores the fact that the decisions to remove Elite from the market and discontinue the MarkTen cigalikes were both announced after the transaction

negotiations entered their final stages and the parties had reached an agreement that Altria would not compete in the closed-system e-cigarette market. (CCFF ¶¶ 779-830, 839-61, 987, 989).

913. And on September 17, Willard signed off on “stop[ping] all of the work that we have identified before as work we should stop,” including the PMTA work. (PX1182 (Altria) at 001; RX0319 (Altria) at 001).

### **Response to Finding No. 913**

The proposed finding is incomplete, misleading, unreliable, and unsupported. Respondents mischaracterize both emails. The first email, PX1182 (Altria), includes an email from Garnick to Willard in which Garnick writes, “I thought I would set out what I propose to do, and I welcome your thoughts and corrections.” (PX1182 (Altria) at 001). Garnick then proposes a series of points, including a suggestion to stop work with a caveat for Mark Ten Elite that would allow the work to be put “to bed in such a way that it can be easily revived later if the agile team wants to pursue it.” (PX1182 (Altria) at 001). This proposal by Garnick does not define what is covered by his stop plan and expressly indicates that the MarkTen Elite work should be put “to bed” so it can easily be revived later “if the agile team wants to pursue it.” (PX1182 (Altria) at 001). Willard wrote back “Ok here” to Garnick’s list of proposals and it is not clear to what he is agreeing. (PX1182 (Altria) at 001). The proposed finding also fails to mention by this time, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

Moreover, the proposed finding ignores the fact that the decisions to remove Elite from the market and discontinue the MarkTen cigalikes were both announced after the transaction

negotiations entered their final stages and the parties had reached an agreement that Altria would not compete in the closed-system e-cigarette market. (CCFF ¶¶ 779-830, 839-61, 987, 989).

Finally, the proposed finding's reliance on RX0319 is also misleading for the reasons stated in response to RPF 912. (*See* Response to RPF 912).

914. Quigley knew the “ramifications” of this conclusion would be that he “was likely going to be standing in front of [his] employees and telling some of them that they didn't have jobs.” (Quigley (Altria) Tr. 2048-49).

#### **Response to Finding No. 914**

The proposed finding is unsupported by any contemporaneous documents; instead, it relies exclusively on self-serving testimony from an Altria executive that is unreliable due to potential business ties between his current company and Altria. (*See* CCFF ¶¶ 2037-39). Respondents have not pointed to any specific evidence regarding employee termination plans. Furthermore, the proposed finding is incomplete and misleading because it fails to mention that Brian Quigley repeatedly advocated for continued investment in both Elite and the MarkTen cigalikes in 2018. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155).

915. Altria kept the Growth Team plan confidential for this reason, because “it was going to have significant impact to [those staffed on the Growth Teams].” (Gifford (Altria) Tr. 2800-01).

#### **Response to Finding No. 915**

The proposed finding is unsupported by any contemporaneous documents; instead, it relies exclusively on self-serving testimony from an Altria executive that is unreliable. Respondents have not pointed to any specific evidence regarding employee termination plans. The proposed finding also fails to mention that Altria had already signaled its willingness to agree to JLI's demand that it stop competing in the closed-system e-cigarette market prior to the announcement of the growth teams. (CCFF ¶¶ 695-734).

The proposed finding also is misleading because it fails to mention by this time, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 944-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

Moreover, the proposed finding ignores the fact that the decisions to remove Elite from the market and discontinue the MarkTen cigalikes were both announced after the transaction negotiations entered their final stages and the parties had reached an agreement that Altria would not compete in the closed-system e-cigarette market. (CCFF ¶¶ 779-830, 839-61, 987, 989).

Finally, the proposed finding is incomplete to the extent that it fails to disclose that the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

916. The Growth Teams announcement involved “a fairly big organizational restructuring” and was likely “to be interpreted by employees as management acknowledging a failure on the Nu Mark effort.” (Willard (Altria) Tr. 1435 (discussing RX0842 (Altria))). In essence, Altria was telling the organization “we’re going back to square zero.” (Gifford (Altria) Tr. 2802).

### **Response to Finding No. 916**

The proposed finding is unreliable. Willard's testimony about others' “likely” interpretations is not supported by any evidence from anyone with such reaction. In the absence of supporting evidence, this proposed finding is unreliable. The proposed finding is further unreliable because it is supported exclusively by self-serving testimony from Altria executives, and this testimony is in stark contrast to the company's remarks to the public and investors on July 26, 2018, in Altria's Q2 earnings call, less than two months prior. Willard stated to investors in that

earnings call that “Nu Mark grew volume by approximately 16% in the quarter and 23% for the first half, primarily driven by expanded distribution” and that MarkTen Elite and MarkTen Bold were “[t]he drivers of the growth in second quarter and first half” and were “getting traction with consumers.” (CCFF ¶ 1113). Willard also told investors, “primary products that we [Altria] have in distribution at retail in large numbers of stores are the original MarkTen, the MarkTen Bold product with nicotine salts, and then MarkTen Elite.” (CCFF ¶ 130).

The proposed finding also fails to mention by this time, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 944-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

Moreover, the proposed finding ignores the fact that the decisions to remove Elite from the market and discontinue the MarkTen cigalikes were both announced after the transaction negotiations entered their final stages and the parties had reached an agreement that Altria would not compete in the closed-system e-cigarette market. (CCFF ¶¶ 779-830, 839-61, 987, 989).

**B. Days Later, FDA Sent A Letter Calling For “Bold Action” On Youth Vaping, Which Induced Altria To Discontinue Elite And Non-Traditional Flavors**

**1. FDA Letter**

917. After issuing several public warnings in spring 2018 about youth vaping (*see supra* Part III.G), on September 12, 2018, FDA sent a letter to five major e-vapor manufacturers and made a simultaneous public statement demanding that the manufacturers take “prompt action” to address FDA’s concerns related to youth vaping. (RX1120 (FDA) at 002, 003; RX1921 (FDA) at 005-06).

**Response to Finding No. 917**

The proposed finding is misleading because it omits that according to the FDA, the 5 manufacturers who received the FDA letter “collectively[] represent more than 97 percent of the current market for e-cigs — JUUL, Vuse, MarkTen [Altria], blu e-cigs, and Logic.” (RX1921 (FDA) at 006). The proposed finding is incomplete and misleading because it fails to mention that Altria also received another letter from FDA Commissioner Gottlieb after the announcement of the JLI deal in which Commissioner Gottlieb expressed concern that Altria’s plans with JLI contradicted commitments it had made to the FDA about Altria’s efforts to combat youth usage of e-cigarettes. (CCFF ¶¶ 1240-43).

918. Both Altria and JLI received one of the letters from FDA. (RX1120 (FDA) (letter to Altria); PX9051 (FDA) (letter to JLI)).

#### **Response to Finding No. 918**

The proposed finding is incomplete and misleading for the reasons stated in response to RPF 917. (*See* Response to RPF 917).

919. In its letter to Altria, FDA noted that its spring “blitz” of retailers had uncovered “the illegal sale of MarkTen products to minors.” (RX1120 (FDA) at 002).

#### **Response to Finding No. 919**

The proposed finding is misleading because while the FDA letter does include the quote in the proposed finding, Altria knew that its products were not a significant contributor to the rise in youth vaping. (CCFF ¶¶ 1323-52; *see also* Response to RPF 925). Specifically, Quigley testified at trial that Altria’s goal was to have products that did not cause initiation. (CCFF ¶¶ 1324-26). Furthermore, in contrast to Altria’s own e-cigarettes, Altria recognized that JUUL appealed to youth, (CCFF ¶¶ 1248-253); in fact, draft talking points for Willard of Altria expressly states, “At the same time JUUL has created a youth usage epidemic. We cannot allow that to continue.” (CCFF ¶ 1252). The proposed finding is also incomplete and misleading for the reasons stated in response to RPF 917. (*See* Response to RPF 917).

920. FDA advised Altria that it was reconsidering its exercise of discretion in connection with the Deeming Rule—i.e., FDA was raising the possibility that all e-vapor products, including those on the market before August 8, 2016, would need to be removed unless and until they received PMTA authorization. (RX1120 (FDA) at 002; *see also* Murillo (Altria/JLI) Tr. 2963 (recalling FDA’s letter “made clear” that the options on the table included “accelerating the deadlines or taking products off the markets pending an application or approval”).

### **Response to Finding No. 920**

The proposed finding is unsupported. Respondents do not quote the specific language from the FDA letter referred to in the proposed finding, and Complaint Counsel has not been able to confirm what Murillo believes is “clear” in the letter.

In addition, the proposed finding is incomplete and misleading because it fails to note that no other competitor reacted to the FDA’s messages as dramatically as Altria. JLI, Reynolds’ Vuse, ITG’s Blu, JTI’s Logic, and NJOY continued to sell e-cigarettes after the FDA’s letter, (*see* Response to RPF 917 (all but NJOY actually received the letter); CCFF ¶¶ 1028-33, 1132-36, 155, 160, 165, 185, 190), while Altria discontinued its e-cigarette business, (CCFF ¶¶ 131-32), just before investing in the largest e-cigarette manufacturer, JLI, the market leader. (CCFF ¶ 159). Indeed, multiple industry analysts realized that Altria’s discontinuation of its e-cigarette business likely indicated that a deal with JLI was imminent. (CCFF ¶¶ 1020-25).

The proposed finding is also incomplete and misleading for the reasons stated in response to RPF 917. (*See* Response to RPF 917).

921. FDA asked Altria to both meet with FDA and respond in writing within 60 days with “a detailed plan . . . to address and mitigate widespread use by minors.” (RX1120 (FDA) at 003).

### **Response to Finding No. 921**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF ¶¶ 919-20. (*See* Responses to RPF ¶¶ 919-20).



922. Among other things, FDA listed “[r]emoving flavored products from the market until those products can be reviewed by FDA as part of a PMTA” as a step that Altria could consider as part of its plan. (RX1120 (FDA) at 003). Altria understood this comment to “strongly suggest[]” that it should remove flavored products from the market pending FDA review. (Willard (Altria) Tr. 1441).

### **Response to Finding No. 922**

The second sentence of the proposed finding is unsupported and unreliable. The second sentence is supported exclusively by Willard’s self-serving testimony and is therefore unreliable. Furthermore, there is no language in the FDA letter or other support for Willard’s assumption that the FDA was strongly suggesting one consideration over another. In fact, the removal of flavored products suggestion appears last in the FDA’s list. (RX1120 (FDA) at 003). Moreover, the FDA asked for a letter within sixty-days that put forth Altria’s plan to mitigate the widespread use of minors; the FDA did not ask or demand that Altria remove any products in that timeframe. In addition, none of the recommendations from the FDA letter included removing all pod-based products and cigalikes from the market. (RX1120 (FDA) at 003). The proposed finding is incomplete and misleading for the reasons set forth in response to RPF 919-20. (*See Responses to RPF 919-20*).

923. Commissioner Gottlieb’s simultaneously issued public statement echoed these messages and emphasized the high stakes of the situation. (RX1921 (FDA) at 006 (“We’re also re-examining the enforcement discretion we currently exercise for other e-cig products currently on the market without authorization.”)).

### **Response to Finding No. 923**

The proposed finding is vague and unsupported as to what the proposed finding means by the “high stakes of the situation.” The proposed finding is also incomplete and misleading for the reasons set forth in response to RPF 919-20. (*See Responses to RPF 919-20*).

924. Commissioner Gottlieb’s public statement reiterated that “[o]ur comprehensive plan on nicotine and tobacco regulation remains intact.” Commissioner Gottlieb reemphasized FDA’s belief “that tobacco products exist on a continuum of risk, and that there are opportunities to move adult smokers down that ladder of harm.” (RX1921 (FDA) at 008).

**Response to Finding No. 924**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF 919-20. (See Responses to RPF 919-20). The proposed finding is also misleading because it fails to address Commissioner Gottlieb's full quote where he expresses his support and the FDA's support for continuum of risk products and e-cigarettes:

At the FDA, we still believe that new innovations that don't use combustion, like the electronic cigarettes, offer an important opportunity for adults to transition off combustible tobacco. I still believe in this opportunity. I still believe in the concept of modified risk I still believe that tobacco products exist on a continuum of risk, and that there are opportunities to move adult smokers down that ladder of harm. The leadership of the FDA's tobacco center still firmly believes in this concept.

(RX1921 (FDA) at 008).

925. But at the same time, Commissioner Gottlieb was clear that FDA would not "tolerate a whole generation of young people becoming addicted to nicotine as a tradeoff for enabling adults to have unfettered access to these same products." (RX1921 (FDA) at 003).

**Response to Finding No. 925**

The proposed finding is incomplete and misleading because it fails to address that Altria's products did not raise youth initiation concerns. (See Responses to RPF 919, 925; CCF 1323-52). Specifically, cigalikes (e.g., MarkTen, MarkTen Bold) do not raise the same youth vaping concerns as pod-based products (e.g., JUUL), (CCF 1328-31); low nicotine strength e-cigarettes (e.g., MarkTen Elite) do not raise the same level of youth vaping concerns as high nicotine products (e.g., JUUL), (CCF 1332-35); e-liquids lacking nicotine salts (e.g., MarkTen Elite) do not raise the same youth vaping concerns as e-liquids with nicotine salts (e.g., JUUL), (CCF 1336-39); and non-flavored e-cigarette products do not raise the same level of youth vaping concerns. (CCF 1340-44). The proposed finding is also incomplete and misleading for the reasons set forth in response to RPF 919-20. (See Responses to RPF 919-20).

926. As a result, Commissioner Gottlieb indicated that FDA was going to revisit its compliance policy and warned that it was “actively considering whether [it would] enforce the premarket review provision earlier.” (RX1921 (FDA) at 004).

### **Response to Finding No. 926**

The proposed finding is also incomplete and misleading for the reasons set forth in response to RPF 919-20. (*See Responses to RPF 919-20*).

927. Commissioner Gottlieb warned further that FDA was considering whether to “curtail the marketing and selling of flavored products.” (RX1921 (FDA) at 004).

### **Response to Finding No. 927**

The proposed finding is also incomplete and misleading for the reasons set forth in response to RPF 919-20. (*See Responses to RPF 919-20*).

928. Commissioner Gottlieb promised to hold e-vapor manufacturers like Altria “accountable” and explained that FDA’s five letters issued that day put them “on notice.” (RX1921 (FDA) at 006-07). He called for manufacturers “to respond with forceful plans . . . or face regulatory consequences,” and he reiterated his expectation that these manufacturers would bring those “robust plans” to FDA in 60 days. (RX1921 (FDA) at 006, 008).

### **Response to Finding No. 928**

The first sentence of proposed finding is misleading and unsupported. Commissioner Gottlieb actually said the FDA would “continue to hold retailers accountable” and that e-cigarette manufacturers “ought to follow suit.” (RX1921 (FDA) at 007). As written, Commissioner Gottlieb actually encouraged e-cigarette manufacturers to hold retailers accountable. The proposed finding is also incomplete and misleading for the reasons set forth in response to RPF 919-20. (*See Responses to RPF 919-20*).

929. Gottlieb followed these warnings with grim words: “Let me be clear: Everything is on the table. This includes the resources of our civil and criminal enforcement tools.” (RX1921 (FDA) at 007). At trial, Willard explained what this meant: “[I]t’s hard to miss his point. Unless you marshal all your resources to help solve the problem, it’s a pretty threatening letter.” (Willard (Altria) Tr. 1439).

### **Response to Finding No. 929**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF 919-20. (See Responses to RPF 919-20).

930. The September 12 letter “from [Altria’s] most important regulator” was something that the company took “very seriously.” (Willard (Altria) Tr. 1322, 1437; see also PX7027 Murillo (Altria/JLI) Dep. at 202 (agreeing Altria took the letter “extremely seriously”).

### **Response to Finding No. 930**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF 919-20 and 931. (See Responses to RPF 919-20, 931).

931. As is true for any participant in a heavily regulated industry—particularly one where the fate of a category hangs in the balance—Altria’s relationship with its regulator is critical. (Crozier (Sheetz) Tr. 1561 (agreeing that “meeting FDA regulations, dealing with issues such as youth, underage vaping or underage cigarette usage are very important for the category”); [REDACTED]; PX7031 Willard (Altria) Dep. at 270-71 (explaining that “[t]here were few things [Altria] took more seriously than” comments and guidance from FDA because “FDA had regulatory authority over the US tobacco business, and they ultimately decided which products could stay on the market, [and] which products had to be removed from the market”).

### **Response to Finding No. 931**

To the extent that the proposed finding is arguing that Altria’s relationship with the FDA was the reason Altria pulled its e-cigarettes from the market, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence because Altria’s actions are in stark contrast to the proposed finding. (See Response to RPF 935). Specifically, Altria pulled its pod-based products and discontinued its cigalike business, (CCFF 131-32), in favor of exclusively competing through JLI, (CCFF 40, 883-84), when JLI was the market leader. (CCFF 31). Altria knew its products did not have youth initiation issues and JLI’s did. (See Responses to RPF 919, 925). Even Commissioner Gottlieb and JLI saw the inconsistency in Altria’s words and actions. (See Response to RPF 917; see also CCFF 1241). Other e-cigarette manufacturers

heard the same messages from the FDA and they did not exit the market while Altria did. (*See* Response to RPF 920).

932. If FDA demands “bold action” in response to youth vaping, as it did here, (RX1921 (FDA) at 007), that is a request that Altria must take seriously and act upon, (Willard (Altria) Tr. 1437; PX7027 Murillo (Altria/JLI) Dep. at 202).

### **Response to Finding No. 932**

The proposed finding is incomplete and misleading. The FDA did generically “challenge e-cig[arette] manufacturers to take bold action to reform their own practices.” (RX1921 (FDA) at 007). However, in terms of specific actions, the FDA only required e-cigarette manufacturers to reply in writing in 60 days with a plan of action, (RX1120 (FDA) at 003), and the FDA provided several suggestions for those plans, none of which included removing pod-based products or cigalikes from the market, or investing in the leading manufacturer of closed-system e-cigarettes at the time, JLI. (RX1120 (FDA) at 003; *see also* Response to RPF 920 (other e-cigarette manufacturers continued to stay in the market after the FDA letter); Response to RPF 919, 925 (Altria knew that it did not have the same youth initiation issues as JUUL); Response to RPF 931 (Altria’s claims of being motivated by its relationship with the FDA are misleading)).

933. Garnick explained that FDA’s announcement had a particularly “profound impact” on Altria: “[F]or a number of years [Altria] had devoted a good deal of resources, time, and attention at reducing youth usage numbers for cigarettes, and we got them so that they were at an all-time low. Then for this issue to come up with respect to e-vapor products was something that we thought was awful and something we really wanted to -- to address.” (Garnick (Altria) Tr. 1757-58).

### **Response to Finding No. 933**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF 919-20, 925, 931. (*See* Responses to RPF 919-20, 925, 931).

934. Willard in particular perceived the Commissioner’s letter as “pretty threatening,” as the Commissioner was “essentially . . . saying, you’re part of the problem, and I expect you to contribute to fixing it. I expect you to do it quickly and completely.” (Willard (Altria) Tr. 1437, 1439).

**Response to Finding No. 934**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF 919-20, 925, and 931. (See Responses to RPF 919-20, 925, 931). In addition, the proposed finding is unreliable because it exclusively relies on self-serving testimony from Willard that stands in contrast to the actual words of Commissioner Gottlieb regarding required actions of e-cigarette companies, none of which included shutting down an entire e-cigarette business. (See Response to RPF 932).

935. Willard had served as senior vice president for youth smoking prevention earlier in his career and was accordingly “very sensitive” to “FDA’s concerns about youth usage of tobacco products.” (Willard (Altria) Tr. 1321-22). He recognized that “youth usage . . . was a real threat to the [tobacco] industry overall,” because the rise of youth use of e-vapor was “reversing [the] success” the cigarette industry had achieved in prior decades. But Willard “was confident that [Altria] could help contribute to fixing the youth usage of e-vapor problem just as [it] contributed to combustible cigarettes.” (Willard (Altria) Tr. 1322-23). Willard believed that increases in youth usage could be reversed “with a collective effort and the right set of actions.” (Willard (Altria) Tr. 1322-23).

**Response to Finding No. 935**

The proposed finding is incomplete, misleading, and unreliable for the reasons set forth in response to RPF 919-20, 925, and 931. (See Responses to RPF 919-20, 925, 931).

The proposed finding is also misleading and vague. The last sentence of the proposed finding is misleading and vague as to Willard’s admission that he sought a “collective effort,” a phrase which is undefined in the proposed finding. Without context, Complaint Counsel points to the reality following the FDA’s September 2018 letter: that JLI and Altria collectively acted in entering the transaction, (CCFF 33); that JLI and Altria collectively agreed that Altria would not compete in e-cigarettes, (CCFF 38-39; see also Responses to RPF 762, 766, 804); and that Altria removed its pod-based products and discontinued its cigalike products, (CCFF 131-32), in favor of exclusively competing through JLI, (CCFF 40, 883-84), when JLI was the market leader. (CCFF 31). Altria knew its products did not have youth initiation issues and JLI’s

products did. (*See Responses to RPF 919, 925*). Even Commissioner Gottlieb saw the inconsistency in Altria's words and actions (*See Response to RPF 931*).

To the extent Respondents are trying to argue that Altria removed its e-cigarette products due to some altruistic motive regarding youth vaping, the proposed finding is also incomplete and misleading. (*See Response to RPF 935*). Specifically, Respondents fail to address the evidence that {

[REDACTED]

[REDACTED]

} Indeed, on October 21, 2018, four days before the October 25 letter to the FDA was released, Garnick wrote to Murillo summarizing the ultimate outcome of the pending JLI deal on Altria's e-cigarette business: "no evapor product fits with Tree." (PX1228 (Altria) at 001). Respondents further ignore that Altria executives were aware that JUUL had appealed to non-tobacco users, particularly youth, prior to the transaction, and Altria knew its e-cigarettes did not have such an appeal to youth, (*see Responses to RPF 919, 925*), and Commissioner Gottlieb and even JLI were skeptical of Altria's statements about youth vaping after its investment in JLI. (CCFF 1239-43).

Finally, the proposed finding is unreliable because it relies on self-serving testimony from an Altria executive that is contrary to the evidence.

936. Before FDA's September 12 letter, Altria independently had thought that youth vaping was a problem that needed to be addressed, but "when the FDA raised the issue and said how concerned they were, it increased [Altria's] desire even more to help solve the problem." (PX7031 Willard (Altria) Dep. at 271).

### **Response to Finding No. 936**

The proposed finding is incomplete, misleading, and unreliable for the reasons stated in response to RPF 919-20, 925, 931, and 935. (*See Responses to RPF 919-20, 925, 931, 935*).

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937. Altria also understood that protecting the continuum of risk concept—which FDA indicated was in jeopardy—was of existential importance for its business. (PX7027 Murillo (Altria/JLI) Dep. at 202-03 (“fear[ing]” that FDA was “threatening” to reverse course on the continuum of risk, which would be “of potential catastrophic consequence to” Altria)). Murillo testified that it was “essential” for Altria to take steps that would preserve the continuum of risk because that was something “[Altria] had been working on for . . . 20 years.” (Murillo (Altria/JLI) Tr. 2964). He could not “overstate the significance” of FDA’s statement that it was reevaluating its compliance policy regarding closed-system products. (Murillo (Altria/JLI) Tr. 2962). In his view, FDA’s letter “cast a pall over the vapor category” as well as “the continuum of risk concept that the same Commissioner who signed this letter had advanced in 2017 for harm reduction products.” (Murillo (Altria/JLI) Tr. 2961).

### **Response to Finding No. 937**

The proposed finding is incomplete, misleading, and unreliable for the reasons stated in response to RPF 919-20, 925, 931, 935. (See Responses to RPF 919-20, 925, 931). The proposed finding is further incomplete, misleading, and unreliable because it ignores Commissioner Gottlieb’s actual language in his statement, which does not recommend immediately eliminating pod-based products or cigalikes. (RX1120 (FDA) at 003), and Commissioner Gottlieb’s express support for both e-cigarettes and continuum of risk products. (See Response to RPF 924).

## **2. September 26 Decision**

938.

As Garnick explained at trial, Elite and the non-traditional flavored MarkTen cig-a-like products already were not “converting smokers, they were losing money, and they wouldn’t get a PMTA.” (Garnick (Altria) Tr. 1756-57). FDA’s letter provided just one more reason why Altria should discontinue these products: “[E]nough is enough.” (Garnick (Altria) Tr. 1756-58).

### **Response to Finding No. 938**

The proposed finding is incomplete, misleading, unsupported, and contrary to the weight of the evidence.



Respondents' claim that MarkTen Elite and MarkTen cigalikes were not converting smokers is incomplete, misleading, and unsupported. (*See* CCFF ¶¶ 1301-22). Specifically, Respondents omit the fact that on September 7, 2018—days before September 12, 2018—Craig Schwartz sent several Altria colleagues a presentation entitled “MarkTen Elite Potential Investment Justification Information” which included the results of a HUT study that showed that MarkTen Elite produced conversion rates comparable to or better than JUUL under certain circumstances, and he stated that the results “could support a decision to further invest in MarkTen Elite 1.0 – if that’s what we decide to do.” (CCFF ¶ 1320; *see also* CCFF ¶ 1544 (discussing Altria’s plans as of September 10, 2018 to further invest in R&D)). Furthermore, Altria did not conduct any actual conversion studies on Elite that showed the product could not convert smokers. (CCFF ¶¶ 1305-07).

Respondents claim is further misleading and contrary to the weight of the evidence because MarkTen Elite and MarkTen cigalikes performance and sales were growing in 2018. (*See* Response to RFPP ¶ 900; CCFF ¶¶ 1112-31 (Elite sales were growing prior to the transaction); Response to RFPP ¶ 751 (Elite); Responses to RFPP ¶ 755-56 (MarkTen cigalikes)). Respondents claim is further misleading and contrary to the weight of the evidence because Altria had plans to expand Elite prior to withdrawing it from the market, (CCFF ¶¶ 1147-48), and Altria’s public and investor statements indicated positive traits regarding MarkTen Elite and MarkTen. (CCFF ¶ 1113).

Respondents' claim that MarkTen Elite and MarkTen cigalikes were losing money is incomplete, misleading, and unsupported. Complaint Counsel does not deny that Nu Mark had losses; however, Respondents fail to acknowledge that discontinuing Altria’s e-cigarette business was against Altria’s economic interest, (CCFF ¶¶ 1041-63); that Altria recognized and touted to

investors the importance of e-cigarettes to its future, (CCFF ¶¶ 411-26; 93-108), as did other tobacco companies, (CCFF ¶¶ 109-117); that Altria spent significant amounts of money toward its goal to lead the closed system e-cigarette market, (CCFF ¶¶ 427-43); and that Altria was willing to sacrifice short-term profits to succeed in the closed-system e-cigarette market. (CCFF ¶¶ 1064-82). Furthermore, Altria expected its products would become profitable, (CCFF ¶¶ 1083-87), and correspondingly, Nu Mark's financial performance was improving, (CCFF ¶¶ 1088-1111), and MarkTen Elite's sales were growing. (CCFF ¶¶ 1112-31). Respondents further fail to put the Altria's financial situation in context; they omit that [REDACTED], and that Altria was the only one to exit the market. (CCFF ¶¶ 109-117 (*in camera*); *see also* CCFF ¶¶ 1132-43).

Respondents' claim that MarkTen Elite and MarkTen cigalikes could not get PMTA approval is incomplete, misleading, and unsupported. (*See* CCFF ¶¶ 1254-322). Specifically, in 2018, Altria had until 2022—nearly four years—to file its PMTAs. (CCFF ¶ 1257). Altria's plans and progress to file PMTA for MarkTen were advanced at the time of the transaction. (CCFF ¶¶ 1258-266). And, Altria thought that Elite could achieve PMTA approval as well. (CCFF ¶¶ 1267-74). Altria also had several contingency plans in place to remedy any delays in the PMTA process. (CCFF ¶¶ 1275-300). In addition, an e-cigarette's impact on youth initiation is an important factor in the FDA's PMTA process, and Altria's e-cigarettes did not raise youth initiation concerns. (*See* CCFF ¶¶ 1323-52).

Respondents' indication that Altria decided to pull MarkTen Elite and APEX by MarkTen from the market because of the FDA letter is incomplete, misleading, and unsupported. (*See* CCFF ¶¶ 1237-53, 1359-78; *see Responses to RPF* ¶¶ 919-21, 925, 931, 935). Specifically, Altria had already taken steps toward discontinuing its e-cigarette business after JLI indicated it wanted a

non-compete by the time of the FDA’s September 12, 2108 letter. (CCFF ¶¶ 1359-78). In addition, Altria’s documents show { [REDACTED] }; Responses to RPF 919, 925), and { [REDACTED] } [REDACTED] } On October 21, 2018, four days before the October 25 letter to the FDA was released, Garnick wrote to Murillo summarizing the ultimate outcome of the pending JLI deal on Altria’s e-cigarette business: “no evapor product fits with Tree.” (PX1228 (Altria) at 001). Altria executives linked the discontinuation of MarkTen’s products to the transaction. (CCFF ¶¶ 1390-407).

Even Commissioner Gottlieb saw the inconsistency in Altria’s words and actions, (*see* Response to RPF ¶ 931), when Altria removed its pod-based products and discontinued its cigalike products, (CCFF ¶¶ 131-32), in favor of exclusively competing through JLI, (CCFF ¶¶ 40, 883-84), when JLI was the market leader. (CCFF ¶ 31). Altria knew its products did not have youth initiation issues and JLI’s did. (*See* Responses to RPF ¶¶ 919, 925). Other e-cigarette manufacturers heard the same messages from the FDA and they did not exit the market while Altria did. (*See* Response to RPF ¶ 920).

In addition, Respondents indication that Altria decided to pull MarkTen Elite because of the FDA letter is further contradicted by evidence that Altria was pursuing Elite expansion plans as of late September, after the FDA letter had been received. (CCFF ¶¶ 1147-48).

939. Two weeks later, Altria’s leadership team gathered for an annual planning meeting at Altria’s off-site facility in Montana, known as “the Ranch.” (Willard (Altria) Tr. 1443-44; *see also* PX7031 Willard (Altria) Dep. at 268 (“[T]he management team went off together . . . as part of our normal process, and we said, all right, given everything we’ve learned about the MarkTen product portfolio, what do we think we should do. And, ultimately, we decided to significantly scale back the MarkTen product portfolio.”); PX7003 Quigley

(Altria) IHT at 65-66 (“So typical planning process for Altria, kind of the calendar, the rhythm of how we would run our business, every summer we would go through what we call the game plan. That was our annual planning process. . . . [W]hich would then lead you to a planning meeting in September where you would agree and finalize on those initiatives . . . .”).

### **Response to Finding No. 939**

Complaint Counsel does not dispute that the Altria leadership meeting occurred in late September 2018. However, the proposed finding is misleading because it fails to note that by the time this meeting occurred, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-943). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 944-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86). Moreover, Altria continued to plan for a potential investment in JLI throughout September. (CCFF ¶¶ 752-72). Finally, the proposed finding is incomplete and misleading because it fails to note that Altria also discussed the investment in JLI at the September leadership meeting, including how the deal would impact Altria’s 10 year plan (or “YP”). (CCFF ¶ 772).

940. By that point in late September, Altria “had really had enough time to evaluate MarkTen Elite,” and had determined that “[i]t was not successful.” (Willard (Altria) Tr. 1442). The product had been on the market for around seven months, which is sufficient time to make an assessment of a new product’s performance and prospects. (PX7003 Quigley (Altria) IHT at 55 (explaining you need “26 weeks plus” (i.e., 6 months) with a new brand to “really understand what you have”); PX7023 Fernandez (Altria) Dep. at 82).

### **Response to Finding No. 940**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence for reasons set forth in response to RPF ¶¶ 938, 939. (*See* Responses to RPF ¶¶ 938, 939). The proposed finding is further incomplete and misleading because in reality, Altria withdrew MarkTen Elite before it had time to assess the product’s long-term potential. (CCFF ¶¶ 1144-62).

Moreover, the proposed finding is contradicted by Quigley’s testimony that when he first learned that Altria executives were considering discontinuing MarkTen Elite, he was surprised, and he considered it unusual that Altria launched product, saw it grow, and then withdrew it several months later, (CCFF ¶ 1151), and that he “did not feel it made sense to walk away from the pod business.” (CCFF ¶ 1155).

941. Altria also considered Apex, another pod product, and concluded it was even less promising than Elite such that, despite its limited geographic distribution, leaving it in the market would “represent a missed opportunity.” (Willard (Altria) Tr. 1445; *see also infra* Part XVI.B.3).

### **Response to Finding No. 941**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence for reasons set forth in response to RPF ¶ 938. (*See* Response to RPF ¶ 938; *see also* Responses to RPF Part XVI.B.3). The proposed finding is incomplete, misleading, unreliable, and contrary to the weight of the evidence because in fact, Altria thought APEX was promising. (CCFF ¶¶ 1626-35). Specifically, as late as August 2018, Murillo believed APEX would be a good product because it was designed by people who know “what they’re doing.” (CCFF ¶ 1632). In July 2018, Nu Mark noted that APEX had a “Potentially favorable device design from [an] FDA perspective”, “strong IP”, and an “Effortless inhale/exhale experience.” (CCFF ¶ 1629). In August 2018, Schwartz observed that BP was interested in APEX and that Altria now had a unique opportunity to introduce the product on the West Coast. (CCFF ¶ 1627). This evidence stands in stark contrast to the self-serving and therefore unreliable testimony of an Altria executive cited in the proposed finding.

The proposed finding further ignores that Altria {

[REDACTED]

[REDACTED]

[REDACTED] }

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942. By the time of the Ranch meeting, there was agreement among Altria's and Nu Mark's leaders that pulling Elite and pulling non-traditional flavors were two ways that the company should and would respond to FDA's very serious concerns. (Murillo (Altria/JLI) Tr. 2965-66; Quigley (Altria) Tr. 1993, 2079; PX7031 Willard (Altria) Dep. at 266-70; PX7000 Garnick (Altria) IHT at 102-03).

**Response to Finding No. 942**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence for reasons set forth in response to RPF 932, 938-39. (See Responses to RPF 932, 938-39). In addition, the proposed finding is incomplete and misleading because Quigley testified that the Tree discussion (Altria's investment in JLI) on September 26, 2018 at the Ranch preceded any discussion of removing MarkTen Elite and APEX from the market. (Quigley (Altria) Tr. 2096-98).

943. Accordingly, as summarized in the below slide presented by Quigley on September 26, the leadership decided that "in response to FDA," Altria would "[r]emove Elite & Apex from the Marketplace," (RX1176 (Altria) at 024; see also Quigley (Altria) Tr. 2078; Garnick (Altria) Tr. 1759; { [REDACTED] }):



(RX1176 (Altria) at 024).

**Response to Finding No. 943**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence for reasons set forth in response to RPF 919, 932, 938-39, and 941. (See Responses to RPF 919, 932, 938-39, 941). In addition, the proposed finding is misleading because it ignores the previous slide RX1176 (Altria) at 023 entitled “2019 Nu Mark Work Re-Alignment” wherein it states under the column “Continues”: “Elite 2.0 Hut,” “MarkTen cig-a-like PMTA,” and “Optimized MarkTen support.” (RX1176 (Altria) at 023). On the same page, under a column labeled “Stops/Changes,” there is no mention of stopping sales of MarkTen Elite or MarkTen cigalikes. (RX1176 (Altria) at 023; see also CCF 1374). This language indicates that if there was a decision as the proposed finding suggests, the contents of that decision are unclear at best. In addition, the proposed finding is incomplete and misleading because Quigley testified that the Tree discussion (Altria’s investment in JLI) on September 26, 2018 at the Ranch preceded any discussion of removing MarkTen Elite and APEX. (Quigley (Altria) Tr. 2096-98).

The proposed finding is further incomplete, misleading, and contrary to the weight of the evidence because while Garnick did testify at trial that he was advocating the removal of MarkTen Elite and flavored products “regardless of the Tree [JLI] deal,” (Garnick (Altria) Tr. 1759), that testimony is contradicted by other evidence showing that at Altria, the transaction discussions were intertwined with the FDA response. (See Response to RPF 939). Altria’s documents show that


On October 21, 2018, four days before Altria’s October 25 letter to the FDA was released, Garnick

wrote to Murillo summarizing the ultimate outcome of the pending JLI deal on Altria's e-cigarette business: "no evapor product fits with Tree." (PX1228 (Altria) at 001). Even Commissioner Gottlieb and JLI were skeptical that Altria was removing MarkTen Elite and APEX due to youth vaping concerns. (CCFF ¶¶ 1238-43).

Finally, the proposed finding is supported by self-serving testimony from Altria executives, rendering it unreliable.

944. The leadership also decided at that time to remove all non-traditionally flavored cig-a-like products (defined as all flavors other than tobacco, menthol, or mint), as FDA specifically had suggested might be an appropriate response to its concerns. (Murillo (Altria/JLI) Tr. 2965-67 (explaining that Altria decided to pull its flavors to address the youth issue, with the exception of tobacco (shorthand "brown") and menthol/mint (shorthand "green")); Willard (Altria) Tr. 1444-45; Garnick (Altria) Tr. 1759; RX1176 (Altria) at 024; PX7000 Garnick (Altria) IHT at 102, 105-06).

#### **Response to Finding No. 944**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence, and unreliable. The proposed finding is incomplete, misleading, and contrary to the weight of the evidence for reasons set forth in response to RPFf ¶¶ 919-21, 925, 931, 938-39, 932, 943. (*See* Responses to RPFf ¶¶ 919-21, 925, 931, 938-39, 932, 943). The proposed finding is also contrary to the weight of the contemporaneous document, which states Altria was not planning to pull its flavored cigalike products from the market entirely as a result of the FDA letter: "Maintain Cig-a-like non-tobacco flavor and menthol flavors in E-commerce." (RX1176 (Altria) at 024). Furthermore, the document specifically noted that Altria would retain the right to submit PMTAs for flavored cigalike products. (RX1176 (Altria) at 024). Absent this document, the proposed finding exclusively relies on self-serving testimony from Altria executives, rendering it unreliable.

945. Murillo thought that removing pods and non-traditional flavors was the right decision and it "was [his] recommendation." (Murillo (Altria/JLI) Tr. 2967). He explained that he "thought it was really important to take Dr. Gottlieb's concern very, very seriously, and while Elite and Apex were both very, very small players and very early on in the market, and I had no reason to think that they were unduly appealing to kids, I thought that a



precautionary reaction or approach was appropriate, and I also thought that it was extremely appropriate to demonstrate to the FDA that the bigger principle of harm reduction was more important than sales of Elite or Apex or MarkTen Purple or whatever and that we could always come back with a PMTA in the future. So I thought it was very important to have a very responsive, very comprehensive and collaborative discussion with the FDA that demonstrated that we got the message, we're committed to harm reduction, we're committed to being part of the solution." (Murillo (Altria/JLI) Tr. 2967).

### **Response to Finding No. 945**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence for reasons set forth in response to RPF 919-21, 925, 931, 932, 935, 938-39, 943, 944. (See Responses to RPF 919-21, 925, 931, 938-39, 932, 943). Specifically, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence because fails to address the inconsistency that both JLI and Commissioner Gottlieb saw, (CCFF 1238-43): Altria told the FDA it was withdrawing its pod-based products (Elite and APEX) because of youth vaping concerns, (CCFF 812), at the same time as it was in active negotiations with JLI, (CCFF 773-810), a company that exclusively manufactured pods, (CCFF 155), and was the market leader. (CCFF 159). Altria knew the JUUL products had youth appeal where Altria's products did not. (See Responses to RPF 919, 925). Altria only { [REDACTED] }, and no other competitor exited pods. (See Response to RPF 920). On October 21, 2018, four days before the October 25 letter to the FDA was released, Garnick wrote to Murillo summarizing the ultimate outcome of the pending JLI deal on Altria's e-cigarette business: "no evapor product fits with Tree." (PX1228 (Altria) at 001). Ultimately, Altria removed its pod-based products and discontinued its cigalike products, (CCFF 131-32), in favor of exclusively competing through JLI. (CCFF 40, 883-84).

In addition, the proposed finding is unreliable because it relies exclusively on self-serving testimony from an Altria/JLI executive. Even Commissioner Gottlieb and JLI were skeptical that

Altria was removing MarkTen Elite and APEX due to youth vaping concerns when it invested in JLI. (CCFF ¶¶ 1238-43).

946. Similarly, Quigley, then President and CEO of Nu Mark, “was fully supportive of pulling Elite off the market” in response to FDA’s letter. (Quigley (Altria) Tr. 1993). He thought it was the right decision “[b]ecause [Altria’s] legacy as a company was to lead and be the most responsible tobacco company, and [he] believed it was the most responsible thing to do, and it, frankly, would give the FDA the ability to think about . . . its strategy to deal with flavor pod products and youth usage.” (Quigley (Altria) Tr. 2078-79; *see also* PX7003 Quigley (Altria) IHT at 179-80).

#### **Response to Finding No. 946**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence for reasons set forth in response to RPF 945, 940. (*See* Responses to RPF 945, 940). The proposed finding is also incomplete and misleading because it fails to note that Quigley advocated for continuing investment in both Elite and the MarkTen cigalikes. (CCFF ¶¶ 1036, 1043, 1097, 1104, 1155). In addition, the proposed finding is unreliable because it relies exclusively on self-serving testimony from a former Altria executive, who currently serves on the Board of Directors of a company partially owned by Altria and with ongoing business ties to Altria. (CCFF ¶ 2039). Even Commissioner Gottlieb and JLI were skeptical that Altria was removing MarkTen Elite and APEX due to youth vaping concerns. (CCFF ¶¶ 1238-43).

947. {



**Response to Finding No. 947**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence for reasons set forth in response to RPF 938, 945. (See Responses to RPF 938, 945). As to { [REDACTED] } and incomplete and misleading for the reasons stated in response to RPF 750-51, 753, 938. (See Responses to RPF 750-51, 753, 938 (*in camera*)). Furthermore, the proposed finding is incomplete and misleading because it fails to note that Altria had developed a solution to Elite’s leaking problem and was working on Elite 2.0, which would have addressed many of the remaining issues. (CCF 1206-34, 1281-94).

In addition, the proposed finding is unreliable because it relies exclusively on self-serving testimony of an Altria executive.

948. At the time, there also was “stark debate” on whether Altria should go further and recommend that the Commissioner “pull or ban, rather, all e-vapor pod products.” (PX7036 Garnick (Altria) Dep. at 163-64). While Garnick thought such a recommendation made sense, others in the organization argued that there was “a fundamental difference between pulling an e-vapor product like [Elite], that was not converting smokers, and pulling a product like JUUL, that was having more success at converting smokers than virtually any other non-combustible tobacco product out there. And they had some very powerful arguments in that—in that extent.” (PX7036 Garnick (Altria) Dep. at 163-64).

**Response to Finding No. 948**

The proposed finding is incomplete, misleading, vague, and contrary to the weight of the evidence for reasons set forth in response to RPF 945. (See Response to RPF 945). It is vague what time frame is being addressed by the proposed finding. As to the specific claim that Altria was actually debating banning all pod products, the proposed finding is incomplete, misleading, and unreliable because it ignores that in the fall of 2018, Altria was planning on the investment with JLI, (CCF 752-810), that Altria planned only to { [REDACTED] } [REDACTED], whereby Altria

would exclusively compete through JLI for closed-system e-cigarettes. (CCFF ¶¶ 40, 883-84). Garnick’s testimony suggesting that Altria was considering banning all pod-based closed-system e-cigarettes, thereby rendering Altria’s investment useless, is self-serving and unreliable. (*See* Response to RPF ¶ 953). Indeed, on October 21, 2018, four days before the October 25 letter to the FDA was released, Garnick wrote to Murillo summarizing the ultimate outcome of the pending JLI deal on Altria’s e-cigarette business: “no evapor product fits with Tree.” (PX1228 (Altria) at 001).

949. Leadership kept the decision under wraps for a time because it was not yet final, had not yet been discussed with FDA, and would cause considerable distress for Nu Mark’s employees. (Quigley (Altria) Tr. 2081-82; Gifford (Altria) Tr. 2808-09, 2814; *see also* PX4309 (Altria) at 001 (“I have people over here, wondering about their lives and every little thing gets people upset.”)).

#### **Response to Finding No. 949**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF ¶ 953. (*See* Response to RPF ¶ 953).

950. At the Ranch meeting, leadership also continued to talk about how to move forward with the Growth Teams. Quigley explained that Nu Mark lacked the “internal development capabilities and processes required to lead in innovative products,” including the “nicotine science and insights . . . to develop a product that c[ould] win and effectively switch smokers.” (RX1176 (Altria) at 012). To try to overcome these deficiencies, Quigley explained, the company needed to “[i]mplement a different structure and operating model,” i.e., the Growth Teams. (RX1176 (Altria) at 017). As part of this step, Quigley proposed downsizing Nu Mark. (RX1176 (Altria) at 021-22).

#### **Response to Finding No. 950**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF ¶ 951. (*See* Response to RPF ¶ 951).

951. As Gifford explained, “if [Altria was] going to keep investing,” it needed to figure out “how to shrink [costs] to reduce some of the overhead drag on [its] e-vapor or Nu Mark business.” (Gifford (Altria) Tr. 2806-07). And because the options for shrinking overhead were “either grow volume or reduce expenses,” the conversation among leadership shifted to, “if [Altria is] going to think about growth teams and that being an additional investment,

how can [it] start right-sizing this organization to free up some financial resources and people resources.” (Gifford (Altria) Tr. 2806-07).

### **Response to Finding No. 951**

The proposed finding is incomplete and misleading because it ignores the steady-stream of product improvement, product development, and collaborations Altria had undertaken, and that the growth teams were a next step in that process. (*See* Responses to RPF 902-03, 08). Altria chose to augment Altria’s product development capabilities by mimicking the faster design cycles of software firms and told the growth teams that budget would not be a constraint, and that they could retain any third parties or hire any new talent that they needed to develop new e-cigarette products. (CCFF 1578-79; *see* CCFF 437). Garnick testified Altria would have committed to \$100 million for growth teams. (CCFF 438).

The proposed finding further ignores evidence demonstrating that the growth teams could have continued or restarted R&D efforts on any of Altria’s existing or discontinued products, if the growth teams thought that those efforts would be worthwhile. (CCFF 1578, 1541). The proposed finding is incomplete and misleading because it does not address that Altria could have acquired a new product, (CCFF 1581,) and that even according to Respondents’ proposed findings, Altria had the capability and mindset to improve acquired products and launch them. (*See* RPF 168, 330; *see also* CCFF 1531).

The proposed finding is further incomplete and misleading because to the extent Altria wanted to free up money, the choice was to free up money for growth teams or to fund the JLI investment. (CCFF 1584-86, 438). In addition, the proposed finding is misleading because it fails to note that the decisions to remove Elite from the market and discontinue the MarkTen cigalikes were both announced after the transaction negotiations entered their final stages and the

parties had reached an agreement that Altria would not compete in the closed-system e-cigarette market. (CCFF ¶¶ 779-830, 839-61, 987, 989).

As with Elite and the MarkTen cigalikes, the e-cigarette growth teams were wholly inconsistent with JLI's broad noncompete demand and were disbanded as a result of the transaction. (CCFF ¶¶ 1010-11). Even as the growth teams began to operate in October 2018, Altria understood the bottom line regarding the pending JLI deal: "no evapor product fits with Tree." (PX1228 (Altria) at 001).

### 3. October 1 Work On Communications Plan

952. After the Ranch meeting concluded, Altria turned its attention to preparing for its meeting with FDA, which was scheduled to take place on October 18. (RX0314 (Altria) at 002).

#### **Response to Finding No. 952**

The proposed finding is misleading because it ignores that from October 1, 2018 to October 30, 2018, the negotiations between JLI and Altria about the transaction intensified and Respondents had settled on a final term sheet by the end of the month. (CCFF ¶¶ 773-830). Moreover, the proposed finding ignores that by this time, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

953. As part of that preparation, Willard received an outline on October 1 detailing in part what he might say to FDA, including with regard to the decisions to withdraw pod-based products and limit cig-a-like flavors to tobacco, menthol, and mint. (Willard (Altria) Tr. 1446-49 (discussing RX0314 (Altria))). Altria knew the meeting with FDA was critical, because if afterward "FDA was unhappy with Altria, that could cause them to shut down not only [Altria's] e-vapor business, but it could also flow into problems with [its] cigarette business or [its] smokeless business." (Willard (Altria) Tr. 1447).

**Response to Finding No. 953**

The proposed finding is incomplete, misleading, and unreliable.

The proposed finding is incomplete and misleading. While the RX0314 (Altria) contains some draft bullet points from October 1, 2018 of what Willard “might say” including asking that the FDA ban all pod-based e-vapor products until the manufacturer receives a market order (RX0314 (Altria) at 003), Respondents fail to address that Altria wanted a commitment from JLI about the transaction prior to making any commitment to the FDA. Prior to October 5, 2018, Willard called Pritzker and outlined some proposed terms to see if Pritzker thought it would be constructive for Willard to submit a letter with those terms to JLI. (CCFF ¶ 775). Pritzker thought the terms Willard proposed were sufficiently responsive to JLI’s concerns that the parties could move forward, and Willard subsequently sent a letter to JLI on October 5, 2018. (CCFF ¶ 775). Before that letter was sent, in notes from October 4, 2018 for an Altria board call, Garnick wrote that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *see also* PX7036 (Garnick (Altria), Dep. at 163-64)).

On October 5, 2018, Willard sent a letter to JLI’s Pritzker, Valani, and Burns setting forth the terms he had discussed with Pritzker. (CCFF ¶ 779-82). Altria did receive a response from JLI prior to October 12, confirming that JLI wanted to move forward with the transaction. (CCFF ¶¶

791-92). 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. (CCFF ¶ 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." (CCFF ¶ 793). On October 15, 2018, Willard sent a revised term sheet that inserted a reference to Altria "otherwise exiting the marketing and sale" of electronic cigarette products as a potential pathway to allow Altria to provide certain services to JLI. (CCFF ¶¶ 797, 800). 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." (CCFF ¶ 805). The key negotiators planned to have dinner and a meeting in late October in New York. (CCFF ¶¶ 806-07). On October 21, 2018, four days before the October 25 letter to the FDA was released, Garnick wrote to Murillo summarizing the ultimate outcome of the pending JLI deal on Altria's e-cigarette business: "no evapor product fits with Tree." (PX1228 (Altria) at 001).

On October 25, 2018, Altria issued its letter to the FDA, and there was a commitment to remove Altria's pod-based products from the market. (CCFF ¶ 812). Altria did not recommend banning all pod-based e-cigarettes in its letter. (PX2022 (JLI)).

That same day, 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. (CCFF ¶ 814). JLI and Altria reached final agreement on the term sheet on October 29, 2018. (CCFF ¶¶ 815-30).

Furthermore, Willard's testimony that he was concerned about the FDA's "happiness" is self-serving and unreliable. The evidence demonstrates that Altria was not concerned with the happiness of the regulator after it told the FDA it would pull its pod-based products to combat



youth use, (CCFF ¶ 1238-39), and then it immediately took a 35% stake in JLI, (CCFF ¶ 33), the market leader that only sold pod-based closed-system e-cigarettes, (CCFF ¶¶ 31, 155), a product with known youth appeal issues. (CCFF ¶¶ 1249-53). Commissioner Gottlieb told Altria that Altria’s investment in JLI “contradict[ed] the commitments [Altria] made to the FDA.” (CCFF ¶ 1241; *see also* CCFF ¶ 1242).

954. The October 1 outline was extensive, (Willard (Altria) Tr. 1447), and it was consistent with the September Ranch meeting decisions to discontinue Elite and non-traditional flavored cig-a-likes, (Garnick (Altria) Tr. 1762; *see also* RX0314 (Altria) at 003-04).

#### **Response to Finding No. 954**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF ¶ 953. (*See* Response to RPF ¶ 953).

955. The outline also reflected Altria’s decision to approach FDA with the suggestion that it could “exercise its discretionary enforcement power to remove all pod-based products from the market until the manufacturer receives a market order.” (RX0314 (Altria) at 003).

#### **Response to Finding No. 955**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF ¶ 953. (*See* Response to RPF ¶ 953).

#### **4. October 4, 2018 Board Meeting**

956.

[REDACTED]

#### **Response to Finding No. 956**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF ¶ 953. (*See* Response to RPF ¶ 953).

957. This notification was “part of [Altria’s] normal process.” (Willard (Altria) Tr. 1445-46). It would “do this planning session and then . . . brief the board on the major decisions, particularly ones that might be taken in the short run and have a significant impact on the

organization or on the view that the external investors might have on our business.” (Willard (Altria) Tr. 1445-46).

**Response to Finding No. 957**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPFf ¶ 953. (See Response to RPFf ¶ 953).

958. 

**Response to Finding No. 958**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPFf ¶ 953. (See Response to RPFf ¶ 953).

959. 

**Response to Finding No. 959**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPFf ¶ 953. (See Response to RPFf ¶ 953).

**C. From October Through December, Altria Pursued Two Alternative Strategies—Growth Teams And A JLI Investment**

960. Looking to its e-vapor strategy post-Elite and with the prospect of a JLI transaction as uncertain as ever, Altria simultaneously pursued two alternative paths. (Willard (Altria) Tr. 1391 (“[T]he thing about acquisitions is, sometimes you find a good one and sometimes you can come to terms, but oftentimes, you can’t come to terms, and so you better have an internal strategy.”)).

**Response to Finding No. 960**

The proposed finding is incomplete, misleading, vague, and inaccurate as to the claim that the transaction with JLI was “uncertain as ever” from October through December. In reality, there was a continual stream of discussions beginning in early October leading up to agreement on the final term sheet on October 30, 2018 (*See* Response to RPF 953). By this time, JLI had demanded and Altria understood that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

Due diligence began soon after the exchange of the final term sheet. (CCFF ¶¶ 832-34). By December 4, Respondents were exchanging draft press releases and on December 5, 2018, Altria board member Devitre told JLI’s Valani that Altria was “all systems go” on proceeding with the transaction. (CCFF ¶¶ 841, 844). As with Elite and the MarkTen cigalikes, the e-cigarette growth teams were wholly inconsistent with JLI’s broad noncompete demand and were disbanded as a result of the transaction. (CCFF ¶¶ 1010-11). Even as the growth teams began to operate in October, Altria understood the bottom line regarding the pending JLI deal: “no evapor product fits with Tree.” (PX1228 (Altria) at 001).

961. On October 5, Altria took steps forward on each approach: Altria officially announced the launch of the Growth Teams, (RX0842 (Altria)), and it made one last effort toward making a deal with JLI, (PX1391 (Altria)).

### **Response to Finding No. 961**

The proposed finding is misleading as to Respondents’ indication that the growth teams were a departure from existing projects as opposed to an augmented approach and continuation of development. (*See* Responses to RPF 902-03, 08). The proposed finding is also misleading as Respondents’ claim that on October 5, 2018 Altria made “one last effort” toward making a deal

with JLI. In reality, there were continual discussions both jointly with JLI and at Altria about the proposed transaction from August through October, (*see* Responses to RPF 901, 953), and then the deal was finalized in early December. (*See* Response to RPF 960). More importantly, by this time, JLI had demanded and Altria understood that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF 968-86). Altria had informed JLI of the PMI complications relating Altria contributing or divesting its e-cigarette business during the course of their negotiations. (CCFF 925-43).

## **1. Altria Launched Growth Teams In October**

### **a. Announcement From Willard**

962. On October 5, Willard circulated a company-wide memo announcing the Growth Teams' formation. (RX0842 (Altria) at 001-02).

### **Response to Finding No. 962**

The proposed finding is misleading to the extent that it suggests the formation of the growth teams represented a break from Altria's agreement to stop competing with JLI as a condition of a deal. As with Elite and the MarkTen cigalikes, the e-cigarette growth teams were wholly inconsistent with JLI's broad noncompete demand and were disbanded as a result of the transaction. (CCFF 1010-11). Even as the growth teams began to operate in October, Altria understood the bottom line regarding the pending JLI deal: "no vapor product fits with Tree." (PX1228 (Altria) at 001). Moreover, when Altria leadership announced the creation of the growth teams on October 5, 2018, it made no mention of discontinuing any of Nu Mark's existing e-cigarette products. (*See generally* RX0842 (Altria) (Willard memo re: "Growth Strategy Update:

Innovative Products’’)). On the contrary, the announcement explicitly stated that going forward Nu Mark’s focus would be on its “current products in the marketplace.” (RX0842 (Altria) at 003).

The proposed finding is also incomplete to the extent that it fails to disclose that the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

963. As outlined above, (*see supra* Parts V.C.4, IX.A, IX.B.2), the Growth Teams plan had “been in development for -- for quite some time,” primarily when there were no active negotiations between Altria and JLI. (Willard (Altria) Tr. 1433, 1436).

### **Response to Finding No. 963**

The proposed finding is misleading as to Respondents claim that the growth teams were borne out of a time when there were no active negotiations between JLI and Altria. The proposed finding is also vague as to the timeframe being addressed by the proposed finding. There were continual discussions both jointly with JLI and at Altria about the transaction prior to and through July 2018, (*see* Response to RPFF ¶ 762), into August and through October, (*see* Responses to RPFF ¶¶ 901, 953), and then the deal was finalized in early December 2018. (*See* Response to RPFF ¶ 960; *see also* Responses to RPFF Parts V.C.4, IX.A, IX.B.2).

The proposed finding is also misleading to the extent that it suggests the formation of the growth teams represented a break from Altria’s agreement to stop competing with JLI as a condition of a deal. As with Elite and the MarkTen cigalikes, the e-cigarette growth teams were wholly inconsistent with JLI’s broad noncompete demand and were disbanded as a result of the transaction. (CCFF ¶¶ 1010-11). Even as the growth teams began to operate in October, Altria understood the bottom line regarding the pending JLI deal: “no evapor product fits with Tree.” (PX1228 (Altria) at 001).

Finally, the proposed finding is incomplete to the extent that it fails to disclose that the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

964. Willard’s memo explained that Altria had “spent the past 100 days doing a deep situation analysis” and determined that a “change in direction [was] necessary.” The company had decided that Growth Teams were the best way to continue the transformation that Altria had begun in May 2018 when it “create[ed] the Chief Growth Officer and restructur[ed] parts of the organization to accelerate [Altria’s] innovation pipeline.” (RX0842 (Altria) at 001; *see also* Willard (Altria) Tr. 1435; Gifford (Altria) Tr. 2813).

#### **Response to Finding No. 964**

The proposed finding is misleading as to Respondents’ indication that the growth teams were a departure from existing projects as opposed to an augmented approach and continuation of development. (*See* Responses to RPF ¶¶ 902-03, 08). The proposed finding is also misleading to the extent that it suggests the formation of the growth teams represented a break from Altria’s agreement to stop competing with JLI as a condition of a deal. As with Elite and the MarkTen cigalikes, the e-cigarette growth teams were wholly inconsistent with JLI’s broad noncompete demand and were disbanded as a result of the transaction. (CCFF ¶¶ 1010-11). Even as the growth teams began to operate in October, Altria understood the bottom line regarding the pending JLI deal: “no evapor product fits with Tree.” (PX1228 (Altria) at 001).

The proposed finding is also incomplete to the extent that it fails to disclose that the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

965. Roughly 60 Nu Mark employees would be terminated or transferred. (RX0842 (Altria) at 003).

#### **Response to Finding No. 965**

The proposed finding is incomplete and misleading because it ignores that Altria left in place many existing employees at Nu Mark, (RX0842 (Altria) at 003); that the growth teams were comprised of Altria’s top performers across different disciplines, such as science, regulatory affairs, finance, and marketing, (CCFF ¶ 1577); and that Altria’s CEO, Billy Gifford, told the growth teams that budget would not be a constraint, and that they could retain any third parties or hire any new talent that they needed to develop new e-cigarette products. (CCFF ¶ 1579; *see also* CCFF ¶ 438 (Altria was prepared to spend \$100 million on growth teams)).

The proposed finding is also misleading to the extent that it suggests the formation of the growth teams represented a break from Altria’s agreement to stop competing with JLI as a condition of a deal. As with Elite and the MarkTen cigalikes, the e-cigarette growth teams were wholly inconsistent with JLI’s broad noncompete demand and were disbanded as a result of the transaction. (CCFF ¶¶ 1010-11). Even as the growth teams began to operate in October, Altria understood the bottom line regarding the pending JLI deal: “no evapor product fits with Tree.” (PX1228 (Altria) at 001).

The proposed finding is also incomplete to the extent that it fails to disclose that the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

966. Nu Mark’s “focus” would be “narrow[ed] . . . to the current products in the marketplace,” while the Growth Teams—which were to be housed outside Nu Mark—would take over innovative product development work. (RX0842 (Altria) at 003). As Gifford testified, the message was “we’re going back to square zero.” (Gifford (Altria) Tr. 2802).

### **Response to Finding No. 966**

The proposed finding is misleading to the extent that it suggests the formation of the growth teams represented a break from Altria’s agreement to stop competing with JLI as a condition of a

deal. As with Elite and the MarkTen cigalikes, the e-cigarette growth teams were wholly inconsistent with JLI's broad noncompete demand and were disbanded as a result of the transaction. (CCFF ¶¶ 1010-11). Even as the growth teams began to operate in October, Altria understood the bottom line regarding the pending JLI deal: "no evapor product fits with Tree." (PX1228 (Altria) at 001). To the extent that the proposed finding suggests that the growth teams made the decision to pull Nu Mark's existing products, the proposed finding is contradicted by evidence in the record establishing that such a decision was outside the scope of the growth teams' authority. (PX7016 (Jupe (Altria) Dep. at 209)).

The proposed finding is misleading because it ignores that Altria was not "going back to ground zero." Altria had decided to augment its development efforts and gave its growth teams wide leverage to develop new products and revisit existing products or projects. (*See Responses to RPF ¶¶ 902-03, 08*). This idea, that the growth teams could easily revive projects, as was confirmed by Garnick, who suggested in September 2018 that MarkTen Elite work should be put "to bed" so it can easily be revived later "if the agile team wants to pursue it." (*See Response to RPF ¶ 913; see also Response to RPF ¶ 912*). This is consistent with Altria's approach to innovation, where learnings from prior product development work can inform future efforts. (CCFF ¶¶ 1293, 1562-63, 1565). Altria's R&D work in October included:

- CCFF ¶ 1545: Dr. Maria Gogova explained that Altria developed three nicotine salt formulations for its e-cigarette products containing different acids, which Altria referred to as RK2 technologies. (PX7015 (Gogova (Altria), Dep. at 152-56); PX4006 (Altria)). October 2018 emails between Dr. Maria Gogova, Dr. Bill Gardner, and others indicate that Altria undertook a series of R&D efforts regarding nicotine salts, and that Altria's nicotine salt research continued into late 2018.



(PX4006 (Altria); PX4519 (Altria) at 001-02). The R&D efforts included comparing Altria's nicotine salt formulas specifically with JLI's products. (PX4006 (Altria)).

- CCFF ¶ 1546: Altria was testing a version of MarkTen Elite with nicotine salts in trials with consumers as of October 2018. (PX7015 (Gogova (Altria), Dep. at 159-62); PX4006 (Altria)). The study noted that Nu Mark “currently markets MarkTen® Elite, an e-vapor product, in market. New prototypes with different nicotine salt levels and mixes for two nicotine levels . . . have been developed for the portfolio of this brand.” (PX4512 (Altria) at 001, 003; *see also* PX4513 (Altria) at 001, 003).
- CCFF ¶ 1548: In October 2018, Altria was continuing to conduct research into nicotine salts. (PX1711 (Altria) at 005-06). Altria also continued research on e-cigarette flavors, where Altria had a large toolbox of flavors to integrate into products. (PX1711 (Altria) at 007-08).
- CCFF ¶ 1549: On October 5, the same day that Altria's CEO Howard Willard sent JLI a letter restarting talks, Altria's executive team (Murray Garnick and K.C. Crosthwaite) ordered Brian Quigley to halt all research on nicotine salts for Nu Mark's products. (PX4494 (Altria) at 001). On the same day, Murray Garnick pushed against research into high nicotine and nicotine salt formulations of MarkTen Elite scheduled for October 2018 by the growth teams in a series of emails to Joe Murillo, Dr. Maria Gogova, and Richard Jupe. (PX1952 (Altria) at 001-02; PX1954 (Altria) at 001-03).

- CCFE ¶ 1582: Altria was continuing to work on research and development of next generation technologies and e-cigarette products through the end of 2018, and recommended that nicotine salts be incorporated into all of Altria’s e-cigarette products, regardless of nicotine strength. (PX1711 (Altria) at 003-08 (October 2018 “Tox Forum” presentation)). For example, Richard Jupe testified that, towards the end of 2018, Altria had brought on a number of superior technology partners for its e-cigarette business. (PX7016 (Jupe (Altria), Dep. at 190-91)). Altria’s technology partnerships gave it access to R&D capabilities that it did not possess in-house. (PX7016 (Jupe (Altria) at 44-45, 50-53)).
- CCFE ¶ 1551: As of December 10, 2018, Altria was discussing testing versions of MarkTen Elite and its cigalike products with higher nicotine strengths and nicotine salts as part of its planned growth team work, even though Elite had already been pulled from sale. (PX7015 (Gogova (Altria), Dep. at 168-73); PX4006 (Altria) PX4006 (Altria)). October 2018 emails between Dr. Maria Gogova, Dr. Bill Gardner, and others indicate that Altria undertook a series of R&D efforts regarding nicotine salts, and that Altria’s nicotine salt research continued into late 2018); PX1975 (Altria) at 001(December 2018 email string discussing nicotine content consumer research)).

The proposed finding is also incomplete and misleading because it fails to note that Altria had additional pathways to develop, acquire and launch new e-electronic cigarettes through its partnership with PMI and potential collaborations with other potential partners. (CCFE ¶¶ 1588-730). Further contrary to Respondents claim that Altria was starting at “ground zero” is the reality that Altria left in place many existing employees at Nu Mark. (RX0842 (Altria) at 003).

Finally, the proposed finding is incomplete to the extent that it fails to disclose that the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

967. After the October 5 announcement, the Growth Teams got to work. They were entirely autonomous, (Jupe (Altria) Tr. 2293-94; *see also* RX0450 (Altria) at 045), and had “free rein” to determine the direction of e-vapor product development, (Garnick (Altria) Tr. 1657; *see also* Jupe (Altria) Tr. 2309 (noting that Growth Teams had the ability to set their own direction, choose what to work on, and were not constrained “by how [Altria] ran things in the past and hierarchical decision-making”)).

### **Response to Finding No. 967**

The proposed finding is misleading to the extent that it suggests the formation of the growth teams represented a break from Altria’s agreement to stop competing with JLI as a condition of a deal. As with Elite and the MarkTen cigalikes, the e-cigarette growth teams were wholly inconsistent with JLI’s broad noncompete demand and were disbanded as a result of the transaction. (CCFF ¶¶ 1010-11). Even as the growth teams began to operate in October, Altria understood the bottom line regarding the pending JLI deal: “no evapor product fits with Tree.” (PX1228 (Altria) at 001). To the extent that the proposed finding suggests that the growth teams made the decision to pull Nu Mark’s existing products, the proposed finding is contradicted by evidence in the record establishing that such a decision was outside the scope of the growth teams’ authority. (PX7016 (Jupe (Altria) Dep. at 209)).

The proposed finding is incomplete because it fails to mention that the growth teams could easily revive projects, as was confirmed by Garnick, who suggested in September 2018 that MarkTen Elite work should be put “to bed” so it can easily be revived later “if the agile team wants to pursue it.” (*See* Response to RPF ¶ 913; *see also* Responses to RPF ¶¶ 912, 966).

The proposed finding is also incomplete to the extent that it fails to disclose that the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

968. “[A]ll e-vapor work except for MarkTen cigalike stopped at that time to enable the resources to be available to support the growth teams.” (Gardner (Altria) Tr. 3088).

### **Response to Finding No. 968**

The proposed finding is misleading for the reasons stated in response to RPF 967, specifically that the growth teams could have revived existing or older projects and products if they so desired. (*See* Response to RPF 967), The proposed finding is also incomplete and misleading because it fails to note that Altria had additional pathways to develop, acquire, and launch new e-electronic cigarettes through its partnership with PMI and potential collaborations with other potential partners. (CCFF ¶¶ 1588-730).

The proposed finding is also incomplete to the extent that it fails to disclose that the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

969. The Growth Teams were unconstrained by any budget. Then-CFO Billy Gifford “met with each of the growth teams and told them [to] not let the budget be a constraint on [their] efforts,” “giving them the freedom to start with the consumer and build from that point forward.” (PX7010 Gifford (Altria) IHT at 192-93; *see also* PX7016 Jupe (Altria) Dep. at 216-17 (noting that in the course of Altria’s normal budgeting process, which started every October, the Growth Teams were in the process of “defin[ing] . . . their budget”).

### **Response to Finding No. 969**

The proposed finding is misleading to the extent that it suggests the formation of the growth teams represented a break from Altria’s agreement to stop competing with JLI as a condition of a deal. As with Elite and the MarkTen cigalikes, the e-cigarette growth teams were wholly

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inconsistent with JLI's broad noncompete demand and were disbanded as a result of the transaction. (CCFF ¶¶ 1010-11). Even as the growth teams began to operate in October, Altria understood the bottom line regarding the pending JLI deal: "no evapor product fits with Tree." (PX1228 (Altria) at 001). The last citation of the proposed finding is misleading because [REDACTED] (CCFF ¶¶ 1585-86).

The proposed finding is also incomplete to the extent that it fails to disclose that the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

970. But even with substantial authority and resources, the Growth Teams had a long way to go. As Garnick explained at trial, "at the time of these growth teams, we didn't even have a product concept in mind, let alone a leapfrog concept. . . . The idea was to bring some of our best scientists together. . . and come up with a product concept." That product would then require a PMTA before it could be sold. (Garnick (Altria) Tr. 1661-62; *see also* Jupe (Altria) Tr. 2309, 2313 (noting that autonomy was intended to facilitate product development by 2023, which was an "aggressive" schedule); PX7000 Garnick (Altria) IHT at 132 ("There was no concept of a product they were working on. It was a bunch of people in a room saying, okay, think of something."); [REDACTED]).

### **Response to Finding No. 970**

The proposed finding is misleading for the reasons stated in response to RPF ¶ 966. (*See* Response to RPF ¶ 966). In addition, it ignores that the growth teams had access to the pipeline of products and the existing products from which to continue development and commercialization. Specifically, the growth teams had access to the work Nu Mark had done in August 2018 to prepare a PMTA for Elite 1.0 and getting an improved Elite 2.0 product through the PMTA process. (CCFF ¶¶ 1541, 1551, 1155, 1286-300). In fact, as of August 30, 2018, Altria planned to submit a PMTA for MarkTen Elite 2.0 in January 2022. (CCFF ¶ 1299). Altria continued to develop Elite 2.0 into

at least October. (CCFF ¶¶ 1291-94). In addition, the growth teams had access to products develop and acquire { [REDACTED] } and the array of work Nu Mark had done over the years-long effort in e-cigarettes. (See Response to RPF ¶ 302; CCFF ¶¶ 1588-730 (*in camera*)). Respondents further ignore evidence that Altria projected its growth teams would have a new product ready by 2020, and acknowledged the possibility that a new platform or acquired products could be in place in 2019. (CCFF ¶ 1581). Even according to Respondents' proposed findings, Altria had the capability and mindset to improve acquired products and launch them. (See RPF ¶¶ 168, 330; *see also* CCFF ¶ 1531).

The proposed finding is also incomplete to the extent that it fails to disclose that the growth teams and other evidence bolster and demonstrate that but for the transaction with JLI, Altria would still be competing in the closed system e-cigarette market. (CCFF ¶¶ 1408-15; *see also* CCFF ¶¶ 411-544).

**b. Altria Struggled To Find The Right Talent For The Growth Teams**

971. To guide the Growth Teams, Altria hired Bassiouni Khalid as Senior Vice President of Innovative Product Development. (Jupe (Altria) Tr. 2317; RX0842 (Altria) at 002).

**Response to Finding No. 971**

To the extent that the proposed finding stands for the proposition that Altria lacked individuals with innovation experience, it is contradicted by evidence in the record that Altria retained a number of individuals who had significant experience working on reduced harm product development efforts. (CCFF ¶¶ 421-22; Response to RPF ¶ 965; *see also* CCFF ¶¶ 451, 2013-14).

972. Altria had been trying to hire someone with innovation experience “for a number of years,” and in 2018, then-Chief Growth Officer Crosthwaite had led a “very active effort . . . to hire somebody with that skill set at a relatively senior level.” (PX7031 Willard (Altria) Dep. at 264; *see also* PX7024 Crosthwaite (Altria/JLI) Dep. at 269 (describing the search for talent as “very, very challenging”); PX7015 Gogova (Altria) Dep. at 317-19 (noting

Altria was in need of a leader who “could help [the Growth Teams] and teach [them] to change the culture and mindset” of the team members, as well as leverage an “external network with other innovators, potentially manufacturing facilities [and] academia”).

### **Response to Finding No. 972**

To the extent that the proposed finding stands for the proposition that Altria lacked individuals with innovation experience, it is contradicted by evidence in the record that Altria retained a number of individuals who had significant experience working on reduced harm product development efforts. (CCFF ¶¶ 421-22; Response to RPF 965; *see also* CCFF ¶¶ 451, 2013-14). The proposed finding is also incomplete, misleading, unsupported, and unreliable as to Altria’s claim that it could not find qualified candidates with e-vapor knowledge for the reasons set forth in response to RPF 977. (*See* Response to RPF 977).

973. When Altria internally announced it had hired Khalid, it touted him as an “innovation leader with a proven track record,” and a successful Amazon executive who had “led platform development for [Amazon] Alexa.” (RX0842 (Altria) at 002).

### **Response to Finding No. 973**

To the extent that the proposed finding stands for the proposition that Altria lacked individuals with innovation experience, it is contradicted by evidence in the record that Altria retained a number of individuals who had significant experience working on reduced harm product development efforts. (CCFF ¶¶ 421-22; Response to RPF 965; *see also* CCFF ¶¶ 451, 2013-14).

974. But within days of Khalid joining Altria, the company realized that it had been duped: Khalid was a “fraud” who had plagiarized his resume, invented references, and entirely fabricated his claimed employment history. (Jupe (Altria) Tr. 2319-20; RX0248 (Altria) at 002-03).

### **Response to Finding No. 974**

To the extent that the proposed finding stands for the proposition that Altria lacked individuals with innovation experience, it is contradicted by evidence in the record that Altria

retained a number of individuals who had significant experience working on reduced harm product development efforts. (CCFF ¶¶ 421-22; Response to RPF ¶ 965; *see also* CCFF ¶¶ 451, 2013-14).

975. Altria was “very disappointed” and “quite embarrassed” by the situation. (Jupe (Altria) Tr. 2320).

#### **Response to Finding No. 975**

To the extent that the proposed finding stands for the proposition that Altria lacked individuals with innovation experience, it is contradicted by evidence in the record that Altria retained a number of individuals who had significant experience working on reduced harm product development efforts. (CCFF ¶¶ 421-22; Response to RPF ¶ 965; *see also* CCFF ¶¶ 451, 2013-14).

976. Altria terminated Khalid’s employment and put Jupe in charge of the Growth Teams. (Jupe (Altria) Tr. 2320). But Jupe’s background was not in developing innovative products or electronic-based products; he is a physicist whose primary experience is in the design and manufacturing of cigarettes. (Jupe (Altria) Tr. 2198-2202).

#### **Response to Finding No. 976**

The proposed finding is misleading and inaccurate regarding Jupe’s experience in e-vapor. Richard Jupe is currently the Vice President of Product Development at Altria Client Services, a position he has held since 2012. (CCFF ¶ 2013). Jupe’s product development group provided services to Nu Mark. (CCFF ¶ 2013). Jupe assumed product development responsibilities for e-vapor products around the third quarter of 2017. (CCFF ¶ 2013). Jupe’s product development group was accountable for the design, development, and specifications of e-vapor products. (CCFF ¶ 2014). The group was accountable for “writing all the requirements for manufacturing as well as providing the products to Altria’s regulatory affairs and regulatory sciences group for demonstration through the FSA pathways.” (CCFF ¶ 2014). A sample of Jupe’s documents show that he was engaged on Elite 2.0, (PX1914 (Altria) (Elite acquisition); PX1926 (Altria) (Elite 2.0



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design matrix); that he was directly involved in fixing the leaking associated with MarkTen Elite, (PX1211 (Altria); that he was directly involved with Altria’s relationship with PMI, (PX1919 (Altria); PX1912 (Altria); PX1913 (Altria); that he was involved in R&D competition, (PX1657 (Altria); PX1715 (Altria) (*in camera*); PX1738 (Altria); and that he received documents regarding the agile teams in September 2018, (PX1016 (Altria)), Elite 1.0 and 2.0, (PX1671 (Altria)).

To the extent that the proposed finding stands for the proposition that Altria lacked individuals with innovation experience, it is contradicted by evidence in the record that Altria retained a number of individuals who had significant experience working on reduced harm product development efforts. (CCFF ¶¶ 421-22; Response to RPF ¶ 965; *see also* CCFF ¶¶ 451, 2013-14).

977. Altria began again to look for external talent to replace Khalid, but “there was no other candidate . . . that came as close to being hired.” Altria “found it difficult to find someone who had the expertise that [it was] looking for who was willing to move to Richmond.” (PX7000 Garnick (Altria) IHT at 82; *see also* PX7024 Crosthwaite (Altria/JLI) Dep. at 269 (similar)).

### **Response to Finding No. 977**

The proposed finding is incomplete, misleading, unsupported, and unreliable as to Altria’s claim that it could not find qualified candidates with e-vapor knowledge. First, Altria had access to resources and assistance {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}; *see also* CCFF ¶¶ 1603-619). Second, Altria had the ability to grow its extensive scientific and regulatory resources, (*see* CCFF ¶¶ 507-14), given that Altria had been involved e-cigarettes since well before 2013. (*See* Response to RPF ¶ 276). Third, there were several closed-system competitors from which Altria could have tried to recruit from—JLI,

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Reynolds, Logic, NJOY, and Blu. (See CCFF ¶¶ 153-55, 165-68, 176, 183-84, 190). In fact, [REDACTED] (see Huckabee (Reynolds) Tr. 421 (discussing RX1711) (*in camera*)); PX8008 at 015 (¶ 29), 027 (signature block) (Huckabee (Reynolds), Decl.), [REDACTED]. Furthermore, to the extent that the proposed finding stands for the proposition that a legacy tobacco firm located in the Southeast faces challenges recruiting sufficient innovation talent for its e-cigarette business, Reynolds faced similar challenges and yet did not discontinue its own e-cigarette business. (CCFF ¶¶ 1132-43).

Finally, the proposed finding is unreliable and supported exclusively by self-serving testimony of Altria executives.

## **2. Altria Simultaneously Renewed Negotiations With JLI**

978. On October 5, 2018, Willard sent a letter to JLI, which Altria saw as “one last effort” to engage with JLI to “see whether some of these different terms [would be] of any interest to them.” (PX7031 Willard (Altria) Dep. at 226; *see also* PX2152 (JLI)).

### **Response to Finding No. 978**

The proposed finding is incomplete, misleading, vague, and unreliable in its claim that Altria saw its October 5 letter as “one last effort” to engage with JLI. The proposed finding is contradicted by evidence in the record that there were ongoing internal discussions and external communications between Respondents about the transaction during the month of September. (CCFF ¶¶ 752-72). This proposed finding also ignores the early October communications between Altria and JLI leading up to the October 5 letter—specifically Willard and Pritzker’s conversation about terms—and Altria’s October 4 Board meeting, where Garnick’s notes { [REDACTED]

**a. Altria's October 5, 2018 Letter Contained Key Concessions About Payment Structure And Control**

979. JLI viewed the October 5 letter as a “turning point” because it “solved” several of the disputes between the parties. (PX7021 Pritzker (JLI) Dep. at 137). Specifically, the letter included several key concessions by Altria: (1) Altria would purchase a 35 percent economic interest; (2) Altria initially would “receive non-voting shares . . . , with the parties cooperating to seek regulatory approvals to convert those non-voting shares into voting shares”; (3) the “full investment would be made at closing”; (3) JLI would not be required to split its domestic and international business; and (4) Altria would agree to a standstill to prevent it from acquiring additional shares or control of JLI following the investment. (PX2152 (JLI) at 002-03; *see also* PX7021 Pritzker (JLI) Dep. at 119 (discussing points that were critical to JLI in August)).

**Response to Finding No. 979**

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be finalized, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86). The proposed finding is vague and unsupported as to the characterization of “several key concessions.”

980. According to Burns, the “major points that were changed relative to previous discussions” all related to control and supporting JLI's mission through support services. (PX7025 Burns (JLI) Dep. at 212; *see also* PX7031 Willard (Altria) Dep. at 225-26 (stating that the terms in the letter that were “particularly important to JLI, particularly the first couple of terms” related to deal structure and control, and were “different, significantly different than the last deal [the parties] were discussing”)).

**Response to Finding No. 980**

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be finalized, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-

system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

981. Altria's new proposal for 35 percent ownership "divid[ed] what [Altria] would have preferred and what [JLI] would have preferred, which was less than that." (Pritzker (JLI) Tr. 807; *see also* PX7021 Pritzker (JLI) Dep. at 138 ("I thought 35 percent was a good faith attempt to reach a number that might be acceptable to both parties . . .")). JLI "did not want to give up control" but it also wanted the investment to "be meaningful on [Altria's] part," so this was "the right zip code or area in terms of size." (PX7025 Burns (JLI) Dep. at 211-12). And, by proposing a 35 percent interest, the letter "made the likelihood of Altria's getting to a control position less likely" and made the "cash outlay" more feasible for Altria. (Pritzker (JLI) Tr. 837).

#### **Response to Finding No. 981**

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be finalized, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

982. In addition, JLI was pleased to see that "Altria would agree to a standstill that would prevent it from acquiring additional shares or engaging in a business combination with [JLI]." (PX2152 (JLI) at 003; *see also* PX7025 Burns (JLI) Dep. at 212). This was important to JLI because it did not want to "give [Altria] a path to control unless it was [JLI's] desire to give them a path to control," and a standstill meant that Altria "could not edge their way into control by purchasing other shares above the 35 percent level." (PX7025 Burns (JLI) Dep. at 212). With the standstill provision, JLI "absolutely knew this was a non-control transaction." (PX7025 Burns (JLI) Dep. at 212).

#### **Response to Finding No. 982**

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be finalized, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

983. Finally, by offering “a proposal that would encompass the entire company, [the letter] gave the promise that actually [the companies] could get to an agreement on value.” (Pritzker (JLI) Tr. 836).

#### **Response to Finding No. 983**

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be finalized, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

984. Altria's concessions on ownership and control persuaded JLI to reengage. (PX2117 (JLI) at 052 (JLI Board minutes confirming that after discussing the October 5 letter, the Board authorized Pritzker, Valani, and Burns to reengage with Altria)). “[F]or the first time in the entire time that [the parties had] been talking,” Pritzker believed that the parties “had the outline of a transaction that might be possible.” (PX7021 Pritzker (JLI) Dep. at 137).

#### **Response to Finding No. 984**

The proposed finding is unsupported and misleading as to Respondents' conclusion that “Altria's concessions on ownership and control persuaded JLI to reengage.” The Board minutes do not confirm the reason they authorized re-engagement with Altria. (PX2117 (JLI) at 052

(minutes mention a letter from Richard proposing to re-engage with no discussion as to why JLI was ready to re-engage)). The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be finalized, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

**b. The October 5 Letter Did Not Alter The Parties' Understanding Of The Proposed Noncompete Reflected In The August 19 Term Sheet And August 22 Joint Issues List**

985. In contrast to the concessions on ownership and control, nothing had changed with respect to the proposed noncompete. Willard's letter simply reiterated that, if a transaction ultimately were reached, Altria would agree "not [to] compete, in a manner consistent with [the parties'] previous discussions." (PX2152 (JLI) at 003).

**Response to Finding No. 985**

The proposed finding is misleading for the reasons set forth in response to RPF ¶ 986.

(See Response to RPF ¶ 986).

986. The reference to "previous discussions" harkened back to the August 19 term sheet and August 22 issues list, which contained no "cease to operate" language and provided that Altria would not compete with JLI with future e-vapor products, but it would "keep MarkTen and MarkTen Elite on the market until they could be divested or contributed pursuant to FTC review." (PX7021 Pritzker (JLI) Dep. at 204-05; *see also* Willard (Altria) Tr. 1217, 1416-17; Pritzker (JLI) Tr. 714-15, 863-70 (indicating Pritzker understood "consistent with [the parties'] previous discussions" to mean "consistent with prior draft[s] of the term sheets," like the August 19 term sheet)). There were no other term sheets exchanged between late August and October 5. (Willard (Altria) Tr. 1416-17; Garnick (Altria) Tr. 1753-54).

**Response to Finding No. 986**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

First, Respondents fail to address the full language regarding the non-compete contained in Altria's October 5, 2018 letter. The letter provided in Term 6:

6. Altria would agree that it and its current and future subsidiaries will not compete, in a manner consistent with our previous discussions, in the U.S. e-vapor market for any period, exclusive of the aforementioned transition period, during which it provides support services.

(CCFF ¶ 961).

Second, Respondents' claim that the reference to Willard's language "Altria would agree . . . not [to] compete, in a manner consistent with our previous discussions" pertained only to the August 19 term sheet and August 22 issues list, is incomplete, misleading, and contrary to the weight of the evidence. Respondents ignore that Pritzker and other witnesses testified that "previous discussions" included "all" previous discussions, not limited to the two formal documents Respondents suggest. (CCFF ¶ 785). Respondents also ignore the plain meaning of "previous discussions," which would pertain to previous communications not limited in any way by Willard. Moreover, Respondents ignore that by this point in time, October 5, 2018, JLI and Altria were in agreement on Term 6. Specifically:

- Pritzker understood the non-compete ("Term 6") in the October 5 letter to be referring to "all of the discussions that we had" and that to him, what the non-compete suggested "was there was an agreement on that." (CCFF ¶ 785). Pritzker did not see Term 6 as a game changer, but saw it as Altria simply saying, "we'll do the thing with the noncompete that we previously exchanged views on." (CCFF ¶ 785). Pritzker testified that his prior conversations with Willard suggested that Altria was willing to divest if necessary, and that it had not "gotten to the point

where there was any additional agreement required, as far as I was concerned, on that issue.” (CCFF ¶ 964).

- Willard testified that Term 6 of his October 5, 2018 letter was referring to a topic “which it sounds like we had come to prior agreement on [ . . . ] .” (CCFF ¶ 962).
- Valani viewed this Term 6 of Willard’s October 5, 2018 letter “similarly to the other provisions in the previous term sheet, which is that their obligation to us was to not be competitive and that we assumed that they would find the legal means to do so and that we’re prepared to give them [] any flexibility as long as the result was okay.” (CCFF ¶ 963).

In addition, the proposed finding ignores the actual previous discussions between JLI and Altria regarding the non-compete and the concept that Altria would cease to operate its e-cigarettes business. By August 19, 2018, JLI had twice proposed term sheets that included that Altria divest/contribute/cease to operate its e-cigarette business. (*See* CCFF ¶ 894 (July 30, 2018 JLI term sheet); CCFF ¶ 913 (discussing the August 4, 2018 JLI term sheet). The proposed finding further ignores the evidence that demonstrates that on August 4, 2018, JLI expressly contemplated MarkTen and MarkTen Elite would be “shutdown” as part of the non-compete. (CCFF ¶ 694). The proposed finding further ignores the context of the discussions in July and August 2018: that JLI’s intention was that Altria not compete, JLI communicated that to Altria, and JLI understood that Altria would just “shutdown,” (*see* Responses to RPF ¶¶ 762, 766, 783), and that Altria’s August 6, 2018 documents indicate it told JLI it would “potentially exit our own vapor business,” and shortly thereafter, when Altria struck the divest/contribute/cease to operate clause, JLI told Altria that it “was not acceptable to us.” (*See* Response to RPF ¶ 804). Furthermore, Respondents ignore Willard’s talking points for the August 18, 2018, meeting that explain why Altria struck the



divest/contribute/cease to operate clause, with the notes indicating that the removal was due to antitrust concerns and not due to substantive disagreement. (*See* Response to RPF ¶ 804). After the August 18, 2018 meeting, the divest/contribute/cease to operate clause was eliminated and the term “shutdown” was removed from the non-compete clause as to MarkTen and MarkTen Elite. (*See* Response to RPF ¶ 804).

To the extent that Respondents are trying to argue that because the “cease to operate” language was removed from the August 19, 2018 (also called August 18, 2018) term sheet because that the concept was eliminated, Respondents ignore that after the October 5, 2018 letter, additional term sheets expressly contemplated Altria “otherwise exiting the marketing and sale of products in the Field.” (CCFF ¶¶ 966 (October 15, 2018 term sheet), 967 (October 31, 2018 term sheet)). In any case, in the August 19 (also called August 18) term sheet, the October 5 term sheet, the October 15 term sheet, and the final October 31 term sheet, it was clear that Altria would have to rid itself of its e-cigarette business and not compete against JLI. (CCFF ¶¶ 957, 962-67).

Respondents cite to testimony from Pritzker’s deposition that Complaint Counsel objected to and that was derived from leading and vague questions from JLI’s counsel. (PX7021 Pritzker (JLI) Dep. at 204-05). Willard’s trial testimony does not support Respondents’ proposition and is vague. (Willard (Altria) Tr. 1217, 1416-17). Respondents misrepresent Pritzker’s trial testimony, where when asked about “previous discussions”—he did not limit his testimony to solely the August 19 term sheet as Respondents indicate. (Pritzker (JLI) Tr. 714-15). Finally, Respondents’ citation to eight pages of Pritzker testimony does not appear to support Respondents’ proposed finding. (Pritzker (JLI) Tr. 863-70).

987. Neither side was particularly concerned with the noncompete. Willard only included it in the October 5 letter because he thought “it was probably helpful in that at least some of what was in here was not a point of disagreement.” (PX7031 Willard (Altria) Dep. at 227-

28). “[C]ompetition in the future was not typically a contentious term,” and it had not caused the negotiations to break down. (PX7031 Willard (Altria) Dep. at 228).

### **Response to Finding No. 987**

To the extent that the proposed finding stands for the proposition that both Altria and JLI clearly understood that Altria could not continue to compete in the e-cigarette business if there was to be a deal, Complaint Counsel does not disagree. To the extent that the proposed finding stands for the proposition that the noncompete issue was not a critical part of the negotiations, it is incomplete, misleading, and contrary to the weight of the evidence. (CCFF ¶¶ 867-924; *see* Response to RPF ¶ 791).

988. Similarly, Pritzker believed the noncompetition provision was “the least of [his] concerns,” and he “had a full belief that [the parties] would be able to reach an understanding on that based on . . . as [Willard] says, [‘]our previous discussions.[’]” (PX7021 Pritzker (JLI) Dep. at 141). JLI did not view “point number 6” (the noncompete) as a deal breaker in the negotiations, and it “always believed that [Altria] would follow a waterfall of likely divesting the business, which somebody else would pick it up and continue to compete.” (PX7025 Burns (JLI) Dep. at 160-61).

### **Response to Finding No. 988**

To the extent that the proposed finding stands for the proposition that the noncompete issue was not a critical part of the negotiations, it is incomplete, misleading, and contrary to the weight of the evidence. (CCFF ¶¶ 867-924; *see* Response to RPF ¶ 791). The last clause of the proposed finding is incomplete, misleading, and contrary to the weight of the evidence. Respondents ignore the copious evidence regarding Altria shutting down its e-cigarette business. (*See* Responses to RPF ¶¶ 762, 766, 783, 804). Specifically:

- On July 27, 2018, after Gross was scheduled to speak to Willard on July 24, (CCFF ¶ 673), Gross emailed Pritzker of JLI that stated that Gross was “under the impression that [Altria] would just shut down Mark 10.” (CCFF ¶ 675). At trial, Pritzker testified that he understood “Mark 10” to be referring generally to Altria’s

competitive products, and understood “shut down” to mean the products would be gone and Altria no longer competing. (CCFF ¶ 971). Pritzker’s testimony relating to the late July negotiations acknowledged shutting down Altria’s e-cigarettes business was an option: “various ideas came up as to what might be allowed or required by the FTC . . . and perhaps shut down was a possibility.” (Pritzker (JLI) Tr. 686).

- On July 30, 2018, JLI sent Altria a term sheet that included “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)” its e-cigarette business. (CCFF ¶ 894; *see also* CCFF ¶¶ 895-97). It also included a non-compete: “Richard agrees, for so long as it owns at least 5% of Jack’s outstanding shares, to refrain from competing anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their divestiture or contribution as described above).” (CCFF ¶ 686).
- On August 4, 2018, JLI sent another term sheet. The divest/contribute/cease to operate provision remained the same. (PX2570 (JLI) at 005). The non-compete provision was similar to the July 30 term sheet, but this time the word “shutdown” was added: “Richard agrees, for so long as it owns at least 5% of Jack’s outstanding shares, to refrain from competing anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their divestiture, shutdown, or contribution described above).” (CCFF ¶ 694).

- Altria’s August 5, 2018 draft talking points for Willard state: “If we establish this partnership, then we expect that Altria will: . . . potentially exit our own vapor business . . .” (CCFF ¶ 698; *see* CCFF ¶¶ 696-97).
- On August 9, 2018, Altria pushed back on JLI’s instruction by striking the divest/contribute/cease to operate clause and revising the non-compete in a proposed term sheet, (CCFF ¶¶ 705-08), and a few days later on August 15, 2018, JLI told Altria that the push back was unacceptable. (CCFF ¶¶ 918, 921-22). Willard’s August 18, 2018 talking points explained Altria’s decision to strike the divest/contribute/cease to operate clause from the term sheet was driven by antitrust concerns and not by substantive disagreement and provided reassurance that Altria agreed to exit e-cigarettes and be bound by a robust non-compete. (CCFF ¶¶ 730-31).
- 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.” (CCFF ¶ 782; *see also* CCFF ¶ 785).
- JLI did not care whether Altria divested its e-cigarette business; JLI only cared that Altria found a way to no longer compete in e-cigarettes, (CCFF ¶¶ 898-905), and after October 5, the parties continued to discuss Altria exiting e-cigarettes. (CCFF ¶¶ 800-01, 828).

Burns testimony is also self-serving and therefore unreliable. His testimony is also vague as to what he meant by Altria would “follow a waterfall of likely divesting” its e-cigarette business. To the extent Burns is referring to the July 30, 2018, JLI term sheet’s provision that states, “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)” its e-cigarette business, (CCFF ¶ 894), his testimony is misleading and contradicted by other evidence in the record that shows JLI did not care how Altria got rid of its products but only cared about the end result. (CCFF ¶¶ 898-906).

**c. The October 15, 2018 Term Sheet Demonstrated That The Key Concessions Focused On Valuation And Control, Not The Noncompete**

989. On October 10, 2018, the JLI Board, citing the “recent letter received from [Altria] proposing to re-engage in discussions regarding a potential investment and strategic relationship on certain specified terms,” authorized Pritzker, Valani, and Burns to “re-engage with Richard and to obtain further clarification of its proposal.” (PX2117 (JLI) at 052).

**Response to Finding No. 989**

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be finalized, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

990. But there still was a long way to go to reach an agreement. The parties spoke on October 11 and, following the call, Devitre observed that Pritzker “was not showing interest in doing a deal. I guess it’s off. Everyone tried their best!” (PX4168 (Altria) at 001).

**Response to Finding No. 990**

The proposed finding is unsupported, misleading, and conclusory. The first sentence should be disregarded because it contains no citations to the record and makes an inferential leap based on the sixteen words in the second sentence quote, which were preceded by more than a year of discussions. (CCFF ¶¶ 629-67 (noting discussions between JLI and Altria started in 2017)). In

the proposed finding, Respondents misleadingly omit negotiations between JLI and Altria between the October 5 letter and October 11, 2018. (CCFF ¶¶ 788-792), and that JLI authorized engagement with Altria on October 10, 2018. (PX2117 (JLI) at 052). Respondents further omit that Willard had discussed the terms of the October 5 letter with Pritzker on the phone and that Pritzker thought the terms Willard proposed were sufficiently responsive to JLI's concerns that the parties could move forward. (CCFF ¶ 775). Moreover, Respondents ignore that the October 5 letter sought JLI's response by October 12 and Pritzker committed to respond by that deadline. (CCFF ¶ 787).

The proposed finding is unreliable because even Respondents admit in their own proposed findings that Devitre was wrong about the deal being over. (*See* RPF ¶ 991). The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be finalized, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

991. The next morning, on October 12, Pritzker informed Willard that JLI was amenable to the terms set forth in the October 5 letter. (RX1265 (Altria) at 007).

#### **Response to Finding No. 991**

Complaint Counsel does not disagree with the proposed finding and adds that Willard texted Devitre on October 12 that he had spoken with Pritzker and JLI had "[a]greed on term in the letter." (CCFF ¶ 793).

992. Shortly thereafter, Altria reported to members of the deal team that, "it appears that Tree is still alive (if on life support)." (RX0283 (Altria) at 001).

#### **Response to Finding No. 992**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. The proposed finding ignores evidence that shows that on October 10, 2018, the JLI Board authorized continued engagement with Altria. (PX2117 (JLI) at 052). Respondents rely on a heavily redacted email to support their proposition. (RX0283 (Altria) at 001). Even with the limited un-redacted language, the email instructed WLKR (Wachtell, Altria's outside law firm) to start working on something, which indicates that the deal is not on "life support" and that the quoted language is dramatic. (RX0283 (Altria) at 001).

Furthermore, the proposed finding is incomplete and misleading for the reasons set forth in response to RPF 993. (*See* Response to RPF 993).

993. That same day, Willard provided an update to the Altria Board. He indicated that Altria had proposed "a 35% stake in the entire company," and subsequently the parties had "agreed that it made sense for [Altria] to send [JLI] a revised draft term sheet." (PX1350 (Altria) at 001). Willard indicated Altria would send JLI the revised term sheet "next week." (PX1350 (Altria) at 001).

### **Response to Finding No. 993**

The proposed finding is incomplete and misleading because it omits the point Willard's update to the Altria Board describes the discussions with JLI as "on-going negotiations." (PX1350 (Altria) at 001).

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be finalized, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

994. On October 15, Altria sent JLI a term sheet reflecting the terms proposed in the October 5 letter. (PX1269 (Altria) at 001). Regarding antitrust clearance, this term sheet continued to propose that both parties would “use reasonable best efforts to seek Antitrust Clearance” and would “agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria’s] e-vapor business.” (PX1269 (JLI) at 006-07). “[I]f necessary to obtain Antitrust Clearance,” Altria would offer to divest its e-vapor assets, and if those assets were not otherwise transferred to a third party, Altria would contribute such assets to JLI upon receipt of antitrust clearance. (PX1269 (JLI) at 006-07; *see also* Pritzker (JLI) Tr. 868).

#### **Response to Finding No. 994**

The proposed finding is misleading because before the parties sought HSR clearance, Altria removed its pod-based products and discontinued its cigalike products. (CCFF ¶¶ 33-34, 47-48, 131-32). The proposed finding is incomplete and misleading in that it fails to mention that the October 15 term sheet expressly contemplated Altria “otherwise exiting the marketing and sale of products in the Field.” (CCFF ¶ 966).

995. The October 15 term sheet also included a noncompete provision, with an identical carve-out as the August 19 term sheet for MarkTen cig-a-like and MarkTen Elite “prior to their contribution or divestiture.” (PX1269 (Altria) at 008). Altria revised portions of the noncompete unrelated to the treatment of its existing products, including by removing JLI’s proposals from the August 19 term sheet that the noncompete apply “anywhere in the world” or to “current and future affiliates” (rather than subsidiaries). (PX1269 (Altria) at 008; *see also* PX1432 (Altria) at 024; *supra* ¶ 828). The revised proposal contemplated that Altria would “refrain, and . . . cause its current and future subsidiaries to refrain, from competing in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above). . . . The non-compete will terminate upon the termination of the Services Term.” (PX1269 (Altria) at 008-09).

#### **Response to Finding No. 995**

The proposed finding is misleading, undefined, and vague as to the term “carve out.” (*See* Responses to RPF ¶¶ 789, 822, 825, 827). The term “carve out” is particularly vague in light of the addition of a provision that contemplated Altria “otherwise exiting the marketing and sale of [e-cigarette products],” which would include exiting its current products (MarkTen Elite and MarkTen):



- Services provided upon earlier of (i) contribution described above or (ii) Richard otherwise exiting the marketing and sale of products in the Field (“Contribution Date”). Richard agrees, effective from the Contribution Date and thereafter during the Services Term to provide the following services in the U.S. (the “Contribution Date Services,” and together with the Purchase Date Services, the “Services”):
  - assist with direct marketing programs, including inserts and/or onserts;
  - fully support Jack’s efforts to gain distribution, display and in-store support for Jack’s products, including support of point of sale prominence for Jack’s products alongside Richard’s; and
  - grant Jack access to Richard’s best in class infrastructure (including distribution) to maximize the growth of Jack.

(CCFF ¶ 800). The underlined language in this provision was added by Altria, including the reference to Altria “otherwise exiting the marketing and sale of products in the Field.” (CCFF ¶ 801).

996. Although the parties had reengaged in discussions, a deal was far from struck. In a text to Peter Gross (JLI’s banker) on October 16, Devitre wrote, “We have been through ups and downs before. Long way to go before this is over.” (PX4168 (Altria) at 002).

### **Response to Finding No. 996**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence because JLI and Altria—less than two weeks later, on October 29, 2018—reached an agreement on terms. (CCFF ¶¶ 821-25).

The proposed finding is misleading in that it fails to mention that, regardless of other deal-related issues that needed to be finalized, JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing e-cigarette business and not competing in the future for closed-system e-cigarettes. (CCFF ¶¶ 867-994). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

**D. In Late October, Following A Meeting With FDA, Altria Announced Its Decision To Withdraw Pod Products And Non-Traditional Cig-A-Like Flavors**

**1. Altria Previewed Its Planned Response To The September 12 Letter At The FDA Meeting On October 18**

997. On October 18, Altria met with Commissioner Gottlieb to discuss FDA's September 12 letter and Altria's planned response. (*See, e.g.*, Willard (Altria) Tr. 1288, 1446).

**Response to Finding No. 997**

The proposed finding is incomplete because it fails to note that the October 18, 2018 meeting with Commissioner Gottlieb occurred after Willard sent his October 5, 2018, letter to JLI's senior negotiators and after Willard texted Devitre that JLI had "[a]greed on term [sic] in the letter." (CCFF ¶¶ 779-82, 793). The proposed finding is also incomplete because it fails to note that Altria and JLI exchanged a revised term sheet three days before the October 18, 2018 meeting and reached agreement on a final term sheet less than two weeks after the October 18, 2018 meeting. (CCFF ¶¶ 797-804, 825).

998. At the meeting, Altria informed FDA of its intention to withdraw both its pod products and its non-traditional cig-a-like flavors from the market in light of FDA's concerns about the "epidemic" rate of youth e-vapor use. (Willard (Altria) Tr. 1448-50; Garnick (Altria) Tr. 1764-65).

**Response to Finding No. 998**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

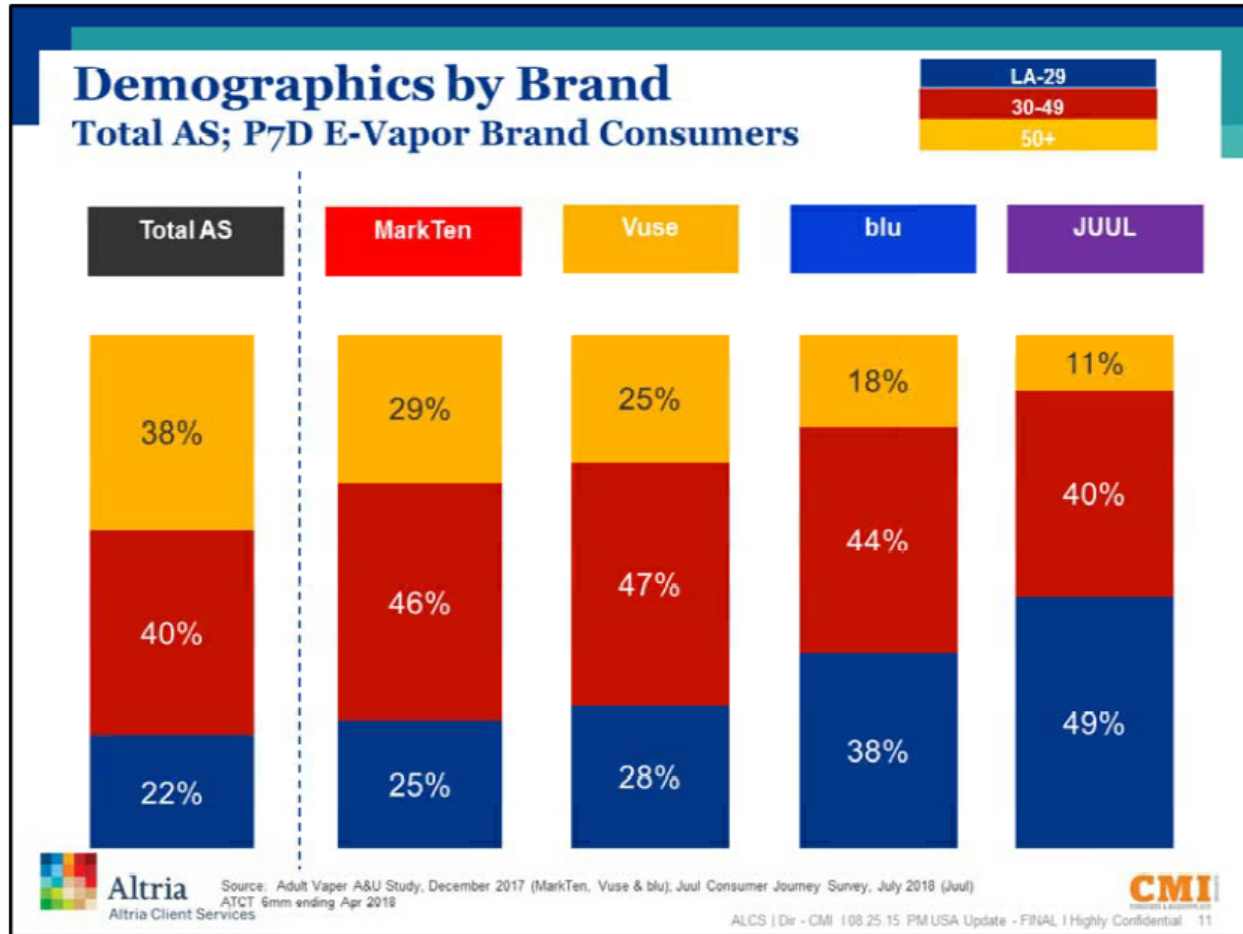
The proposed finding is incomplete for the reasons cited in response to RPF 997. (*See* Response to RPF 997 (Pritzker testified that "the concern is [Altria] could develop other products or even release once again MarkTen and [] MarkTen Elite back into the market. So there were still concerns about competition . . . .")). The proposed finding is misleading in that it fails to mention that JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-

994). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

To the extent that the proposed finding implies that the "FDA's concerns about the 'epidemic' rate of youth e-vapor use" was the true reason that Altria withdrew "its pod products and its non-traditional cig-a-like flavors from the market," the proposed finding is misleading and contrary to the weight of the evidence. (CCFF ¶¶ 1237-53, 1345-52, 1379-82, 1394-95).

Altria employees consistently testified that Altria's e-cigarette products did not have a youth initiation issue. (CCFF ¶¶ 1345-52; *see* Response to RPFF ¶ 1002). On October 25, 2018, Willard sent a letter to FDA Commissioner Scott Gottlieb in which he wrote "we do not believe we have a current issue with youth access to or use of our pod-based products." (CCFF ¶ 1348). When asked whether Altria had any data that suggested that Elite was contributing to the youth vaping epidemic, Magness testified "No, we did not with regard to Elite." (CCFF ¶ 1349). Pascal Fernandez testified that Altria had no evidence that its e-vapor products were used by minors. (CCFF ¶ 1350). [REDACTED]

[REDACTED] } Willard testified that Altria had no reason to believe youth were using MarkTen Elite. (CCFF ¶ 1352). An August 2, 2018 presentation prepared by Brian Quigley and circulated to Altria's leadership showed that the MarkTen brand tended to have fewer users in younger age groups than competing brands. (PX1174 (Altria) at 013).



(PX1174 (Altria) at 013).

In contrast, Altria executives were aware that JUUL appealed to non-tobacco users, particularly youth, prior to the transaction. (CCFF ¶¶ 1248-53). Craig Schwartz stated in an August 15, 2018 email to Altria’s former chairman that “40%” of Juul’s sales were to consumers aged between the legal age at the time and 21, with a “significant initiation component” which he anticipated would “present problems with the FDA when it seeks Market Authorization to continue selling beyond 2022.” (CCFF ¶ 1249). Schwartz added that the “big issue” for JLI was “clearing FDA by 2022,” adding that “cleaning [Juul] up to do so would be dilutive.” (CCFF ¶ 1249). Paige Magness testified: “At the time of the transaction, I remember being concerned about, based on my understanding of PMTAs, that the youth usage issue would be very difficult for JUUL in a

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PMTA context.” (CCFF ¶ 1250). Willard testified that the JUUL product’s ability to convert adult smokers “came with a negative in that as more adults chose e-vapor, more youth were choosing e-vapor.” (CCFF ¶ 1251). Willard testified that around October 25, 2018, “the evidence pointed to the fact that it [JUUL] was also the number one product that was being utilized by youth.” (CCFF ¶ 1251). Draft talking points prepared for Howard Willard for an Altria “Town Hall” event state: “JUUL is a radically disruptive e-vapor product. It took 10 years to develop JUUL as a product that could convert adult smokers. At the same time JUUL has created a youth usage epidemic. We cannot allow that to continue.” (CCFF ¶ 1252).

Altria announced its decision to suspend MarkTen Elite on October 25, 2018 after transaction negotiations were well advanced. (CCFF ¶¶ 811-30, 1379-82).

After that announcement, later in the morning of October 25, 2018, Altria’s Willard and Gifford spoke to JLI’s Pritzker, Valani, and Burns by phone. (CCFF ¶ 814). During that call, Willard said that, despite what Altria had told the FDA about pod-based products, Altria still wanted to move forward with acquiring an interest in JLI. (CCFF ¶ 814). On the October 25, 2018 phone call, Willard explained that Altria was removing Elite because they had concluded it was not as good as JUUL’s product. (CCFF ¶ 815).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED] } This is consistent with the fact that all other closed-system e-cigarette suppliers withdrew their flavored products, but none withdrew their pod-based products for youth concerns. (CCFF ¶¶ 153-96, 207, 1132-43, 1198-201); *see also* PX2782 (JLI) at 008 (noting that JLI removed all of its fruit flavors from retail in November 2018 and then pulled its mint-flavored pods in November 2019) (stating “Mint pull impact ~ 25%”).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

{

[REDACTED]

[REDACTED] }

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On October 2, 2018, Garnick sent to Crosthwaite and Gifford a series of proposed discussion points for a meeting with FDA Commissioner Gottlieb, including a commitment to discontinue MarkTen Elite, but he stated that the discussion points were predicated on the assumption the JLI deal would not go forward: “In light of our discussion today, I thought you should see what we propose to be our talking points for the Gottlieb meeting. Obviously, this assumes we do not receive a satisfactory response from Tree [JLI].” (CCFF ¶ 1395).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

The proposed finding is also incomplete and misleading because it also fails to note that after Altria announced its transaction with JLI, FDA Commissioner Gottlieb wrote to Willard on February 6, 2019 requesting a meeting “regarding representations [Altria] made in a meeting with Food and Drug Administration (FDA) senior leadership on October 18, 2018, and in a written submission that followed, where [Altria] 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).

The February 6, 2019 letter from Commissioner Gottlieb also 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

testified that he understood Commissioner Gottlieb's references to "commitments" to encompass both the commitments that Altria had made at the October 18, 2018 meeting and in Willard's October 25, 2018 letter to the FDA announcing the discontinuation of MarkTen Elite and APEX by MarkTen. (CCFF ¶ 1242).

Finally, the proposed finding is incomplete and misleading because it fails to note that, when asked about Altria's rationale for withdrawing MarkTen Elite, JLI's then-CEO, Burns, testified "it seemed in conflict that you would write this statement and still want to have discussions about investing in a company whose primary product was a pod-based e-vapor product." (CCFF ¶ 1243).

999. FDA responded positively to this news. (Willard (Altria) Tr. 1448; Garnick (Altria) Tr. 1764-65 ("We got a positive reaction.")). Because Altria was "the leader in the overall tobacco category" (albeit not e-vapor), "if [Altria] were willing to take significant actions, . . . it set the right example for other companies to do the same" and "gave FDA somewhere to point when they compelled others to take action." (Willard (Altria) Tr. 1448).

#### **Response to Finding No. 999**

The proposed finding is incomplete and misleading because it fails to note that after Altria announced its transaction with JLI, FDA Commissioner Gottlieb wrote to Willard on February 6, 2019 requesting a meeting "regarding representations [Altria] made in a meeting with Food and Drug Administration (FDA) senior leadership on October 18, 2018, and in a written submission that followed, where [Altria] 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).

The February 6, 2019 letter from Commissioner Gottlieb also 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 testified that he understood Commissioner Gottlieb's references to "commitments" to encompass both the commitments that Altria had made at the October 18, 2018 meeting and in Willard's



October 25, 2018 letter to the FDA announcing the discontinuation of MarkTen Elite and APEX by MarkTen. (CCFF ¶ 1242).

1000. Although Commissioner Gottlieb was “troubled by balancing how effective some pod products were at converting smokers with the youth issue,” Altria did not get the “impression” at the meeting that he was “seriously considering” pulling all pod products from the market. (Garnick (Altria) Tr. 1767-68).

### **Response to Finding No. 1000**

The proposed finding is incomplete and misleading because it fails to note that after Altria announced its transaction with JLI, FDA Commissioner Gottlieb wrote to Willard on February 6, 2019 requesting a meeting “regarding representations [Altria] made in a meeting with Food and Drug Administration (FDA) senior leadership on October 18, 2018, and in a written submission that followed, where [Altria] 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).

The February 6, 2019 letter from Commissioner Gottlieb also 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 testified that he understood Commissioner Gottlieb’s references to “commitments” to encompass both the commitments that Altria had made at the October 18, 2018 meeting and in Willard’s October 25, 2018 letter to the FDA announcing the discontinuation of MarkTen Elite and APEX by MarkTen. (CCFF ¶ 1242).

### **2. On October 25, In Conjunction With Its Third Quarter Earnings Call, Altria Announced That It Was Discontinuing Its Pod Products And Non-Traditional Cig-A-Like Flavors In Response To FDA’s Letter**

1001. On October 25, 2018, Altria sent its formal response to FDA, in a letter that the company made public that same day. (Willard (Altria) Tr. 1450-51).

### **Response to Finding No. 1001**

The proposed finding is incomplete because it fails to note that the October 25, 2018 announcement occurred after Willard sent his October 5, 2018 letter to JLI's senior negotiators and after Willard texted Devitre that JLI had "[a]greed on term [sic] in the letter." (CCFF ¶¶ 779-82, 793). The proposed finding is also incomplete because it fails to note that Altria and JLI exchanged a revised term sheet on October 15, ten days before the October 25 announcement meeting, and reached agreement on a final term sheet less than one week after the October 25 announcement. (CCFF ¶¶ 797-804, 825). The proposed finding is also incomplete and misleading because it fails to note that JLI demanded and Altria understood that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993).

1002. Altria announced that it would withdraw its pod products from the market. (PX1071 (Altria) at 002). Although Altria did not believe it had a "current issue with youth access to or use of [its] pod-based products," it did "not want to risk contributing to the issue" with a product that was not converting adult smokers. (PX1071 (Altria) at 003).

### **Response to Finding No. 1002**

To the extent that the proposed finding claims that "Altria announced that it would withdraw its pod products from the market" and "Altria did not believe it had a 'current issue with youth access to or use of [its] pod-based products,'" Complaint Counsel does not disagree.

To the extent that the proposed finding claims that "[Altria] did 'not want to risk contributing to the [youth] issue' with a product that was not converting adult smokers," the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 998 and 1021. (*See Responses to RPF ¶¶ 998, 1021*).

1003. Altria also announced that it would discontinue all non-traditional cig-a-like flavors. (PX1071 (Altria) at 003).

### **Response to Finding No. 1003**

The proposed finding is incomplete and misleading because it fails to note that JLI demanded and Altria understood that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993).

1004. Altria sent the letter to FDA early in the morning of October 25. (Willard (Altria) Tr. 1238, 1451-53).

#### **Response to Finding No. 1004**

The proposed finding is incomplete and misleading because it fails to note that JLI demanded and Altria understood that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993).

1005. Later, at 7:00 AM EDT, Altria released the letter “as part of a collection of information related to [its third quarter] earnings call.” (Willard (Altria) Tr. 1237-39, 1452-53; RX2028 (Altria) at 001).

#### **Response to Finding No. 1005**

The proposed finding is incomplete and misleading because it fails to note that JLI demanded and Altria understood that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993).

1006. Altria timed the letter’s release to coincide with its regularly scheduled earnings call because “there was material information in [the letter] related to some of the actions [it was] suggesting to the FDA,” which Altria “thought the investment community was entitled to learn about.” (Willard (Altria) Tr. 1238-39).

#### **Response to Finding No. 1006**

The proposed finding is incomplete and misleading because it fails to note that JLI demanded and Altria understood that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993).

1007. In the earnings call later that morning, Altria explained that although Elite and non-traditionally flavored cig-a-likes were being withdrawn from the market, 80 percent of Nu Mark’s e-vapor volume from the third quarter would remain on the market. (PX9082 (Altria) at 003). That was “essentially because, while [Nu Mark] had a number of flavored products and [it] had certainly some volume in the pod-based products, most of [its] volume

was tobacco flavored or a menthol or mint, and so while this was an impact to [its] business, there was still a number of products that represented a lot of volume that would remain on the market.” (Willard (Altria) Tr. 1456; *see also* Gifford (Altria) Tr. 2809 (similar); Crozier (Sheetz) Tr. 1557-58 (confirming Elite’s removal had minimal impact on the category as a whole); RX1505 (JLI) at 001 (recounting Altria’s earnings call characterization of the impact on volumes as “immaterial”); RX1519 (JLI) at 001 (“Pulling these products from their portfolio have [sic] no material significance to their commercial returns (given their poor performance in e-cigs as a whole.)”).

### **Response to Finding No. 1007**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that on December 7, 2018, Altria announced the discontinuation of its entire e-cigarette business. (CCFF ¶ 848).

To the extent that the proposed finding claims that “Elite’s removal had minimal impact on the category as a whole,” the proposed finding is contrary to the weight of the evidence for the reasons cited below in response to RPF ¶¶ 1338-82. (*See* Responses to RPF ¶¶ 1338-82).

To the extent that the proposed finding claims that Altria’s e-cigarette business was characterized by “poor performance in e-cigs as a whole,” the proposed finding is contrary to the weight of the evidence for the reasons cited in response to RPF ¶¶ 276-300, 431-85. (*See* Responses to RPF ¶¶ 276-300, 431-85). In addition, Altria’s e-cigarette products were profitable and commercially successful. (CCFF ¶¶ 1088-131). Altria anticipated that its products would continue to be profitable in the future. (CCFF ¶¶ 1083-87). The financial performance of Altria’s cigalike products improved continuously from 2016 to 2018 and Altria consistently assessed that its cigalike products were doing well and meeting targets. (CCFF ¶¶ 1088-111). MarkTen Elite’s sales grew continuously from the launch of the product until September 2018. (CCFF ¶¶ 1112-31). The proposed finding is incomplete and misleading because it fails to note that JLI demanded and

Altria understood that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993).

**3. Altria Thought JLI Would Be Displeased By The Letter And, As Predicted, JLI Viewed It As A Hostile Act, Not The Fulfillment Of An Agreement**

1008. That same day, after the letter was released publicly, Willard sent it “to Mr. Pritzker and the JLI principals.” (Willard (Altria) Tr. 1237-38; *see also* RX0216 (Altria)).

**Response to Finding No. 1008**

Complaint Counsel has no specific response.

1009. Altria had not discussed with JLI its decision to withdraw pod and non-traditional flavored cig-a-like products before sending the letter to FDA. (Garnick (Altria) Tr. 1763-64).

**Response to Finding No. 1009**

The proposed finding is unreliable, incomplete, and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies only on self-serving testimony.

The proposed finding is incomplete because it fails to note that Altria and JLI exchanged a revised term sheet ten days before the October 25, 2018 announcement meeting and reached agreement on a final term sheet less than one week after the October 25, 2018 announcement. (CCFF ¶¶ 797-804, 825).

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 998. (*See* Response to RPF ¶ 998).

1010. JLI therefore had no advance notice of Altria’s response to FDA or of the possibility that Altria would remove products from the market. (Pritzker (JLI) Tr. 873-74; Valani (JLI) Tr. 956; *see also* PX7021 Pritzker (JLI) Dep. at 216-17; PX7032 Valani (JLI) Dep. at 149-50; PX7025 Burns (JLI) Dep. at 215-16; PX7035 Masoudi (JLI) Dep. at 126-27).

**Response to Finding No. 1010**

The proposed finding is unreliable, incomplete, and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies only on self-serving testimony.

The proposed finding is incomplete because it fails to note that Altria and JLI exchanged a revised term sheet ten days before the October 25, 2018 announcement meeting and reached agreement on a final term sheet less than one week after the October 25, 2018 announcement. (CCFF ¶¶ 797-804, 825).

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 998. (*See* Response to RPF ¶ 998).

1011. JLI only learned about Altria's letter to FDA after the letter became public. (Valani (JLI) Tr. 954).

#### **Response to Finding No. 1011**

The proposed finding is unreliable, incomplete, and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies only on self-serving testimony.

The proposed finding is incomplete because it fails to note that Altria and JLI exchanged a revised term sheet ten days before the October 25, 2018 announcement meeting and reached agreement on a final term sheet less than one week after the October 25, 2018 announcement. (CCFF ¶¶ 797-804, 825).

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 998. (*See* Response to RPF ¶ 998).

1012. At the time, Altria anticipated that JLI would be unhappy with Altria's announcement, particularly because the letter said that Altria "believed that pod products substantially

contributed to the youth epidemic.” (Garnick (Altria) Tr. 1765; *see also* Gifford (Altria) Tr. 2830 (confirming Altria did not expect that discontinuing Elite and flavored cig-a-like products would “increase [the] chances of doing a final deal with JLI”).

### **Response to Finding No. 1012**

The proposed finding is unreliable, incomplete, and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies only on self-serving testimony.

The proposed finding is incomplete because it also fails to note that Altria and JLI exchanged a revised term sheet ten days before the October 25, 2018 announcement meeting and reached agreement on a final term sheet less than one week after the October 25, 2018 announcement. (CCFF ¶¶ 797-804, 825).

To the extent that the proposed finding claims that “Altria did not expect that discontinuing Elite and flavored cig-a-like products would ‘increase [the] chances of doing a final deal with JLI,’” the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 998. (*See* Response to RPF ¶ 998).

To the extent that the proposed finding stands for the proposition that JLI perceived tension between Altria’s public statements that pods contributed to the youth vaping epidemic while privately seeking an equity stake in the leading pod-based product, Complaint Counsel does not disagree.

1013. The undisputed evidence—both from testimony and contemporaneous documents—demonstrates JLI was “shocked” to learn of Altria’s decision and viewed the letter as a “hostile action towards JUUL.” (PX7011 Valani (JLI) IHT at 124-26; *see also* Valani (JLI) Tr. 944-45 (characterizing Altria’s letter to FDA as “surprising”); PX7021 Pritzker (JLI) Dep. at 150 (similar)).

### **Response to Finding No. 1013**

The proposed finding is incomplete and contrary to the weight of the evidence.

The proposed finding is incomplete because it fails to note that Altria and JLI exchanged a revised term sheet ten days before the October 25, 2018 announcement meeting and reached

agreement on a final term sheet less than one week after the October 25, 2018 announcement. (CCFF ¶¶ 797-804, 825).

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 998. (See Response to RPF 998).

To the extent that the proposed finding stands for the proposition that JLI perceived tension between Altria's public statements that pods contributed to the youth vaping epidemic while privately seeking an equity stake in the leading pod-based product, Complaint Counsel does not disagree.

1014. A retailer emailed JLI the day Elite was discontinued to say of the announcement: "This just pisses me off. Continuously fail to compete in the category, so wa[ve] the white flag and try to bring others down with you." (PX2473 (JLI) at 001). Robbins responded internally that this "seem[ed] to be the universal feeling out there. The Altria letter is a thinly veiled attempt to get rid of competition that threatens their cig franchise. Glad the retailers see it for what it is." (PX2473 (JLI) at 001).

#### **Response to Finding No. 1014**

The proposed finding is incomplete, vague, unreliable, and contrary to the weight of the evidence.

The proposed finding is incomplete because it fails to note that Altria and JLI exchanged a revised term sheet ten days before the October 25, 2018 announcement meeting and reached agreement on a final term sheet less than one week after the October 25, 2018 announcement. (CCFF ¶¶ 797-804, 825).

To the extent that the proposed finding claims that "[a] retailer emailed JLI the day Elite was discontinued to say of the announcement: '[t]his just pisses me off. Continuously fail to compete in the category, so wa[ve] the white flag and try to bring others down with you'" and



“Robbins responded internally that this ‘seem[ed] to be the universal feeling out there. The Altria letter is a thinly veiled attempt to get rid of competition that threatens their cig franchise. Glad the retailers see it for what it is,” the proposed finding is vague and unreliable because it relies only on anecdotal, unreliable hearsay testimony.

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 998. (See Response to RPF 998).

1015. No one from JLI ever suggested that he or she was “pleased” by Altria’s decision to discontinue certain products, (Garnick (Altria) Tr. 1776), or contacted Altria to applaud the decision to pull products, (Gifford (Altria) Tr. 2829-30).

#### **Response to Finding No. 1015**

The proposed finding is incomplete, unreliable, and contrary to the weight of the evidence.

The proposed finding is incomplete because it also fails to note that Altria and JLI exchanged a revised term sheet ten days before the October 25 announcement meeting and reached agreement on a final term sheet less than one week after the October 25 announcement. (CCFF 797-804, 825).

The proposed finding is unreliable because it relies only on self-serving testimony.

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 998. (See Response to RPF 998).

1016. Pritzker recalled he did not “welcome[.]” Altria’s decision to pull its pod products, (Pritzker (JLI) Tr. 874-75), and was “amazed” that Altria “had taken the[.] [products] off unilaterally,” (PX7021 Pritzker (JLI) Dep. at 150; *see also* Pritzker (JLI) Tr. 874 (confirming that Altria’s decision was “unexpected”); PX7021 Pritzker (JLI) Dep. at 154-55). JLI had been “perfectly happy to have [Elite] stay on the market.” (Pritzker (JLI) Tr.

874). Moreover, given the tenor of Altria's letter, Pritzker was "very skeptical that [Altria was] sincere in wanting to invest in [JLI]." (PX7021 Pritzker (JLI) Dep. at 155).

### **Response to Finding No. 1016**

The proposed finding is incomplete, unreliable, and contrary to the weight of the evidence.

The proposed finding is incomplete because it fails to note that Altria and JLI exchanged a revised term sheet ten days before the October 25, 2018 announcement meeting and reached agreement on a final term sheet less than one week after the October 25, 2018 announcement. (CCFF ¶¶ 797-804, 825).

The proposed finding is unreliable because it relies only on self-serving testimony.

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 998. (*See* Response to RPF ¶ 998).

1017. JLI had expected that after a deal was reached, the FTC would "determine what should become of [Altria's e-vapor products] and expected that it would be divestiture," and Pritzker worried that Altria's decision to pull Elite "would complicate things." (Pritzker (JLI) Tr. 874-75; *see also* PX7021 Pritzker (JLI) Dep. at 154-55).

### **Response to Finding No. 1017**

The proposed finding is incomplete, misleading, unreliable, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading because it fails to note that Altria did not initiate the HSR review process until February 4, 2019, (CCFF ¶ 866), well after it had pulled Elite from the market and discontinued its entire e-cigarette business. (CCFF ¶ 812, 848).

The proposed finding is unreliable because it relies only on self-serving testimony.

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed

finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 998. (See Response to RPF 998).

Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF 994; Pritzker (JLI) Tr. 670-73).

1018. Although JLI was upset by the letter, Altria indicated it still was interested in pursuing a transaction and JLI was willing to continue negotiating with Altria. (Pritzker (JLI) Tr. 876-7; Garnick (Altria) Tr. 1766-67).

#### **Response to Finding No. 1018**

The proposed finding is incomplete and misleading because it fails to note that JLI demanded and Altria understood that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF 867-993).

1019. As Garnick summarized in an email hours after JLI learned of the letter, “[t]he Tree folks are still talking to us even in light of the announcement we made today.” (PX4350 (Altria) at 001). Garnick explained at trial, “I was not sure we would still be talking by the end of the day because of our letter and our announcement that we were removing pods. We thought that the folks at JLI might be upset by some of the statements we made in the letter and it might have ended the deal. So [in this email,] I was just expressing my relief that we were still going forward with the negotiations.” (Garnick (Altria) Tr. 1766-67).

#### **Response to Finding No. 1019**

The proposed finding is unreliable, incomplete, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

The proposed finding is incomplete because it fails to note that Altria and JLI exchanged a revised term sheet ten days before the October 25, 2018 announcement meeting and reached agreement on a final term sheet less than one week after the October 25, 2018 announcement. (CCFF 797-804, 825).

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 998. (See Response to RPF 998).

#### **4. Retailers Were Not Sad To See Elite Go And Applauded Altria's Stance On Flavors**

1020. Retailers were not disappointed to see Elite or the other non-traditionally flavored cig-a-like products discontinued. (Myers (Altria) Tr. 3368-69 (explaining that retailers “weren’t upset about [Elite’s] discontinuation” since Elite “hadn’t performed well in stores”). The product had been “underperforming in the marketplace,” and retailers “felt like [Altria] had the wrong product from the standpoint of it didn’t have the nicotine levels, the nicotine salts that they felt [were] needed to have a successful product in that category.” (PX7038 Myers (Altria) Dep. at 316).

#### **Response to Finding No. 1020**

The proposed finding is vague, unreliable, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “[r]etailers were not disappointed to see Elite or the other non-traditionally flavored cig-a-like products discontinued,” “retailers ‘weren’t upset about [Elite’s] discontinuation,’” and “retailers ‘felt like [Altria] had the wrong product from the standpoint of it didn’t have the nicotine levels, the nicotine salts that they felt [were] needed to have a successful product in that category,’” the proposed finding is vague and unreliable because it relies only on self-serving hearsay testimony attributed to an ambiguous class of persons.

The proposed finding is also contradicted by other evidence in the record that some retailers thought that Altria’s e-cigarette products were commercially successful in 2018. (PX7042 (Danaher (JLI) Dep. at 97-102 (discussing a June 16, 2018, document entitled “Wells Fargo, Tobacco Talk 2Q18, Retailer Survey Takeaways” which quotes e-cigarette retailers as having said: “MarkTen and Vuse are doing well,” “JUUL tend to draw a younger adult market, MarkTen more of the big business slow growth, but gaining market share,” “[a]ll, both JUUL and MarkTen

performing exceptionally well, while Vuse falling behind due to recall,” “MarkTen improving, but low volume. We are starting to focus on MarkTen. Now helping.”); PX8000 at 004 (¶ 25) (Crozier (Sheetz), Decl.) (“MarkTen remained the second largest vapor brand behind JUUL at Sheetz through 2018)).

To the extent that the proposed finding claims that “Elite ‘hadn’t performed well in stores’” and “[t]he product had been ‘underperforming in the marketplace,’” the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 1007. (*See* Response to RPF ¶ 1007).

To the extent that the proposed finding claims that “retailers ‘felt like [Altria] had the wrong product from the standpoint of it didn’t have the nicotine levels, the nicotine salts that they felt [were] needed to have a successful product in that category,’” the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 614. (*See* Response to RPF ¶ 614).

1021. Crozier, Sheetz’s Category Manager for Cigarettes & Tobacco, explained that because he knew “Altria had been working on preventing youth access with the FDA,” he thought the product pull “was kind of in line with some of their views on the category.” (PX7019 Crozier (Sheetz) Dep. at 91). In Crozier’s view, Elite had not “res[o]nate[d]” with consumers and had not made “any dent in JUUL’s share.” (PX7019 Crozier (Sheetz) Dep. at 76-77).

### **Response to Finding No. 1021**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete, misleading, and directly contradicted by Crozier’s testimony. Crozier testified that Altria’s purported reasons for discontinuing Elite in October 2018 because of underage use were “a little striking” when compared with Altria’s decision to enter into the transaction with JLI two months later. (PX7019 (Crozier (Sheetz), Dep. at 115 (“After the

reasons that Altria gave for discontinuing MarkTen Elite in October of 2018, were you surprised to hear that Altria was partnering with JUUL three months later? . . . A. Yeah. It was a little striking. . . . Just ‘cuz they had talked about pod-based products and then MarkTen was the -- MarkTen Elite was the pod-based product and so was JUUL.’”)

The proposed finding is also incomplete and misleading because Crozier testified that he was not aware of any reports of underage use of MarkTen Elite at Sheetz or any other retailers. (PX7019 (Crozier (Sheetz), Dep. at 113 (“Q. Did you experience any issues at Sheetz with use -- youth use of MarkTen Elite? A. I do not recall any. Q. Were you aware of any reports of underage use of MarkTen Elite at other retailers? A. No, not to my knowledge.”)). In stark contrast to Elite, Crozier testified that “JUUL seemed to be the focus” of concerns about underage use in October 2018. (PX7019 (Crozier (Sheetz), Dep. at 114-15 (Q. Did you hear concerns from the FDA about underage use of e-cigarettes at the time? A. Yes. That was reported in the media news magazines. Q. Was there any particular products where -- where underage use of e-cigarettes was a particular issue in October of 2018? . . . A. JUUL seemed to be the focus at that time, as I recall.”)).

The proposed finding is further incomplete and misleading because Crozier testified that he was surprised that Altria would discontinue Elite after being on the market for less than a year, something he had never seen any other e-cigarette manufacturer do before. (PX7019 (Crozier (Sheetz), Dep. at 109 (“Q. Are you surprised that Altria would launch a product with MarkTen Elite and discontinue it eight months later? . . . A. I was a little surprised that it hadn’t even been on the market an entire year, especially since we kind of had it as an exclusive product launch in March but less than a year is a pretty short time. Q. Do you recall any other examples of e-cigarette suppliers discontinuing products in that short of a time period? A. I do not.”)).

The proposed finding is also vague, incomplete, and misleading, when it refers to “the product pull” because it does not identify the product to which it refers. In addition, Crozier testified that he was surprised that Altria would completely exit the e-cigarette business in December 2018. (PX7019 (Crozier (Sheetz), Dep. at 91) (“Q. And it was the discontinuation of MarkTen cigalike in December that surprised you? . . . A. Yeah, and that was because it was a complete -- the way I took that was they would no longer -- Altria would no longer be involved in the vapor category, which they’re involved in every nicotine category.”)). To the extent that the proposed finding implies that Altria withdrew MarkTen Elite, APEX, and its flavored cigalike products because of a concern about youth vaping, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 998. (*See* Response to RPF 998).

To the extent that the proposed finding claims that “Elite had not ‘res[o]nate[d]’ with consumers and had not made ‘any dent in JUUL’s share,’” the proposed finding is vague because the cited phrases “resonated” and “dent in JUUL’s share” are ambiguous.

Finally, to the extent that the proposed finding implies that Altria’s e-cigarette products were not commercially successful, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 1007. (*See* Response to RPF 1007).

1022. The withdrawal decision was helpful from a business perspective to retailers, because discontinuing Elite freed up inventory dollars and shelf space for other products. (Myers (Altria) Tr. 3369-70).

### **Response to Finding No. 1022**

The proposed finding is unreliable and contrary to the weight of the evidence.

The proposed finding is unreliable because it relies on self-serving hearsay testimony and for the reasons cited above in response to RPF 1020. (*See* Response to RPF 1020).

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To the extent that the proposed finding implies that Altria's e-cigarette products were not commercially successful, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 1007. (*See* Response to RPF 1007).

To the extent that the proposed finding implies that retailer shelf space that was contractually obligated to be allocated to MarkTen Elite was freed up for non-Altria products after the withdrawal of MarkTen Elite, the proposed finding is contrary to the weight of the evidence. Altria's e-cigarette shelf space was subject to long-term contracts under Altria's ITP program. (CCFF ¶¶ 1453-62, 1814; *see also* PX7008 (Cullen (JLI) IHT at 91 [REDACTED]

[REDACTED] Before the amended Services Agreement terminated all non-regulatory services, Altria agreed to make its ITP shelf space available to JLI for lease, and to support JLI's efforts to improve point-of-sale prominence, such as higher shelf placement and more facings. (CCFF ¶ 1957; *see also* CCFF ¶ 1462; PX7008 (Cullen (JLI) IHT at 91 [REDACTED]

[REDACTED]

Altria provided shelf space to JLI that had been allocated in part to Nu Mark's e-vapor products. (CCFF ¶¶ 1462, 1958). JLI claimed that as of July 2019, approximately 17,900 ITP stores had been reset with JLI products. (CCFF ¶ 1960).

1023. Retailers and distributors also were "proud of the fact that [Altria] took a stance on flavors and was trying to address the youth epidemic." (PX7038 Myers (Altria) Dep. at 156). Because the products "didn't mean much to their business" and were not "something they were going to have to figure out how to cover a loss of . . . sales," retailers and distributors "were really focused on the responsible step [Altria] took." (PX7038 Myers (Altria) Dep. at 156).

### **Response to Finding No. 1023**

The proposed finding is unreliable and contrary to the weight of the evidence.



The proposed finding is unreliable because it relies on self-serving hearsay testimony and for the reasons cited above in response to RPF 1020. (*See* Response to RPF 1020).

To the extent that the proposed finding implies that Altria's decision to withdraw MarkTen Elite, APEX, and its flavored cigalike products was motivated by a desire "to address the youth epidemic," the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 998 and 1021. (*See* Responses to RPF 998, 1021).

To the extent that, in claiming Nu Mark's "products 'didn't mean much to their business' and were not 'something they were going to have to figure out how to cover a loss of . . . sales,'" the proposed finding implies that Altria's e-cigarette products were not commercially successful, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 1007. (*See* Response to RPF 1007).

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 998. (*See* Response to RPF 998).

1024. The only real source of frustration for retailers was that they would need to deal with "product returns and moving stuff around on the shelves." (PX7019 Crozier (Sheetz) Dep. at 92).

#### **Response to Finding No. 1024**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. Crozier never testified that "product returns and moving stuff around on the shelves" is the "only real source of frustration." (PX7019 (Crozier (Sheetz) Dep. at 92)). Crozier identified "managing the product coming in and out -- product returns and moving stuff around on the shelves" as a "frustrating part," but never testified that it was the only frustrating part. (PX7019 (Crozier (Sheetz) Dep. at 92)).

The proposed finding is also unfounded and misleading when it cites to a single retail witness for the proposition that “product returns and moving stuff around on the shelves” is the “only real source of frustration” for all retailers.

The proposed finding is also incomplete and misleading for the reasons cited above in response to RPF 1020. (*See* Response to RPF 1020).

To the extent that the proposed finding implies that Altria’s e-cigarette products were not commercially successful, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 1007. (*See* Response to RPF 1007).

1025. But returns were not required. Altria announced to the trade that, instead of recalling the withdrawn products, retailers could sell through their remaining inventory. (Gifford (Altria) Tr. 2811; RX2030 (Altria) at 001).

#### **Response to Finding No. 1025**

Complaint Counsel has no specific response.

#### **5. After Altria’s Announcement, FDA Reaffirmed Its Support For E-Vapor Products That Could Convert Adult Smokers**

1026. On October 31, 2018, after Commissioner Gottlieb met with the five e-vapor manufacturers who had received letters, FDA issued a statement in response to the meetings. (RX0159 (FDA) at 002).

#### **Response to Finding No. 1026**

Complaint Counsel does not disagree.

1027. The statement reiterated FDA’s concern about youth usage of e-vapor products. (RX0159 (FDA) at 002).

#### **Response to Finding No. 1027**

The proposed finding is incomplete and misleading because it fails to note that after Altria announced its transaction with JLI, FDA Commissioner Gottlieb wrote to Willard on February 6, 2019 requesting a meeting “regarding representations [Altria] made in a meeting with Food and Drug Administration (FDA) senior leadership on October 18, 2018, and in a written submission

that followed, where [Altria] 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).

The February 6, 2019 letter from Commissioner Gottlieb also 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 testified that he understood Commissioner Gottlieb’s references to “commitments” to encompass both the commitments that Altria had made at the October 18, 2018 meeting and in Willard’s October 25, 2018 letter to the FDA announcing the discontinuation of MarkTen Elite and APEX by MarkTen. (CCFF ¶ 1242).

1028. But at the same time, FDA confirmed that it remained committed to the public health benefit of converting adult cigarette smokers to noncombustible alternatives such e-vapor products: “We still believe that non-combustible forms of nicotine delivery may be less harmful alternatives for currently addicted adult smokers who still seek nicotine, without the risks associated with combustible cigarettes. And we want to keep this option for adults open.” (RX0159 (FDA) at 002).

### **Response to Finding No. 1028**

The proposed finding is incomplete and misleading for the reasons cited in response to RPF ¶ 1027. (*See* Response to RPF ¶ 1027).

1029. Murillo was “very pleased with this statement” because it indicated that Gottlieb “was still committed to the comprehensive plan for nicotine based on the continuum of risk” and characterized the presentations by Altria and other companies as “constructive.” (Murillo (Altria/JLI) Tr. 2968-69).

### **Response to Finding No. 1029**

The proposed finding is incomplete and misleading for the reasons cited in response to RPF ¶ 1027. (*See* Response to RPF ¶ 1027).

1030. Although Altria remained “concerned about the youth issue,” it was encouraged to go forward with negotiations following FDA’s October 31 statement. (Garnick (Altria) Tr. 1769). Although youth use “absolutely had to be addressed,” Altria believed it “could help” JLI navigate the concerns raised by FDA. (Garnick (Altria) Tr. 1771).

**Response to Finding No. 1030**

To the extent that the proposed finding implies that Altria’s decision to withdraw MarkTen Elite, APEX, and its flavored cigalike products from the market or to invest in JUUL was motivated by a desire to address “the youth issue,” the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 998 and 1021. (*See Responses to RPF 998, 1021*).

1031. Moreover, unlike MarkTen Elite and MarkTen cig-a-like, JUUL successfully was converting smokers. (Garnick (Altria) Tr. 1771 (“We had our product that was not converting smokers, losing money, and not essentially going anywhere, wouldn’t get a PMTA. And then we saw JUUL, and we saw in the data that JUUL was converting smokers.”); Gifford (Altria) Tr. 2828 (“[By this point in time,] the outside world was clearly seeing—and . . . an independent survey [by market analysts showed] that JUUL was very successful in converting adult smokers,” so much so that it was “impacting brands across the cigarette space”); *see also* RX0858 (Altria) at 003). Altria believed that JUUL “was the most . . . effective noncombustible product on the market to convert smokers.” (Garnick (Altria) Tr. 1771).

**Response to Finding No. 1031**

The proposed finding is unreliable, incomplete, misleading, incorrect, and contrary to the weight of the evidence.

The proposed finding is unreliable to the extent that it relies on self-serving testimony.

The proposed finding is incomplete and misleading because it fails to note that smoker conversion is only one factor the FDA considers when determining whether to grant a PMTA and that unintended consequences, such as youth usage, are also important considerations. (CCFF 1323-27)

To the extent that the proposed finding claims that “MarkTen Elite and MarkTen cig-a-like, [were not] successfully [] converting smokers,” the proposed finding is misleading, incorrect, and contrary to the weight of the evidence for the reasons set forth above in response to RPF 601-51. (*See Responses to RPF 601-51*).

To the extent that the proposed finding claims that Nu Mark's products were "losing money, and not essentially going anywhere," the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 1007. (*See* Response to RPF 1007).

To the extent that the proposed finding claims that "Altria believed that JUUL 'was the most . . . effective noncombustible product on the market to convert smokers,'" the proposed finding is misleading and contrary to the weight of the evidence. Altria knew that a substantial portion of JUUL's growth was attributable to non-smoker and youth initiation and that JUUL's association with youth initiation was a substantial risk to its PMTA. (CCFF ¶¶ 1248-53). For instance, Craig Schwartz stated in an August 15, 2018 email to Altria's former chairman that "40%" of Juul's sales were to consumers aged between the legal age at the time and 21, with a "significant initiation component" which he anticipated would "present problems with the FDA when it seeks Market Authorization to continue selling beyond 2022." (CCFF ¶ 1249). Schwartz added that the "big issue" for JLI was "clearing FDA by 2022," adding that "cleaning [Juul] up to do so would be dilutive." (CCFF ¶ 1249).

#### **6. In Response To FDA's Letter, JLI Also Pulled Non-Traditional Flavors From Retail Stores**

1032. Two weeks after Altria's letter to FDA, JLI announced its own response to FDA's letter. (RX1926 (JLI)).

#### **Response to Finding No. 1032**

Complaint Counsel has no specific response.

1033. JLI discontinued sales of all non-traditional flavors from retail, leaving those flavors to be sold only online, where JLI would be implementing additional age-verification measures. (RX1926 (JLI) at 001-03; *see also* RX0292 (Altria) (news article previewing the announcement); Willard (Altria) Tr. 1243 (observing that JLI "restricted the sale of their flavored products . . . to respond to the letter they received from the FDA"); Garnick (Altria) Tr. 1775-76 (agreeing JLI's decision took place before Altria's investment)).

#### **Response to Finding No. 1033**

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The proposed finding is incomplete and misleading because it fails to note that, unlike Altria, JLI and the other major e-cigarette competitors did not pull all of their pod-based products from the market in response to the FDA letter and continue to sell pod-based products today. (CCFF ¶¶ 29, 168, 178, 185, 190; *see also* Willard (Altria) Tr. 1244 (acknowledging that neither JLI nor Reynolds pulled its pod-based product off the market completely)).

1034. In its announcement, JLI explained that it was “sensitive to the concern articulated by Commissioner Gottlieb” about flavors. (RX1926 (JLI) at 002). Its decision to stop selling flavored products in retail stores reflected its “common goal” with FDA to “prevent[] youth from initiating on nicotine.” (RX1926 (JLI) at 001).

#### **Response to Finding No. 1034**

The proposed finding is incomplete and misleading for the reasons cited in response to RPFF ¶ 1033. (*See* Response to RPFF ¶ 1033).

1035. As Danaher explained in his deposition, JLI had “been taking a series of escalating steps to also look at youth access and appeal. It was a major concern of [the company’s]. And [JLI] came up with a very comprehensive plan that, amongst other things, said that we were going to no longer sell any of [its] [non-traditional flavored pod] products to distributors or retailers as of the date that we made that announcement, which was I believe November 9th.” (PX7005 Danaher (JLI) IHT at 144).

#### **Response to Finding No. 1035**

The proposed finding is incomplete and misleading for the reasons cited in response to RPFF ¶ 1033. (*See* Response to RPFF ¶ 1033). The proposed finding is also unreliable because it relies only on self-serving testimony.

1036. At the time, non-traditional flavored pods made up about 50 percent of JLI’s revenue, and virtually all of that was in retail stores. (PX7009 Burns (JLI) IHT at 163 (noting that of JLI’s eight products, the “four we extracted from the market[]” represented “about 50 percent of our revenue at that point”); *see also* [REDACTED]).

#### **Response to Finding No. 1036**

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 1033. (*See* Response to RPF 1033).

1037. As a result, the company anticipated a “big” financial impact as a result of its decision, with many of its customers “go[ing] to a competitor’s products.” (PX7009 Burns (JLI) IHT at 164-165; *see also* PX7009 Burns (JLI) IHT at 17 (explaining that only five to 10 percent of JLI’s revenue was from its online business)).

#### **Response to Finding No. 1037**

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 1033. (*See* Response to RPF 1033). The proposed finding is also unreliable because it relies only on self-serving testimony.

1038. But as then-CEO Burns explained, JLI “d[id]n’t care” about the financial impact because it knew it “ha[d] to get the category in shape.” (PX7009 Burns (JLI) IHT at 165).

#### **Response to Finding No. 1038**

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 1033. (*See* Response to RPF 1033). The proposed finding is also unreliable because it relies only on self-serving testimony.

1039. Altria did not know in advance how JLI had planned to respond to FDA’s letter. (Garnick (Altria) Tr. 1764).

#### **Response to Finding No. 1039**

The proposed finding is incomplete and misleading for the reasons cited in response to RPF 1033. (*See* Response to RPF 1033). The proposed finding is also unreliable because it relies only on self-serving testimony.

1040. Altria was “very encouraged” by what JLI ultimately announced: “[Altria] thought that was a step in the right direction . . . [and] reflected a commitment” to prevent youth usage of e-cigarettes, “so [it was] happy to see that.” (Garnick (Altria) Tr. 1769; *see also* Gifford (Altria) Tr. 2829 (“[Altria] thought that was a great step, because if you listened to what the FDA was saying,” it was “nontraditional flavors” that were causing concern for the agency)).

#### **Response to Finding No. 1040**

The proposed finding is incomplete and misleading for the reasons cited in response to RPPF ¶ 1033. (*See* Response to RPPF ¶ 1033). The proposed finding is also unreliable because it relies only on self-serving testimony.

1041. Besides Altria, JLI was the only e-vapor manufacturer to remove flavored products before FDA's flavor ban in 2020, (Garnick (Altria) Tr. 1775). JLI wanted "to make sure that [it was] being proactive as a company." (PX7011 Valani (JLI) IHT at 115).

### **Response to Finding No. 1041**

The proposed finding is incomplete and misleading for the reasons cited in response to RPPF ¶ 1033. (*See* Response to RPPF ¶ 1033). The proposed finding is also unreliable because it relies only on self-serving testimony.

#### **E. The Parties Continued Negotiations And Exchanged A Final Term Sheet On October 30, 2018**

##### **1. October 28 and October 30 Term Sheets**

1042. On October 28, 2018, JLI's attorneys sent a revised term sheet to Altria's counsel. (PX2503 (JLI) at 001).

### **Response to Finding No. 1042**

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPPF ¶ 998. (*See* Response to RPPF ¶ 998).

1043. This term sheet's proposed treatment of Altria's e-vapor products was not materially different from the previous term sheet. Under the Antitrust Clearance Matters section, the term sheet continued to propose that the parties "would be required to use reasonable best efforts to seek Antitrust Clearance" and to "agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] e-vapor business." (PX2503 (JLI) at 006-08). The term sheet also maintained the proposal that Altria offer to divest its e-vapor assets "if necessary to obtain Antitrust Clearance," and if those assets were not otherwise transferred to a third party, to contribute such assets to JLI upon receipt of antitrust clearance. (PX2503 (JLI) at 007). The October 28 term sheet added that such contribution would be "at [JLI's] election," but otherwise the provision was materially unchanged. (PX2503 (JLI) at 007).



**Response to Finding No. 1043**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence for the reasons cited above in response to RPF 772-86. (*See Responses to RPF 772-86*).

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 998. (*See Response to RPF 998*).

1044. The noncompete provision and carve-out also remained unchanged in its treatment of Altria's existing e-vapor products: the noncompete continued to explicitly exempt "MarkTen and MarkTen Elite prior to their contribution or divestiture as described above." (PX2503 (JLI) at 010).

**Response to Finding No. 1044**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence for the reasons cited above in response to RPF 787-91. (*See Responses to RPF 787-91*).

To the extent that the proposed finding implies there was no agreement between Altria and JLI that Altria would exit its existing e-cigarette business as part of the transaction, the proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF 998. (*See Response to RPF 998*).

1045. Other, minor revisions in the October 28 term sheet reflected that the parties continued to negotiate various noncompete issues unrelated to the treatment of Altria's existing products, such as how the noncompete would apply to certain research and development activities and whether it would bind Altria's controlled or upstream affiliates. (PX2503 (JLI) at 010). JLI added the following underlined text to the noncompete provision: "[Altria] agrees to refrain, and to cause its current and future subsidiaries and controlled affiliates to refrain, from competing (or preparing to compete, including through research and development activities) in the e-vapor business, other than (i) with respect to MarkTen and MarkTen Elite prior to their contribution or divestiture as described above and (ii) basic research not directed toward the e-vapor business and not undertaken with the intent (primarily or in part) of developing or commercializing technology or products in the e-vapor business. . . . Consequences of competition by an upstream [Altria] affiliate dealt with in "Richard Exit Right" below." (PX2503 (JLI) at 010).

**Response to Finding No. 1045**

The proposed finding is incomplete and misleading because it fails to note that JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

1046. On October 29, 2018, JLI and Altria negotiators met in New York for a previously scheduled meeting. (Pritzker (JLI) Tr. 875; PX2322 (JLI) at 001).

**Response to Finding No. 1046**

The proposed finding is incomplete and misleading because it fails to note that JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

1047. Pritzker recalled this “was a long meeting” and the parties “covered a lot of points” and, to his “surprise, it ended with [him] feeling that actually there was a road to actually getting something done.” (Pritzker (JLI) Tr. 876).

**Response to Finding No. 1047**

The proposed finding is vague, unreliable, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe, attendees, or purpose for the “long meeting” and because the phrase “there was a road to actually getting something done” is ambiguous.

The proposed finding is unreliable because it relies only on self-serving testimony from a JLI shareholder and Board member.

To the extent that the proposed finding implies that transaction negotiations were tentative by October 29, 2018, the proposed finding is misleading and contrary to the weight of the evidence. transaction negotiations were well advanced by October 29, 2018. (CCFF ¶¶ 788-824, 1379-82).

The proposed finding is misleading because it fails to note that JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

1048. The conversations were "sufficiently promising" that the parties decided to begin work on the actual deal documents. (Pritzker (JLI) Tr. 876-77).

#### **Response to Finding No. 1048**

The proposed finding is vague, misleading, and contrary to the weight of the evidence.

The proposed finding is vague because it does not specify a timeframe, attendees, or purpose for the "conversations" and because the phrases "sufficiently promising" and "actual deal documents" are ambiguous.

To the extent that the proposed finding implies that transaction-related documents prepared before October 29, 2018 were unreliable or tentative, the proposed finding is misleading and contrary to the weight of the evidence. Altria and JLI substantially agreed on transaction terms on October 29, 2018. (CCFF ¶¶ 820-25). Altria's and JLI's principal negotiators defined, negotiated, and memorialized those transaction terms in transaction-related documents in the months leading up to October 29, 2018. (CCFF ¶¶ 578-819).

The proposed finding is misleading because it fails to note that JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67) and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

1049. JLI sent Altria a final, nonbinding term sheet on October 30. (RX0285 (Altria) at 001; *see also* RX0285 (Altria) at 004 n.1 (“This term sheet is not binding on any party.”)). That term sheet maintained the same structure for treatment of Altria's existing e-vapor products, according to which Altria would either contribute or divest its existing products as part of the HSR clearance process. (RX0285 (Altria) at 021-22). The noncompete and carve-out remained unchanged, explicitly providing for Nu Mark's existing products to remain on the market until antitrust clearance. (RX0285 (Altria) at 021-22, 024).

#### **Response to Finding No. 1049**

The proposed finding is incomplete, misleading and contrary to the weight of the evidence.

To the extent that, the proposed finding implies that Altria and JLI did not substantially agree on transaction terms before October 30, 2018, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 1048. (*See* Response to RPF ¶ 1048).

To the extent that the proposed finding implies that Altria and JLI had not agreed that Altria would exit the closed-system e-cigarette market as part of the transaction, the proposed finding is misleading and contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 998. (*See* Response to RPF ¶ 998).

To the extent that the proposed finding claims that “The noncompete and carve-out remained unchanged, explicitly providing for Nu Mark's existing products to remain on the market until antitrust clearance,” the proposed finding is incomplete, misleading, and contrary to the

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weight of the evidence for the reasons cited above in response to RPF 787-91. (See Responses to RPF 787-91).

**2. In October, The Parties Addressed Potential Restrictions Imposed By Altria’s Contractual Relationship With PMI By Delaying The HSR Clearance Timeline**

1050. During the course of the negotiations, Altria became concerned that an existing agreement with PMI might complicate the potential investment in JLI. (Garnick (Altria) Tr. 1587-88). Specifically, the issue was whether the agreement with PMI—the E-Vapor Joint Research, Development and Technology Sharing Agreement (“JRDTA”)—restricted Altria’s ability to divest or contribute its e-vapor products to a third party during the term of the agreement. (Garnick (Altria) Tr. 1587; PX7036 Garnick (Altria) Dep. at 156-57; see also {REDACTED}).

**Response to Finding No. 1050**

The proposed finding is incomplete and misleading because it fails to note that JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF 867-993). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF 945-67) and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF 968-86).

1051. {REDACTED}

**Response to Finding No. 1051**

The proposed finding is incomplete and misleading. {REDACTED}

{REDACTED}

{REDACTED}

{REDACTED}

The proposed finding is also incomplete and misleading because it fails to mention that PMI’s King testified that the JRDTA “could have been extended,” but it did not make sense to do

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so because of the transaction and non-compete agreement that Altria entered into with JLI. (King (PMI) Tr. 2368-69; *see also* King (PMI) Tr. 2518 [REDACTED]

[REDACTED]

[REDACTED]

In addition, according to King, “the ‘joint’ in joint development and technology would no longer have made sense if Altria wasn’t able to launch, develop, work in the e-cigarette space, then there couldn't really be a joint development agreement going forward. And, in fact, even before the term ended, our feeling was that they had -- they had essentially left the playing field because of their agreement not to work in the e-cigarette space.” (King (PMI) Tr. 2369).

The proposed finding is also incomplete because it fails to note that, JLI demanded and Altria understood that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67) and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

1052. [REDACTED]

[REDACTED] Altria was concerned that this agreement potentially constrained its ability to transfer ownership of those products during the term of the agreement. (PX7036 Garnick (Altria) Dep. at 156-57).

### **Response to Finding No. 1052**

The proposed finding is incomplete because it fails to note that JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria

indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

1053. By October 2018, Altria first raised this issue with JLI. (PX7036 Garnick (Altria) Dep. at 197-98). By then, Altria and JLI already had reached consensus on the noncompete carve-out, which permitted Altria to continue competing with its existing products “until HSR was granted, and then [Altria] would contribute those products to JLI or, if necessary to get HSR approval, [Altria] would divest.” (Garnick (Altria) Tr. 1591-92; *see also supra* Part VI.H-I).

### **Response to Finding No. 1053**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

To the extent that the proposed finding claims that “[b]y October 2018, Altria first raised [the issue described in RPF ¶¶ 1050-52] issue with JLI,” the proposed finding is misleading and contrary to the weight of the evidence. 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. (CCFF ¶¶ 899, 928-31).

To the extent that the proposed finding claims that “the noncompete carve-out, [ ] permitted Altria to continue competing with its existing products ‘until HSR was granted, and then [Altria] would contribute those products to JLI or, if necessary to get HSR approval, [Altria] would divest,’” the proposed finding is incomplete, misleading, and contrary to the weight of the evidence for the reasons cited above in response to RPF ¶¶ 787-91. (*See* Responses to RPF ¶¶ 787-91).

The proposed finding is also incomplete and misleading because it fails to note that the October 15, 2018 term sheet added a reference to Altria “otherwise exiting” the e-cigarette business that provided an alternative pathway for Altria to provide certain services to JLI without going through a divestiture or contribution of its existing e-cigarette business. (CCFF ¶¶ 800-03).

The proposed finding is incomplete and misleading because it fails to note that, JLI demanded and Altria understood that any deal had to result in Altria exiting its existing business

and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

1054. By the end of October, the parties had developed a work-around to the potential problem by agreeing to extend the date to file for HSR clearance past the date that the JRDTA was set to expire. (Garnick (Altria) Tr. 1591-92; PX7036 Garnick (Altria) Dep. at 197).

#### **Response to Finding No. 1054**

The proposed finding is incomplete and misleading for the reasons cited above in response to RPF 1053. (See Response to RPF ¶ 1053).

The proposed finding is incomplete and misleading because it fails to note that Altria did not initiate the HSR review process until February 4, 2019, (CCFF ¶ 866), well after it had pulled Elite from the market and discontinued its entire e-cigarette business. (CCFF ¶¶ 812, 848). Finally, the proposed finding is incomplete and misleading because it fails to note that on December 9, 2018, after Altria had announced the discontinuation of its entire e-cigarette business, Garnick wrote to Masoudi to confirm that Altria was "not in the market anymore" and that it could "not get back into the market without getting a PMTA." (CCFF ¶ 851).

1055. In the October 15, 2018 term sheet, Altria proposed: "[Altria] shall elect the time (not to exceed two years from closing of the Purchase) when the parties initiate the HSR clearance process." (PX1269 (Altria) at 006; see also Garnick (Altria) Tr. 1591-92). By the time of this term sheet, July 2020 was less than two years away. (PX1269 (Altria) at 001).

#### **Response to Finding No. 1055**

The proposed finding is incomplete and misleading for the reasons cited above in response to RPF ¶¶ 1053-54. (See Responses to RPF ¶¶ 1053-54).

1056. As Garnick explained, this language "was to give us some room to file HSR so that when we did it, and we got HSR approval, we could go ahead and contribute our product or divest it, if necessary, if possible, to a third party." (PX7036 Garnick (Altria) Dep. at 157).



**Response to Finding No. 1056**

The proposed finding is incomplete and misleading for the reasons cited above in response to RPF 1053-54. (See Responses to RPF 1053-54).

1057. In the October 28 term sheet, JLI largely accepted Altria's proposal to delay filing for HSR, but changed the filing deadline to be July 2020 rather than an undefined date within two years of closing: "[Altria] shall elect the time (no later than July 15, 2020) when the parties initiate the HSR clearance process." (PX2503 (JLI) at 007).

**Response to Finding No. 1057**

The proposed finding is incomplete and misleading for the reasons cited above in response to RPF 1053-54. (See Responses to RPF 1053-54).

1058. The October 30 final nonbinding term sheet left unchanged JLI's proposal that Altria could delay HSR filing until July 2020. (RX0285 (Altria) at 022 ("[Altria] shall elect the time (no later than July 15, 2020) when the parties initiate the HSR clearance process."); see also RX0838 (Altria) at 325 (Nov. 15 draft deal document with deadline to file for HSR clearance "[o]n or prior to July 15, 2020")).

**Response to Finding No. 1058**

The proposed finding is incomplete and misleading for the reasons cited above in response to RPF 1053-54. (See Responses to RPF 1053-54).

1059. This solution was acceptable to both parties. (Garnick (Altria) Tr. 1671, 1677-78).

**Response to Finding No. 1059**

The proposed finding is incomplete and misleading because it fails to note that JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF 867-993). Altria agreed to JLI's demand that it had to stop competing in the closed-system e-cigarette market, (CCFF 945-67), and Altria indicated to JLI that it might comply with JLI's non-compete demand by shutting down its closed-system e-cigarette business. (CCFF 968-86).

1060. For Altria, the resolution "avoid[ed]" any potential issue with the PMI agreement and allowed Altria to divest or contribute its existing products. (Garnick (Altria) Tr. 1671).

**Response to Finding No. 1060**

The proposed finding is incomplete and misleading for the reasons cited above in response to RPF 1053-54. (*See Responses to RPF 1053-54*).

1061. Meanwhile, the delay was acceptable to JLI because JLI's "concern" was not "the time period before filing HSR. What [JLI was] concerned about [was] that once [Altria was] on their board, which would happen upon HSR approval, that we would not be competitors at that point." (Garnick (Altria) Tr. 1677). Accordingly, JLI was fine with putting off HSR approval until July 2020, "because it meant pushing back the date when [Altria] would be on their board." (Garnick (Altria) Tr. 1678).

**Response to Finding No. 1061**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The proposed finding is incomplete and misleading for the reasons cited above in response to RPF 1053-54. (*See Responses to RPF 1053-54*).

To the extent that the proposed finding claims that "the delay was acceptable to JLI because JLI's 'concern' was not 'the time period before filing HSR. What [JLI was] concerned about [was] that once [Altria was] on their board, which would happen upon HSR approval, that we would not be competitors at that point,'" the proposed finding is misleading and contrary to the weight of the evidence. Restricting Altria's ability to compete in e-cigarettes was a critical part of the transaction to JLI. (CCFF 867-79).

The proposed finding is also misleading because the final deal documents, executed on December 20, 2018, no longer gave Altria through July 15, 2020 to make its HSR filing, but instead required both Altria and JLI to make their HSR filings within 90 days. (CCFF 943).

**3. Contrary To Complaint Counsel's Theory, There Is No Evidence That JLI Insisted That Marketing Services Commence Immediately Upon Signing**

1062. The October 15 term sheet also distinguished between two types of services that Altria could provide to JLI. (PX1269 (Altria) at 007-08). The October 28 and October 30 term sheets similarly contained this distinction. (PX2503 (JLI) at 008-09 (Oct. 28 term sheet); RX0285 (Altria) at 022-23 (Oct. 30 term sheet)).

**Response to Finding No. 1062**

Complaint Counsel does not disagree.

1063. Some services could be provided immediately upon closing the transaction. (PX1269 (Altria) at 007-08). These services included supporting, consulting, and assisting JLI in obtaining PMTA approval for its products. (PX1269 (Altria) at 007); *see also* PX2503 (JLI) at 008-09; RX0285 (Altria) at 022-23).

**Response to Finding No. 1063**

Complaint Counsel does not disagree.

1064. Other services—known as enhanced services—could not be provided so long as Altria and JLI remained competitors in the e-vapor category because of antitrust considerations. (PX7036 Garnick (Altria) Dep. at 193-94; PX1269 (Altria) at 008). Enhanced services included assisting with JLI’s marketing; assisting with JLI’s “efforts to gain distribution, display, and in-store support”; and providing JLI with access to Altria’s “best in class infrastructure (including distribution).” (PX1269 (Altria) at 008; *see also* PX2503 (JLI) at 009; RX0285 (Altria) at 023).

**Response to Finding No. 1064**

Complaint Counsel does not disagree, and adds that the enhanced services included the provision of advertising “inserts” and “onserts” on Marlboro cigarette packets. (PX1269 (Altria) at 008). Although early term sheets indicate that “access to Altria’s smoker database” was not an enhanced service, (PX1269 (Altria) at 008), Altria later insisted that it would not provide database access to JLI prior to HSR approval. (PX7008 (Cullen (JLI) IHT at 25)).

The proposed finding is incomplete because it fails to note that JLI demanded, and Altria understood, that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. (CCFF ¶¶ 867-993). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market, (CCFF ¶¶ 945-67), and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. (CCFF ¶¶ 968-86).

1065. To address this antitrust issue, the October 15 term sheet proposed that Altria would not provide the enhanced services until the “earlier of (i) contribution . . . or (ii) [Altria]

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otherwise exiting the marketing and sale of products in the Field.” (PX1269 (Altria) at 008). The October 28 and October 30 term sheets contained similar language but replaced “contribution” with “Antitrust Clearance.” (PX2503 (JLI) at 009; RX0285 (Altria) at 023).

### **Response to Finding No. 1065**

The proposed finding is incomplete and misleading because it fails to note that { [REDACTED]

[REDACTED] } The proposed finding is also incomplete and misleading for the reasons cited above in response to RPF 1053-54. (See Responses to RPF 1053-54).

1066. These revisions were added by Altria’s counsel “to ensure that [Altria was] protected and in compliance with the antitrust laws before . . . [it] provide[d] those enhanced services that [Altria] could not provide as long as [it was] a [competitor].” (PX7036 Garnick (Altria) Dep. at 194). This term, drafted by Altria’s outside counsel, simply defined when enhanced services could be provided; it imposed no obligations related to Altria’s e-vapor products. (See PX7036 Garnick (Altria) Dep. at 194; RX0308 (Altria) at 008).

### **Response to Finding No. 1066**

The proposed finding is incomplete and misleading for the reasons cited above in response to RPF 1053-54, 1065. (See Responses to RPF 1053-54, 1065).

Furthermore, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

1067. For JLI’s part, Pritzker does not recall noticing this language when it was added to the October 15 term sheet, and he does not know why it was added. (Pritzker (JLI) Tr. 872).

### **Response to Finding No. 1067**

The proposed finding is incomplete and misleading for the reasons cited above in response to RPF 1053-54, 1065. (See Responses to RPF 1053-54, 1065).

1068. Complaint Counsel has suggested that JLI insisted Altria provide the enhanced services upon signing, implying that Altria withdrew its products so it could provide those services quicker. (*See, e.g.*, Tr. 46 (opening statement); Garnick (Altria) Tr. 1668-69, 1675-79). But no evidence supports this theory. Indeed, the record reflects that neither JLI nor Altria was concerned about delaying the start of enhanced services due to a delay in filing for HSR review. (Pritzker (JLI) Tr. 871-72; Willard (Altria) Tr. 1212-13).

**Response to Finding No. 1068**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. To the extent that the proposed finding claims that no evidence supports the theory that “JLI insisted Altria provide the enhanced services upon signing, implying that Altria withdrew its products so it could provide those services quicker” and “neither JLI nor Altria was concerned about delaying the start of enhanced services due to a delay in filing for HSR review,” the proposed finding is contrary to the weight of the evidence. (CCFF ¶¶ 851, 984-85).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; PX2115 (JLI

(Burns email to JLI stockholders describing transaction’s benefits); PX7011 (Valani (JLI), IHT at 137-39 (testifying that Altria had “a huge customer database [ ] that they were offering to us that we thought had big benefit to us”)). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

On December 9, 2018, Altria’s Garnick emailed JLI’s Masoudi: “I thought while on the plane I would see if we could resolve an issue or two: [ . . . ] Pre-antitrust do not compete – How about if we agree to file within 90 days (we intend to file within 30 days, but I would like a cushion for unforeseen events). Would that resolve this? Alternatively, if the businesses want to start enhanced services right way, the do not compete provision could start running based on when providing enhanced services begins and tied to that. This is of course a nonissue, since we are not in the market anymore and we can’t get back into the market without getting a PMTA. But do not compete cannot start simply with closing for antitrust reasons – section 1 issue.” (CCFF ¶ 851).

Shortly after closing on the transaction, Altria began providing JLI with enhanced services such as product inserts. (Garnick (Altria) Tr. 1,679; Willard (Altria) Tr. 1,232-33; PX7011 (Valani (JLI) IHT at 182-83)).

1069. It was in fact the regulatory support services, which *could* be provided upon closing even if Altria were still in the e-vapor marketplace, that were most desirable to JLI. (Pritzker (JLI) Tr. 820; PX7025 Burns (JLI) Dep. at 211-12).

#### **Response to Finding No. 1069**

The proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPFf ¶ 1068. (*See* Response to RPFf ¶ 1068). The proposed finding is also unreliable because it relies only on self-serving testimony.

1070. Pritzker stated that it was Altria’s PMTA support services that were critical, because “getting PMTA approval is literally existential for the company. You cannot operate without PMTA approval . . . . Altria’s team was the best in the country, and . . . their willingness to provide services through that team was invaluable.” (Pritzker (JLI) Tr. 820).

#### **Response to Finding No. 1070**

The proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPFf ¶ 1068. (*See* Response to RPFf ¶ 1068). The proposed finding is also unreliable because it relies only on self-serving testimony.

1071. Similarly, as then-CEO Kevin Burns testified, the support services were “incredibly important,” to JLI, “especially things like support around PMTA submission and FDA support,” as those showed that Altria was “going to come out and support [JLI’s] mission.” (PX7025 Burns (JLI) Dep. at 212).

### **Response to Finding No. 1071**

The proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 1068. (*See* Response to RPF ¶ 1068). The proposed finding is also unreliable because it relies only on self-serving testimony.

1072. By contrast, Pritzker viewed the enhanced services as “valuable services but not the critical service.” (Pritzker (JLI) Tr. 871). He “would not have seen [delaying the start of enhanced services] as a problem,” and he agreed that he was not “concerned about what the trigger date would be for starting them.” It was “important . . . for real and cosmetic reasons to know that [Altria was] prepared to offer [the enhanced] services, but when they started would not have been consequential to [him].” (Pritzker (JLI) Tr. 871-72).

### **Response to Finding No. 1072**

The proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 1068. (*See* Response to RPF ¶ 1068). The proposed finding is also unreliable because it relies only on self-serving testimony.

1073. Willard’s memory was the same. He recalled that JLI wanted Altria’s services, but both sides understood that “there were certain reasons why they could be provided at various times, and . . . both sides were fairly flexible on that.” (Willard (Altria) Tr. 1213). He did not “recall that the timing of those services was an important part of what [JLI was] expecting.” (Willard (Altria) Tr. 1213).

### **Response to Finding No. 1073**

The proposed finding is contrary to the weight of the evidence for the reasons cited above in response to RPF ¶ 1068. (*See* Response to RPF ¶ 1068). The proposed finding is also unreliable because it relies only on self-serving testimony.

## **F. In Early December, Altria, Seeking Cost Savings For New Opportunities, Discontinued Its Remaining Nu Mark Products**

1074. In the course of its annual budget process in the fall of 2018, Altria came to terms with the fact that both of its “two pathways” to success in the e-vapor industry—developing a leap

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frog product through the Growth Teams or the potential investment in JLI—would require a substantial financial commitment. (Gifford (Altria) Tr. 2842; *see also* [REDACTED]). If Altria “could . . . ever be successful with JLI, . . . [it] would have to finance [the investment], and any money [it] saved would help with the interest cost. Or if [Altria] were unsuccessful with JLI, [that money would] fund the growth teams, and those investments would have to step up through time as they made progress . . .” (Gifford (Altria) Tr. 2842; *see also* Gifford (Altria) Tr. 2810 (“[W]e really needed to . . . free[] up people resources and financial resources to put elsewhere in the business”); PX7010 Gifford (Altria) IHT at 189 (recalling that because Nu Mark was “unsuccessful from both a financial and a growth base and knowing that the existing products were going to take additional investment,” Gifford felt, “as the financial person,” that he “needed to free up the resources to fund the growth teams, or make the decision to fund . . . the interest related to an investment”); PX1348 (Altria) at 002 (memorializing discussion from Altria’s December 7, 2018 Board meeting about the need for \$300-600 million in annual cost savings); [REDACTED]).

#### **Response to Finding No. 1074**

The proposed finding is unreliable, vague, incomplete, and misleading. Complaint Counsel does not disagree that shutting down Nu Mark helped Altria finance its investment in JLI, [REDACTED]  
[REDACTED]  
[REDACTED] (CCFF ¶¶ 1387-88). Nor does Complaint Counsel disagree that Altria disbanded the growth teams when it decided to invest in JLI. The first sentence is nonetheless unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is also vague as to the phrase “success in the e-vapor industry,” which is undefined. The first and second sentence are both incomplete and misleading to the extent that they suggest as a “fact” that Altria’s path forward was limited to growth teams or the JLI transaction, and to the extent that they merely characterize, without support, Altria’s existing e-vapor business as “unsuccessful.” The facts are that Altria’s existing e-vapor business had been growing in sales volume, improving financially, and [REDACTED] over the preceding years. (CCFF ¶¶ 1088-111). Sales of Elite in particular had been growing before Altria decided to pull it from the market in October



2018. (CCFF ¶¶ 1112-31). The reliance on Gifford’s testimony that “the existing products were going to take additional investment” is also incomplete and misleading to the extent that it suggests that investments in growth teams and existing products were necessarily mutually exclusive. In fact, the growth teams had the freedom to incorporate Nu Mark e-vapor products, (CCFF ¶ 1541), and, before being disbanded, were considering ways to do so. (CCFF ¶ 1551).

1075. Altria already anticipated that each Growth Team would cost approximately \$30 million per year, and it was prepared to allocate more if necessary. (RX0570 (Altria) at 012, 024; PX7010 Gifford (Altria) IHT at 192-93 (explaining Altria would have given the Growth Teams \$100 million per year if that’s what they needed—“budget [would not be] a constraint” on the Growth Teams’ efforts)).

#### **Response to Finding No. 1075**

Complaint Counsel does not disagree with the proposed finding.

1076. And if Altria instead completed a multi-billion-dollar deal with JLI, that too would require significant financial resources. (PX7036 Garnick (Altria) Dep. at 214 (if the JLI transaction went forward, Altria “needed to find about \$500 million in cost savings [per year] to pay for it”)).

#### **Response to Finding No. 1076**

Complaint Counsel does not disagree with the proposed finding.

#### **1. Nu Mark Had Been Losing Money For Years And Had No Path To Profitability**

1077. Freeing up these resources was going to require Altria to make changes internally. From 2014 to 2017, Nu Mark lost \$600 million. (PX4029 (Altria) at 10 (detailing \$229 million in losses in 2014; \$182 million in losses in 2015; \$118 million in losses in 2016; \$71 million in losses in 2017)).

#### **Response to Finding No. 1077**

The proposed finding is unreliable, incomplete, and misleading. The first sentence is unreliable because it cites to no evidence in the record.

Complaint Counsel does not disagree that the document cited in support of the second sentence shows that Nu Mark’s income improved by tens of millions of dollars each year from

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2014 to 2017, and notes that the same page shows that Nu Mark's marginal contribution likewise improved by nearly \$50 million dollars over the same timeframe. (PX4029 (Altria) at 010).

The proposed finding is also incomplete and misleading in that it fails to mention that other e-vapor competitors also experienced commercial challenges, but remained in the market. (CCFF ¶¶ 1132-43).

1078. As Begley recalled, Nu Mark lost money every year during his tenure as head of the company, (Begley (Altria) Tr. 1087-88; *see also* { [REDACTED] }):
- (a). Nu Mark posted losses in every year prior to 2015. (Begley (Altria) Tr. 1062-63).
  - (b). In 2015, Nu Mark lost \$182 million. (PX4040 (Altria) at 012; Begley (Altria) Tr. 1061; Gifford (Altria) Tr. 2724-25).
  - (c). Going into 2016, Nu Mark expected to meet its 2016 operating company income target of a loss of \$115 million. (PX4073 (Altria) at 002; *see also* { [REDACTED] }). That year, Nu Mark lost \$118 million. (Gifford (Altria) Tr. 2726; RX0746 (Altria) at 007).
  - (d). In 2017, Nu Mark lost another \$71 million. (Gifford (Altria) Tr. 2736-37; PX4012 (Altria) at 010).

### **Response to Finding No. 1078**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence. The statement that “Nu Mark lost money every year during [Begley’s] tenure as head of the company” is unreliable in that the page of the document cited does not reference any losses. (*See* PX4073 (Altria) at 003 (*in camera*)).

The statement that “Nu Mark posted losses in every year prior to 2015” is unreliable in that it relies solely on the self-serving testimony of an Altria executive.

The statement that “Nu Mark lost \$182 million” in 2015 is incomplete and misleading to the extent that it suggests that Nu Mark was unique as an e-vapor company in suffering losses, and Complaint Counsel notes that the cited document also presents an estimate that Reynolds’ Vuse also lost approximately \$160-\$180 million the same year. (PX4040 (Altria) at 012).

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The statement that “Nu Mark lost \$118 million” in 2016 is likewise incomplete and misleading in that the cited document presents an estimate that Reynolds’ Vuse also lost approximately \$120 million the same year. (RX0746 (Altria) at 007). Complaint Counsel does not disagree that Nu Mark did not expect to be profitable in 2016, and notes that { [REDACTED]

The statement that “Nu Mark lost another \$71 million” in 2017 is incomplete and misleading in that { [REDACTED]

Finally, the proposed finding is misleading and contrary to the weight of the evidence because it ignores that Altria, { [REDACTED] }, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1079. [REDACTED]

### **Response to Finding No. 1079**

The proposed finding is vague, unreliable, improper, incorrect, incomplete, and misleading. It is vague in that { [REDACTED] } It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. The claim that { [REDACTED] } is, as a general proposition,

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improper opinion testimony from a fact witness. The proposed finding is also incorrect and misleading to the extent that it suggests that { [REDACTED] [REDACTED] }. In 2017 alone MarkTen cigalikes grew volume by approximately 60% (CCFF ¶ 1096); Nu Mark sales growth continued into 2018, (CCFF ¶¶ 1097, 1099-105, 1108-09); and Elite in particular saw sales growth before Altria pulled it from the market in October 2018. (CCFF ¶¶ 1112-31). Complaint Counsel does not disagree that { [REDACTED] [REDACTED] }.

The proposed finding is also incomplete and misleading in that it fails to mention that other e-vapor competitors also experienced commercial challenges, but remained in the market. (CCFF ¶¶ 1132-43).

1080. Every year that Begley was CEO of Nu Mark, the point in the future at which Nu Mark hoped that it would break even or make a profit was pushed out further. (Begley (Altria) Tr. 1088):

- (a). In 2015, Nu Mark predicted that it would become profitable in 2017. (Gifford (Altria) Tr. 2719-21; RX1733 (Altria) at 092).
- (b). In 2016, Altria “pushed” its profitability projection “out a year to 2018.” (Gifford (Altria) Tr. 2725-26; PX4040 (Altria) at 012).
- (c). Nu Mark’s 2017 plan “pushed out another year, break-even in 2019 was the estimated or the forecast.” (Gifford (Altria) Tr. 2726; RX0746 (Altria) at 007).

**Response to Finding No. 1080**

The proposed finding incomplete, misleading, and contrary to the weight of the evidence. It is incomplete and misleading in that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED] }

In addition, the proposed finding is misleading and contrary to the weight of the evidence because it ignores that Altria, { [REDACTED] }, [REDACTED]

[REDACTED]

[REDACTED] { [REDACTED]

[REDACTED] }.

1081. The financial situation did not improve once Quigley was at the helm. In the first nine months of 2018, Nu Mark lost \$101 million. (Gifford (Altria) Tr. 2817-19 Willard (Altria) Tr. 1458-59; PX1127 (Altria) at 003). In that same time frame, Nu Mark’s share of the total dollars spent in e-vapor had tumbled from approximately 15 percent to 4.7 percent. (RX1447 (JLI) at 009).

### **Response to Finding No. 1081**

The proposed finding is unreliable, incomplete, incorrect, and misleading. The first sentence is unreliable in that it cites no evidence in the record.

The second sentence is incomplete and misleading because it ignores that in 2018 specifically, Nu Mark incurred expenses related to the launch of Elite, including the funding of heavy promotions in order to compete with JLI. (CCFF ¶¶ 475, 559, 1419, 1425-31). Nu Mark’s 2018 expenditures also included, above and beyond those on marketing and sales, an investment of over \$100 million in its Innovative Tobacco Products (ITP) program. (CCFF ¶¶ 431-32).

The third sentence is incorrect and misleading to the extent that it suggests that Nu Mark suffered a decline in sales in 2018. In fact, Nu Mark’s sales grew in 2018, (CCFF ¶¶ 1097, 1099-105, 1108-09), and as of September 2018 MarkTen was the “2nd fastest growing e-vapor brand overall . . . in [the] US.” (CCFF ¶ 1505). The graph that the proposed finding cites for support tracks not sales in dollars or units but “total vapor dollar share” (RX1447 (JLI) at 009), and in

2018 JUUL was driving growth in the overall e-vapor market (e.g., RX0272 (Altria) at 005 (May 2018 Board presentation) (“JUUL volume performance is driving category growth”)). The third sentence is also incomplete and misleading to the extent that it suggests that Nu Mark was unique in experiencing a fall in market share. The graph cited for support shows that all e-vapor brands other than JUUL appeared to lose share over 2018. (RX1447 (JLI) at 009). Despite their loss in share, these e-vapor brands—other than MarkTen—continued competing in the market when Altria pulled its products, and continue to compete today. (CCFF ¶¶ 1028-33).

The proposed finding is also incomplete and misleading in that it fails to mention that other e-vapor competitors also experienced commercial challenges, but remained in the market. (CCFF ¶¶ 1132-43).

1082. The reality was that with only cig-a-like products and without a successful pod product, Nu Mark “had no chance of achieving [its financial projections]” and would continue to incur losses. (Begley (Altria) Tr. 1087-88). The 2018 plan predicted that cig-a-like volumes would decline and pod volumes would grow substantially. (PX4012 (Altria) at 009; Begley (Altria) Tr. 1131-32). And, as Complaint Counsel’s expert acknowledges, “[f]irms have economic incentives to invest in segments that are growing rather than shrinking,” (PX5000 Rothman Report ¶ 94), as cig-a-likes were.

### **Response to Finding No. 1082**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence. The first sentence is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is vague as to the term “successful.” It is incomplete and misleading to the extent that it suggests that Elite was not “a successful pod product,” because: (1) Elite’s sales were growing, (CCFF ¶¶ 1112-31); (2) Altria implemented improvements to Elite, (CCFF ¶¶ 1206-36); and (3) Altria pulled Elite from the market before it had time to assess the product’s long-term potential. (CCFF ¶¶ 1144-62).

The second sentence is unreliable in that the cited document assumed Nu Mark would also be marketing a pod product, such as Elite, at least from 2018 through 2020. (PX4012 (Altria) at

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009). Indeed, the prediction that “pod volumes would grow substantially” refers to Nu Mark’s own pod volumes. (PX4012 (Altria) at 009).

The third sentence is unreliable and misleading in that it relies on a paragraph in Dr. Rothman’s Report that addresses investment in e-vapor products versus traditional cigarettes, not pod products versus cigalikes. (PX5000 at 044-45 (¶ 94) (Rothman Report)). Respondents’ attempt to apply Dr. Rothman’s statement to this context is contrary to the weight of the evidence, as other e-vapor companies have continued to market cigalikes despite the rise of pod products. (CCFF ¶¶ 1173-76).

1083. Indeed, Altria projected that Nu Mark’s losses would continue for the foreseeable future: Nu Mark expected to lose another \$235 million over the next three years. (PX4232 (Altria) at 013; *see also* [REDACTED]; Willard (Altria) Tr. 1459 (“[Altria] always hoped that [Nu Mark] would launch a successful product and [it] could turn that into a profit, but there didn’t seem to be any likelihood of that happening in the next few years for Nu Mark.”)).

### **Response to Finding No. 1083**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that Altria was unique as an e-vapor company in facing commercial challenges.

The totality of the record makes clear that Altria, { [REDACTED] }, [REDACTED]

[REDACTED] Indeed, it was Altria’s decision to exit the closed-system e-cigarette market that was unique, as other e-vapor companies continued to compete despite experiencing their own commercial challenges. (CCFF ¶¶ 1132-43). { [REDACTED]

[REDACTED] } In

addition, it had taken Quigley six years to turn around Altria’s U.S. Smokeless Tobacco group, as compared to the six to seven months he was given as CEO of Nu Mark. (CCFF ¶¶ 1152-53).

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1084. On top of those losses, Altria was sinking at least \$50 million per year into support and overhead for Nu Mark that was not allocated specifically to Nu Mark. (PX4232 (Altria) at 013; *see also* { [REDACTED] } [REDACTED] ).

#### **Response to Finding No. 1084**

The proposed finding is vague, unreliable, incomplete and misleading. The terms “support and overhead” are vague and undefined, and there is no supporting evidence for the \$50 million figure. It is unreliable in that the document cited does not identify any line items as “support” or “overhead” (PX4232 (Altria) at 013), and in that { [REDACTED] } [REDACTED] [REDACTED] }.

The proposed finding is also incomplete and misleading in that it fails to mention that other e-vapor competitors also experienced commercial challenges, but remained in the market. (CCFF ¶¶ 1132-43).

#### **2. New Problems Continued To Emerge With Nu Mark’s Remaining Cig-A-Like Products**

1085. And even in late November 2018, there were “a number of other issues that were still being worked out” with respect to Altria’s efforts to address the dry puff problems with Nu Mark’s remaining on-market cig-a-like products. (Murillo (Altria/JLI) Tr. 3070-71). As Murillo described the process, it was “solving one issue and then creating at least, you know, a series of other issues.” (Murillo (Altria/JLI) Tr. 3072).

#### **Response to Finding No. 1085**

The proposed finding is unreliable, vague, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive. It is vague in that it fails to identify the specific “other issues” referenced. It is incomplete and misleading to the extent that it suggests that Altria had no hope of resolving any outstanding dry puff issues related to its cigalike product. In fact, by November 2018 Altria had tested a prototype of a new battery



assembly that successfully reduced formaldehyde generation associated with dry puff. (CCFF ¶¶ 1275-80). As of November 2018, the deadline for PMTA submissions was still nearly four years away, in August 2022. (CCFF ¶ 201). Instead of allowing Nu Mark to complete its work on the new battery assembly, Altria halted that work when it announced its decision to exit the e-vapor business in December 2018. (CCFF ¶ 1280).

1086. As a result, by this time period, Altria's scientists still were not sure that they had a dry puff prevention fix that they could submit for a PMTA. (Gardner (Altria) Tr. 2573-74; *see also* PX7015 Gogova (Altria) Dep. at 245-46 (“[The scientists] knew what to anticipate and what to look for, but [they] had no way to know exactly what are the consequences [of the battery change].”)).

#### **Response to Finding No. 1086**

The proposed finding is unreliable and vague. It is unreliable in that it relies solely on the self-serving testimony of Altria executives. It is vague in that it fails to specify “this time period.” To the extent that it refers to late November 2018, the deadline for PMTA submissions at that time was still nearly four years away, in August 2022. (CCFF ¶ 201). Instead of allowing its scientists to determine whether they had “a dry puff prevention fix that they could submit for a PMTA,” Altria halted that work when it announced its decision to exit the e-vapor business in December 2018. (CCFF ¶ 1280).

1087. In particular, Altria discovered that battery manufacturing quality decline caused changes to the aerosol mass. (PX7026 Gardner (Altria) Dep. at 258-59 (“The aerosol delivery was different from what it was in 2016.”)). Despite their best efforts, Altria scientists were unable to resolve the changed aerosol mass. (PX7016 Jupe (Altria) Dep. at 83 (“[W]e never figured out how to get a consistent aerosol at the end of the day.”); PX7017 Magness (Altria) Dep. at 156 (explaining consideration of an annealing process that may have had to be added to address the aerosol mass change); PX1407 (Altria) at 014; RX0552 (Altria) at 006, 007 (noting unresolved investigation into problems with the cartridge and battery quality)).

#### **Response to Finding No. 1087**

The proposed finding is unreliable, incomplete, and misleading. The first sentence is unreliable in that it relies solely on the self-serving testimony of an Altria executive.

The second sentence is incomplete and misleading to the extent that it suggests that Altria scientists had, before Altria decided to remove its cigalikes from the market, affirmatively concluded that any aerosol mass issue could not be resolved. The two documents cited date from November 2018, at which point the deadline for PMTA submissions was still nearly four years away, in August 2022. (CCFF ¶ 201). The document cited as “noting unresolved investigation into problems with the cartridge and battery quality” does not refer to any unresolved problems with battery quality; on the contrary, it states, “Battery issue seems to be resolved” (RX0552 (Altria) at 006), and recommends a production schedule that “[b]uys time for cartridge issue to be resolved” (RX0552 (Altria) at 007). Though the other cited document refers to an issue related to “new chip quality during scale up,” it also notes, “Potential issue identified and working on root cause.” (PX1407 (Altria) at 014). In terms of the aerosol mass differences between 2016 and 2018, the document likewise makes clear that the “[r]oot cause [was] under investigation.” (PX1407 (Altria) at 014). Instead of allowing these ongoing investigations to conclude, Altria halted that work when it announced its decision to exit the e-vapor business in December 2018. (CCFF ¶ 1280).

1088. Murillo was “concerned” that the aerosol mass issue “could not be resolved favorably in time to do all the work required for an application, including stability, because aerosol mass is essential to stability,” and to show “12 months stability, you need 12 months.” (PX7027 Murillo (Altria/JLI) Dep. at 132; *see also* Murillo (Altria/JLI) Tr. 2937-38).

#### **Response to Finding No. 1088**

The proposed finding is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive, and because Murillo is not a scientist and does not have an advanced degree in any natural science. (PX7027 (Murillo (Altria/JLI), Dep. at 25)).

1089. Altria’s scientists also had discovered that there were problems with the cig-a-like’s wicking rate, (Gardner (Altria) Tr. 2571-74), and cartridge, (RX0552 (Altria) at 006, 007 (noting unresolved investigation into problems with the cartridge and battery quality)).

#### **Response to Finding No. 1089**

The proposed finding is unreliable, incomplete, and misleading. In terms of “problems with the cig-a-like’s wicking rate,” the proposed finding is unreliable in that it relies solely on the self-serving testimony of an Altria executive. In terms of problems with the cigalike’s cartridge, the proposed finding is incomplete and misleading to the extent that it suggests that Altria scientists had, before Altria decided to remove its cigalikes from the market, affirmatively determined that those problems could not be resolved. In fact, the cited document recommends a production schedule that “[b]uys time for cartridge issue to be resolved.” (RX0552 (Altria) at 007). The document dates from November 2018, at which point the deadline for PMTA submissions was nearly four years away, in August 2022. (CCFF ¶ 201). Instead of allowing time to resolve the cartridge issue, Altria halted that work when it announced its decision to exit the e-vapor business in December 2018. (CCFF ¶ 1280). Finally, the cited document does not refer to any unresolved problems with battery quality; on the contrary, it states, “Battery issue seems to be resolved.” (RX0552 (Altria) at 006).

### **3. Altria Withdrew Nu Mark’s Remaining Products On December 7, 2018**

1090. Faced with these financial losses and dire regulatory prospects, Altria “decided to go ahead and shut [Nu Mark] down. Without a pathway to profitability, [Altria] had already funded the growth teams,” and it decided, “let’s shut it down, let’s not lose additional money, and let’s look at how . . . [to] continue the growth teams and look for ways to participate well into the future in the e-vapor space.” (Gifford (Altria) Tr. 2841; *see also* Willard (Altria) Tr. 1460 (“[Altria] was making hard decisions to cut costs on products that hadn’t worked out, and so [it] ultimately decided to eliminate these e-vapor products” because “[it was] not in the business of losing money, [it was] in the business of making money”); PX7024 Crosthwaite (Altria/JLI) Dep. at 283 (recalling Altria decided it “would be better served putting resources towards future platforms and not supporting the [cig-a-like] platform”); PX7031 Willard (Altria) Dep. at 281; PX1182 (Altria); RX0878 (Altria); *see also* [REDACTED] [REDACTED] }).

#### **Response to Finding No. 1090**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable to the extent that it relies on PX1182, which dates from September 2018 and does not reference shutting down Nu Mark or pulling its cigalike products from the market. (PX1182 (Altria)). The proposed finding is also incomplete and misleading to the extent that it relies on RX0878, as that document references “shutting down the[] business” in the context of an email chain with the subject heading “Project Tree Materials,” which was the code name for the deal with JLI. (RX0878 (Altria) at 001). Beyond these two documents, the proposed finding is unreliable in that it relies on the testimony of Altria and JLI executives, and offers mere characterization (e.g., “dire regulatory prospects”) not reflected in the cited evidence.

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that “financial losses and dire regulatory prospects” formed the basis of Altria’s decision to shut down Nu Mark. In reality, Nu Mark’s financial performance had been improving. (CCFF ¶¶ 1088-111). Sales of Elite in particular had been increasing before Altria pulled it from the market in October 2018. (CCFF ¶¶ 1112-31). Moreover, Altria understood that long-term success in e-vapor required up-front investment and was willing to sacrifice short-term profits in pursuit of that goal. (CCFF ¶¶ 1064-87). And, Nu Mark was not unique among e-vapor companies in facing commercial challenges; it was only unique in its decision to exit the market. (CCFF ¶¶ 1132-43). In terms of regulatory prospects, the proposed finding ignores that, despite FDA regulations, Altria had in the past successfully designed and implemented improvements to its e-vapor products, including Elite. (CCFF ¶¶ 1206-36). By late 2018, Altria’s plans and progress in preparing a PMTA for MarkTen were already well advanced, (CCFF ¶¶ 1258-66), and Altria had plans to develop and implement improvements to its e-vapor products for an even greater chance of securing PMTA approval. (CCFF ¶¶ 1275-300). Contrary to the reasons Altria’s

executives urged in their unsupported testimony, the totality of the record demonstrates that Altria's decision to remove its e-vapor products—not only its cigalikes but also its pod products—from the market sprang from its desire to facilitate a transaction with JLI. (CCFF ¶¶ 578-1033, 1353-407).

1091. On December 7, 2018, Willard sent an internal email to Altria employees announcing that the company would be discontinuing “production and distribution of all *MarkTen* and *Green Smoke* e-vapor products,” (RX1000 (Altria) at 004), and the company issued a public press release saying the same, (PX9080 (Altria) at 001).

#### **Response to Finding No. 1091**

Complaint Counsel has no specific response.

1092. Both Altria's internal and public announcements indicated that this decision was made based on “current and expected financial performance, coupled with regulatory restrictions that burden our ability to quickly improve these products.” (Willard (Altria) Tr. 1459-61; RX1000 (Altria) at 004; PX9080 (Altria) at 001).

#### **Response to Finding No. 1092**

The proposed finding is misleading and contrary to the weight of the evidence. Complaint Counsel does not disagree that Altria prepared and issued statements to its employees and the public that contain the cited language. However, Altria's announcement that its decision to exit the e-vapor business was based on “current and expected financial performance” is contrary to the weight of the evidence. Nu Mark's financial performance had been improving. (CCFF ¶¶ 1088-111). Sales of Elite in particular had been increasing before Altria pulled it from the market in October 2018. (CCFF ¶¶ 1112-31). Moreover, Altria understood that long-term success in e-vapor required up-front investment and was willing to sacrifice short-term profits in pursuit of that goal. (CCFF ¶¶ 1064-87). And, Nu Mark was not unique among e-vapor companies in facing commercial challenges; it was only unique in its decision to exit the market. (CCFF ¶¶ 1132-43). The weight of the evidence is likewise contrary to the notion that “regulatory restrictions” formed the basis of Altria's decision to exit the e-vapor business. Despite FDA regulations, Altria had in

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the past successfully designed and implemented improvements to its e-vapor products, including Elite. (CCFF ¶¶ 1206-36). By late 2018, Altria’s plans and progress in preparing a PMTA for MarkTen were already well advanced, (CCFF ¶¶ 1258-66), and Altria had plans to develop and implement improvements to its e-vapor products for an even greater chance of securing PMTA approval. (CCFF ¶¶ 1275-300). Contrary to the stated reasons in Altria’s prepared announcements, the totality of the record demonstrates that Altria’s decision to remove its e-vapor products—not only its cigalikes but also its pod products—from the market sprang from its desire to facilitate a transaction with JLI. (CCFF ¶¶ 578-1033, 1353-407).

1093. The announcements also indicated that Verve products would be discontinued. (PX9080 (Altria) at 001; RX1000 (Altria) at 004).

#### **Response to Finding No. 1093**

The proposed finding is incomplete and misleading because {

[REDACTED]

[REDACTED]

[REDACTED].

1094. Verve was an oral product in Nu Mark’s portfolio—essentially a chewable rubber disk that released flavor and nicotine. (Willard (Altria) Tr. 1459). Because Verve was not an e-vapor product, it would not have been affected by the eventual noncompete agreement reached between Altria and JLI. (Garnick (Altria) Tr. 1777-78). But Altria was losing money on Verve, and “there was no sign it was ever going to be successful.” (Willard (Altria) Tr. 1459-60).

#### **Response to Finding No. 1094**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of Altria executives. It is incomplete and misleading because {

[REDACTED]

[REDACTED].

1095. Altria discontinued Verve because like the MarkTen cig-a-like, “it was not profitable, and we did not have a pathway to profitability, and it was also not converting smokers.” (Garnick (Altria) Tr. 1777-78).

**Response to Finding No. 1095**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of Altria executives. It is unreliable in that Altria had not performed any studies that established MarkTen cigalikes were not converting smokers. (CCFF ¶¶ 1304, 1321-22). It is incomplete and misleading because { [REDACTED]

[REDACTED]

[REDACTED] }.

1096. Altria was not the only company to make such a decision. R.J. Reynolds, for example, has also discontinued e-vapor products that had minimal sales. (Huckabee (Reynolds) Tr. 383-84; *see also* [REDACTED] [REDACTED] }; Quigley (Altria) Tr. 1961 (“[I]t would not be uncommon to make a decision where we’re losing money and a product is not performing or doesn’t have what it needs to be successful to be pulled from the market.”)).

**Response to Finding No. 1096**

The proposed finding is irrelevant, vague, incomplete, and misleading. As explained in greater detail below, regardless of any action with respect to any specific product, [REDACTED]

[REDACTED]

(CCFF ¶¶ 1133-35, 1138).

The first sentence is vague as to the term “such a decision.”

The second sentence is incomplete and misleading in that the testimony cited refers to open-system vapor products, not closed-system e-cigarettes. (Huckabee (Reynolds) Tr. 383-84).

In fact, Reynolds continues to sell four types of closed-system e-cigarettes under its Vuse brand, including cigalikes. (Huckabee (Reynolds) Tr. 377-79, 385). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } The second sentence of the proposed finding is also incomplete and misleading in relying on the cited Quigley testimony, which identifies no specific examples of a “product [that] is not performing” being “pulled from the market.” (Quigley (Altria) Tr. 1961). Quigley himself testified that “the cig-a-like platform was growing. Not declining” as of August 2018, that Altria’s cigalike business was “actually growing 3-1/2 million units.” (PX7003 (Quigley (Altria), IHT at 152)).

1097. There was no demand from JLI that caused Altria to make the decision to discontinue these products on December 7. (Gifford (Altria) Tr. 2850; *see also* Gifford (Altria) Tr. 2844). Gifford explained that he never was asked to remove Altria’s e-vapor products from the market before finalizing the JLI transaction, (Gifford (Altria) Tr. 2774), and he never at any point in the negotiations understood that Altria had to pull any or all of its existing e-vapor products to get the deal done. (Gifford (Altria) Tr. 2774, 2850).

### **Response to Finding No. 1097**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is misleading and contrary to the weight of the evidence in that it ignores the multitude of term sheets



and correspondence during negotiations where JLI made clear that Altria's exit from the e-vapor business would be a condition for any transaction. (CCFF ¶¶ 880-924). For example, on August 15, 2018 Gifford received a message from JLI noting that Altria had "retained the right under certain circumstances to compete not only with existing Mark Ten products, but also with other products under development and future products," adding, "The commitment to divest Mark Ten has been stricken. This is not acceptable to us." (PX1012 (Altria) at 001-02). Gifford understood this language as JLI's response to Altria's latest term sheet, and the reference to MarkTen specifically as Altria's existing e-vapor products. (Gifford (Altria) Tr. 2873-74). Further, during deal negotiations Altria indicated that it would meet JLI's demand, (CCFF ¶¶ 945-67), potentially by ceasing to operate its e-vapor business. (CCFF ¶¶ 968-88).

1098. Indeed, Altria employees not involved with the JLI negotiations agreed that the products should come off the market. Quigley thought it was a "reasonable business decision" to shut down a business that was "still losing money." (Quigley (Altria) Tr. 1993; *see also* PX7041 Quigley (Altria) Dep. at 131 ("I think it was the right business decision.")). Although the decision "was hard" for him "because of the impact on people," "[u]ltimately, . . . [Nu Mark] didn't have the products [and] was losing money." (PX7041 Quigley (Altria) Dep. at 131). Jupe "was very pleased by the decision in that we were refocusing our resources [and] thinking forward." (Jupe (Altria) Tr. 2322-23). Schwartz explained, "[c]onsumers had moved away from cigalike. If the idea was to convert smokers, which was our mission, right, and to achieve leadership in the e-vapor space, we were not going to accomplish that with what was left of the portfolio." (PX7018 Schwartz (Altria) Dep. at 162; *see also* PX7002 Schwartz (Altria) IHT at 160 (agreeing with the decision because Nu Mark "only had a cig-a-like franchise" left and had eliminated its non-traditional flavors)). Michael Brace, who at the time was the general manager of Nu Mark, testified that he also "underst[ood] the decision to discontinue Nu Mark and agreed with it." (PX7013 Brace (Altria) Dep. at 11, 172).

### **Response to Finding No. 1098**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies entirely on the self-serving testimony of Altria executives, citing no ordinary-course documents. It is misleading and contrary to the weight of the evidence in that, despite "still losing money," Nu Mark's financial performance had been improving. (CCFF ¶¶

1088-111). Sales of Elite in particular had been increasing before Altria pulled it off the market in October 2018. (CCFF ¶¶ 1112-31). Moreover, Altria understood that long-term success in e-vapor required up-front investment and was willing to sacrifice short-term profits in pursuit of that goal. (CCFF ¶¶ 1064-87). And, Nu Mark was not unique among e-vapor companies in facing commercial challenges; it was only unique in its decision to exit the market. (CCFF ¶¶ 1132-43). The weight of the evidence is likewise contrary to the notion that Altria “didn’t have the products.” Despite FDA regulations, Altria had in the past successfully designed and implemented improvements to its e-vapor products, including Elite. (CCFF ¶¶ 1206-36). By late 2018, Altria’s plans and progress in preparing a PMTA for MarkTen were already well advanced, (CCFF ¶¶ 1258-66), and Altria had plans to develop and implement improvements to its e-vapor products for an even greater chance of securing PMTA approval. (CCFF ¶¶ 1275-300). Contrary to the self-serving testimony that the proposed finding cites, the totality of the record demonstrates that Altria’s decision to remove from the market its e-vapor products—not only its cigalikes but also its pod products—sprang from its desire to facilitate a transaction with JLI. (CCFF ¶¶ 578-1033, 1353-1407).

#### **4. Retailers Were Not Disappointed By The Withdrawal Of Nu Mark’s Remaining Products**

1099. As it had with Elite, Altria allowed its trade partners to sell through their remaining inventory. (Gifford (Altria) Tr. 2812 (explaining the product pull was not a recall); *see also* [REDACTED]).

#### **Response to Finding No. 1099**

Complaint Counsel has no specific response.

1100. Retailers were not disappointed to see the other Nu Mark products discontinued, because the products did not sell, and discontinuing them freed up inventory dollars and shelf space for other products. (*See* Myers (Altria) Tr. 3369-71; *see also* Crozier (Sheetz) Tr. 1557-60 (agreeing that a business limited to cig-a-likes was unlikely to be a competitive threat);

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PX7038 Myers (Altria) Dep. at 307 (“MarkTen . . . was a very small part of their category business contributor . . .”).

### **Response to Finding No. 1100**

The proposed finding is unreliable, vague, incorrect, misleading, and contrary to the weight of the evidence. It is unreliable to the extent that it relies on the self-serving testimony of Myers, an Altria executive whose cited testimony relies on anecdotal hearsay. It is also vague in that it fails to specify which “other Nu Mark products” it means, and the cited Myers testimony concerns both Elite and cigalike products. (Myers (Altria) Tr. 3369-71). It is also incorrect, misleading, and contrary to the weight of the evidence in claiming that “the products did not sell,” as { [REDACTED] } Indeed, from July 2017 through June 2018, MarkTen was the second-fastest growing brand in the e-vapor category, after JUUL. (CCFF ¶ 1104). At Sheetz specifically, Nu Mark had the second-highest share of e-vapor sales as of October 2018. (CCFF ¶ 1110). Sales of Elite in particular were growing before Altria pulled it from the market in October 2018. (CCFF ¶¶ 1112-31). Further, Quigley testified that “the cig-a-like platform was growing. Not declining” as of August 2018, that Altria’s cigalike business was “actually growing 3-1/2 million units.” (PX7003 (Quigley (Altria), IHT at 152)).

### **5. JLI’s Principal Negotiators Did Not Even Notice Altria’s Announcement**

1101. JLI did not have any prior notice of Altria’s December 7 withdrawal, nor had anyone at JLI requested that it take that action. (Pritzker (JLI) Tr. 884-85; Valani (JLI) Tr. 957; *see also* PX7021 Pritzker (JLI) Dep. at 164, 169; PX7032 Valani (JLI) Dep. at 151-52; PX7025 Burns (JLI) Dep. at 217-18; PX7035 Masoudi (JLI) Dep. at 89, 128-29).

### **Response to Finding No. 1101**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of JLI executives. It is

misleading and contrary to the weight of the evidence in that it ignores the multitude of term sheets and correspondence during negotiations where JLI made clear that Altria's exit from the e-vapor business would be a condition for any transaction. (CCFF ¶¶ 880-924). As Pritzker, Valani, Burns, and Masoudi all testified, they had consistently told Altria's negotiators for months that Altria could not compete in e-vapor post-transaction, that it could only participate in the category through its investment in JLI. (CCFF ¶¶ 881-91). Indeed, the first term sheet that JLI sent Altria, back in July 2018, included language requiring Altria to dispose of its existing e-vapor business and not to compete going forward. (PX1300 (Altria) 005-06; CCFF ¶¶ 892-913). In response to Altria's attempt to strike the commitment to dispose of its existing business, JLI reiterated its demand in August 2018, noting that it was "not acceptable" to JLI that Altria continue to compete in e-vapor, either with "existing Mark Ten products" or future products. (PX4171 (Altria) at 002; CCFF ¶¶ 914-24). In subsequent interactions, Altria affirmed and reaffirmed that it would accede to JLI's demand. (CCFF ¶¶ 945-86). Moreover, as of October 25, 2018, JLI had already received notice of Altria's decision to stop selling its pod products Elite and APEX. (PX2022 (JLI) at 003; CCFF ¶¶ 987-88).

1102. Indeed, neither Pritzker nor Valani could even recall learning prior to this litigation that Altria had shut down Nu Mark and removed its remaining cig-a-like products in December 2018. (Pritzker (JLI) Tr. 877-78; Valani (JLI) Tr. 951-52, 957; PX7021 Pritzker (JLI) Dep. at 163-64 ("[The announcement] was of no consequence because [he] didn't think that [the products] were particularly competitive to Juul."); PX7011 Valani (JLI) IHT at 134 (calling the decision "irrelevant" because MarkTen was a "terrible" product)). As O'Hara explained: "[I]t barely even registered" because Nu Mark was not "a competitive entity in the market. I did not track them closely. It was not meaningful at all when they did that to [JLI's] competitive stake, you know, in the market." (PX7033 O'Hara (JLI) Dep. at 176).

### **Response to Finding No. 1102**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of JLI executives. It is

misleading and contrary to the weight of the evidence to the extent that it suggests that Altria's announcement was not important to JLI. In fact, as Pritzker, Valani, Burns, and Masoudi all testified, they had consistently told Altria's negotiators for months that Altria could not compete in e-vapor post-transaction and that it could only participate in the category through its investment in JLI. (CCFF ¶¶ 881-91). Indeed, the first term sheet that JLI sent Altria, back in July 2018, included language requiring Altria to dispose of its existing e-vapor business and not to compete going forward. (PX1300 (Altria) 005-06; CCFF ¶¶ 892-913). In response to Altria's attempt to strike the commitment to dispose of its existing business, JLI reiterated its demand in August 2018, noting that it was "not acceptable" to JLI that Altria continue to compete in e-vapor, either with "existing Mark Ten products" or future products. (PX4171 (Altria) at 002; CCFF ¶¶ 914-24).

## **X. IN DECEMBER 2018, THE PARTIES EXECUTED THE TRANSACTION**

### **A. The Transaction Remained Uncertain Throughout November And December As The Parties Conducted Due Diligence And Addressed A Series Of Late-Breaking Disputes**

1103. Following the parties' renewed negotiations in October, Altria "began due diligence in November." (Garnick (Altria) Tr. 1776).

#### **Response to Finding No. 1103**

Although Complaint Counsel does not disagree that due diligence on the transaction began in November 2018, the proposed finding is nonetheless incomplete and misleading to the extent that the phrase "renewed negotiations" suggests that Altria and JLI had altogether ceased activity related to a potential transaction. Despite noting that "[f]urther discussions have been on hold due to the availability of a Tree principal," a slide deck circulated to the Altria Board on September 10, 2018 indicated that the "Parties are discussing time frames for continuing negotiations." (PX4467 (Altria) at 004). Regardless, Altria continued to discuss the potential transaction internally throughout September 2018. (CCFF ¶¶ 752-72).

1104. The deal’s prospects were uncertain throughout that month because Altria “had no idea what due diligence would have uncovered,” and the parties “still had the actual [deal] documents to negotiate, and there were various issues that were still open.” (Garnick (Altria) Tr. 1776; *see also* PX7024 Crosthwaite (Altria/JLI) Dep. at 284 (“Diligence is always . . . a very, very important step in any transaction. Until [Altria] had completed diligence, nothing was certain.”)).

**Response to Finding No. 1104**

The proposed finding is unreliable, vague, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. It is vague in that the reference to “various issues that were still open” is vague. It is incomplete and misleading in that months of deal negotiations had already culminated in Altria and JLI negotiators’ meeting in New York in late-October 2018, (CCFF ¶¶ 816-20), “reach[ing] agreement on terms” on October 29, 2018, (PX4167 (Altria) at 008; CCFF ¶¶ 821-24), and exchanging of a final term sheet the next day. (PX1271 (Altria); CCFF ¶¶ 825-30). Nor does the proposed finding point to any specific concerns or issues Respondents anticipated, or that in fact arose, during due diligence. The proposed finding is also misleading in that it fails to mention that Altria had already signaled its willingness to agree to JLI’s demand that it stop competing in the closed-system e-cigarette market. (CCFF ¶¶ 968-86).

1105. Due diligence took “at least a month” and involved “large volumes of people” undertaking an “exhaustive” review of the “financial, legal, technological, [and] strategic matters of the business.” (Valani (JLI) Tr. 955).

**Response to Finding No. 1105**

Complaint Counsel has no specific response.

1106. While diligence was ongoing, on November 15, 2018, the parties exchanged the first drafts of the deal documents. (Garnick (Altria) Tr. 1780-81; *see, e.g.*, RX0838 (Altria) at 001, 035 (draft voting agreement), 306 (draft purchase agreement), 354 (draft relationship agreement)). These were drafts of the “actual transaction documents,” as distinguished from the term sheets. (Garnick (Altria) Tr. 1781).

**Response to Finding No. 1106**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the parties had not already agreed, before they began to exchange draft deal documents in November 2018, that Altria would stop competing in e-vapor. Regardless of any other deal-related issues that needed to be finalized, Altria had already signaled its willingness to agree to JLI's demand that it had to stop competing in the closed-system e-cigarette market. (CCFF ¶¶ 968-86).

1107. Like the term sheets, the November 15 draft deal documents included a noncompete provision with a carve-out for Altria's existing products. This carve-out permitted Altria to engage in business relating to its MarkTen and MarkTen Elite brands "as such business is presently conducted." (Garnick (Altria) Tr. 1781-83; RX0838 (Altria) at 373).

#### **Response to Finding No. 1107**

The proposed finding is vague, incomplete, and misleading. It is vague in that the term "carve-out" is undefined and not contained in the document cited. It is incomplete and misleading because the term containing the quoted language was qualified as being "subject to Section [4.1] of the Purchase Agreement," (RX0838 (Altria) at 373), which included a term ultimately requiring Altria to "divest or otherwise dispose of" or "transfer and assign" to JLI its e-vapor assets. (RX0838 (Altria) at 292). Thus, the noncompete provision to which the proposed finding refers only permitted Altria to engage in business relating to MarkTen and Elite, as that business was conducted at the time of execution, until the divestiture, disposition, or contribution required by Section 4.1 (RX0838 (Altria) at 292, 373; CCFF ¶¶ 835-36). It is also incomplete and misleading to the extent that it suggests that "presently" refers to any time other than when Altria and JLI executed the transaction, which was on December 20, 2018, by which point Altria had already removed Elite from the market and discontinued production and distribution of its remaining MarkTen products. (CCFF ¶ 864).

1108. Valani testified that he did not know where the "as such business is presently conducted" language came from. (PX7011 Valani (JLI) IHT at 140).

**Response to Finding No. 1108**

The proposed finding is unreliable, incomplete and misleading. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is incomplete and misleading to the extent that it suggests that Altria and JLI principals had not discussed the notion of Altria's exit from the e-vapor category. In fact, JLI had communicated to Altria for months that Altria's exit from the e-vapor business was a basic condition for the transaction. (CCFF ¶¶ 880-924). For example, Valani himself sent the list of "specific points" on August 15, 2018, calling out as "not acceptable to us" that Altria would not commit to divest its MarkTen products and instead retain the right "to compete not only with existing Mark Ten products, but also with products under development and future products." (PX4171 (Altria) at 002; CCFF ¶¶ 917-20). In terms of these "specific points," Valani himself testified that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1109. As of November 15, Altria's business was selling MarkTen cig-a-likes in tobacco, menthol, and mint flavors, so this provision would have unquestionably permitted Altria to keep MarkTen cig-a-like on the market through the antitrust review process with the FTC. (Garnick (Altria) Tr. 1782; Gifford (Altria) Tr. 2831). Further, JLI understood that both MarkTen cig-a-like and Elite were exempted from the noncompete provision in the draft and final deal documents prior to HSR approval: Pritzker's understanding was that Altria could have put its withdrawn products "back on the market if [it] wished." (Pritzker (JLI) Tr. 879).

**Response to Finding No. 1109**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. It is incomplete and misleading in that the transaction was not executed as of November 15, at which point, as Respondents have noted, "diligence was ongoing," (RPFF ¶ 1106), but as of December 20, 2018,



by which point Altria had already both removed Elite from the market and ceased production and distribution of the MarkTen cigalike. (CCFF ¶ 864). Even as of November 15, Altria had removed Elite from the market less than three weeks earlier, (CCFF ¶ 812), and was roughly three weeks away from announcing its decision to shut down Nu Mark and cease production and distribution of the cigalike. (CCFF ¶ 861). Nor did Altria initiate the HSR review process until February 4, 2019, well after both decisions. (CCFF ¶ 866). In addition the proposed finding is misleading because it fails to mention that on December 9, 2018, two days after Altria pulled its products on December 7, Garnick personally confirmed to Masoudi that Altria was “not in the market anymore” and that it could not “get back into the market without getting a PMTA.” (CCFF ¶ 851).

1110. This provision in the deal documents did not change between its introduction on November 15 and the documents’ execution on December 20. (Garnick (Altria) Tr. 1782-83).

#### **Response to Finding No. 1110**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. Complaint Counsel does not disagree that the noncompete provision in the final Relationship Agreement included a provision permitting Altria to engage in the e-vapor business relating to MarkTen, Elite, and Green Smoke, in each case, “as such business is presently conducted.” (PX1276 (Altria) at 026). However, the proposed finding is incomplete and misleading because by the date of execution, December 20, 2018, Altria had already removed Elite from the market, and had already ceased the sale and distribution of MarkTen and Green Smoke. (CCFF ¶ 864).

1111. Altria and JLI continued to disagree about major issues like valuation. (Pritzker (JLI) Tr. 838-39; *see also* Willard (Altria) Tr. 1464 (“[O]ne of the most important terms of the deal was value.”)). Although the parties had settled on a 35 percent investment by early October 2018, it took another two months to agree on valuation. (Pritzker (JLI) Tr. 839).

#### **Response to Finding No. 1111**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. It is vague in that the general reference to “major issues like valuation” is vague and does not specify the magnitude of any disagreement on value or the nature of any other “major issue.” In fact, an email from Devitre to Valani refers to a dispute concerning an “approximately 1% value gap.” (RX1417 (JLI) at 001).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that any outstanding issues in November or December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor. Regardless of any other deal-related issues that needed to be finalized, Altria had already signaled its willingness to agree to JLI’s demand that it had to stop competing in the closed-system e-cigarette market. (CCFF ¶¶ 968-86). By October 29, 2018, the parties had “reached agreement on terms,” (PX4167 (Altria) at 008; CCFF ¶ 821), sufficient to justify exchanging the “final term sheet” the next day, (PX1271 (Altria) at 001; CCFF ¶ 825), proceeding with due diligence, drafting and finalizing long-form transaction documents throughout November and into December 2018, and circulating draft press releases about the transaction in early December. (CCFF ¶¶ 832-57). As of late-November 2018, the parties aimed to close the transaction prior to Christmas 2018, and, despite any ongoing discussion and resolution of any outstanding issues, that goal was met. (CCFF ¶ 839). During that period, correspondence between the principals contained notes of encouragement, reports of progress, and messages of congratulations. (CCFF ¶¶ 844, 855-56).

Complaint Counsel does not disagree that “the parties had settled on a 35% investment by early October 2018,” and notes that that term remained intact in the final agreement. (CCFF ¶ 861).

1112. Indeed, valuation was “an eleventh-hour issue” that the parties continued to negotiate up through December 17. (Pritzker (JLI) Tr. 839, 878; RX1417 (JLI) at 001).

### **Response to Finding No. 1112**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. It is incomplete and misleading in that the cited email from Devitre to Valani identifies the issue as an “approximately 1% value gap.” (RX1417 (JLI) at 001). Moreover, in his text correspondence with Devitre, Willard reported that the valuation issue was “resolved” only two days after the parties had “reached an impasse.” (PX4167 (Altria) at 010-11). To the extent that it suggests that valuation issues in November or December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth above in the second paragraph of the response to RPF 1111. (See Response to RPF 1111).

1113. The fact that Altria pulled its remaining MarkTen e-vapor products on December 7 had no impact on JLI’s thinking and did not make the deal easier to finalize. (Pritzker (JLI) Tr. 878-79). The move did not even register with JLI’s lead negotiators—as described above, neither Pritzker nor Valani could recall learning prior to this litigation that Altria had discontinued its remaining cig-a-like products. (See *supra* Part IX.F.5).

### **Response to Finding No. 1113**

The proposed finding is unreliable in that it relies solely on the self-serving testimony of a JLI executive. In addition the proposed finding is misleading because it fails to mention that on December 9, 2018, two days after Altria pulled its products on December 7, Garnick personally confirmed to Masoudi that Altria was “not in the market anymore” and that it could not “get back into the market without getting a PMTA.” (CCFF ¶ 851). It is also misleading and contrary to the weight of the evidence for the reasons set forth in responses to RPF Part IX.F.5 (See Responses to RPF ¶¶ 1101-02).

1114. Contemporaneous documents demonstrate that the deal remained uncertain after December 7 as the parties worked through the numerous still-outstanding issues. (*See, e.g.*, RX1591 (JLI) at 001; { [REDACTED] }; PX2494 (JLI) at 001; RX1592 (JLI) at 001; RX0910 (Altria) at 001; PX4167 (Altria) at 010; RX1417 (JLI) at 001; PX4167 (Altria) at 010).

**Response to Finding No. 1114**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. It is incomplete and misleading to the extent that it relies on RX1591, which does not specify outstanding issues or anywhere indicate that the transaction is in jeopardy or the closing schedule at risk of delay. (RX1591 (JLI) at 001; *see* Response to RPF ¶ 1115).

The proposed finding is also incomplete and misleading to the extent that it relies on

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }; *see* Response to RPF ¶ 1116).

The proposed finding is also incomplete and misleading to the extent that it relies on PX2494, in which Garnick characterized the issue raised as “not a notable risk,” and “meritless,” while expressing the belief that the parties could “put this matter to rest.” (PX2494 (JLI) at 001, 003; *see* Response to RPF ¶ 1117). Nor does the cited email indicate that JLI refused to compromise on the issue raised. (PX2494 (JLI) at 001; *see* Response to RPF ¶ 1117).

The proposed finding is also incomplete and misleading to the extent that it relies on RX1592, in which Garnick suggested a call to discuss the issues raised “resolve them today,” to

which Masoudi responded that same morning, “I will circle up with my team on this.” (RX1592 (JLI) at 001; *see* Response to RPF ¶ 1118).

The proposed finding is also incomplete and misleading to the extent that it relies on RX0910 and PX4167, because the latter reflects that Altria and JLI resolved the issues raised within a matter of days. (PX4167 (Altria) at 010-11; *see* Responses to RPF ¶¶ 1119-20, 1122).

The proposed finding is also incomplete and misleading to the extent that it relies on RX1417, in which Devitre refers to the issue raised as an “approximately 1% value gap.” (RX1417 (JLI) at 001; *see* Response to RPF ¶ 1122). Again, the parties were able to resolve any impasse on valuation within a few days. (PX4167 (Altria) at 010-11; *see* Responses to ¶¶ 1119-20, 1122).

Finally, to the extent that it suggests that any outstanding issues in December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth in the second paragraph of the Response to Finding No. 1111. (*See* Response to RPF ¶ 1111).

1115. On December 8, Garnick wrote to his JLI counterpart that Willard believed the principals needed to discuss “10 or so outstanding issues . . . in order to close by Dec. 21.” (RX1591 (JLI) at 001; *see also* Gifford (Altria) Tr. 2844-45 (listing key unresolved issues in December, including “the [capitalization] table, pre-emptive rights,” and “right up until the last minute,” valuation); Gifford (Altria) Tr. 2765-66 (explaining that the capitalization table listed capital investors in JLI and the stock options they controlled, which is relevant to whether Altria’s ownership interest in JLI could be diluted by “an IPO in the future or other stock sales”)).

### **Response to Finding No. 1115**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable to the extent that it relies on the self-serving testimony of Gifford, an Altria executive, who neither sent nor received the document cited (RX1591 (JLI) at 001). The proposed finding is also incomplete and misleading in that the document cited does not specify the

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“10 or so outstanding issues,” nor does it anywhere indicate that the transaction is in jeopardy or risks failing to close on schedule; indeed, Garnick proposes a meeting of principals “in order to close by Dec. 21.” (RX1591 (JLI) at 001). To the extent that it suggests that any outstanding issues in December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth above in the second paragraph in response to RPF 1111. (*See* Response to RPF 1111).

1116. At the December 11 Board meeting, Altria’s leadership advised the Board that the deal remained { [REDACTED] } as the parties continued “working out issues,” (PX7028 Wappler (PWP) Dep. at 130).

**Response to Finding No. 1116**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

It is incomplete and misleading in that { [REDACTED] }  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] }. To the extent that it suggests that any outstanding issues in December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth above in the second paragraph in the response RPF 1111. (*See* Response to RPF 1111).

1117. In early- to mid-December, another late-breaking issue threatened to disrupt the deal: JLI expressed concern that under the proposed transaction, JLI might be considered a controlled affiliate of Altria pursuant to the JRDTA, which would require Altria to share all of JLI's IP with PMI. (See PX2494 (JLI) at 001; PX7035 Masoudi (JLI) Dep. at 98-102). On December 14, Garnick informed JLI that Altria was "not willing to give up voting or board rights" to address this remote potentiality, adding that "as a matter of practical reality, we both can point to other facts/circumstances in this deal that demonstrate without doubt that this deal does not give us either 51% ownership or the power to control [JLI]. Indeed, not only do we not control [JLI], but we have agreed never to control [JLI] without board consent." (PX2494 (JLI) at 001 (emphasis in original)).

### **Response to Finding No. 1117**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. It is incomplete and misleading in that Garnick, in the cited email, also expressed the view that "[w]e believe the possibility of interpreting the PMI agreement in the way you propose is not a notable risk," and that "we think the issue is meritless." PX2494 (JLI) at 001). Even though Garnick expressed the belief that the parties could "put this matter to rest," he noted that Willard and Gifford "are prepared to discuss with [JLI]." (PX2494 (JLI) at 003). Nor does the cited email indicate that JLI refused to compromise on this issue; instead, Masoudi responded merely by asking Garnick to call him. (PX2494 (JLI) at 001). To the extent that it suggests that any outstanding issues in December 2018 caused negotiations to break down or delayed the parties' closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth in the second paragraph of the Response to Finding No. 1111. (See Response to RPF ¶ 1111).

1118. The next day, Garnick wrote again to "express a bit [of] dismay at some of the proposed terms [in the services agreement]" that Altria received from JLI, including "[a] provision that would have the effect of giving [JLI] a license, if not ownership, of the [Altria] IP it uses in providing the services" and "a provision that [Altria] pays [JLI's] taxes in certain instances." Garnick hoped that "[g]iven the severe time restraints . . . each side would propose reasonable terms from the very beginning and not seek to overreach." (RX1592 (JLI) at 001).

**Response to Finding No. 1118**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. It is incomplete and misleading to the extent that it suggests that Altria and JLI had reached an impasse, or that JLI refused to compromise, on any of the issues Garnick listed. Instead, Garnick stated, “If we can both approach these negotiations in a spirit of partnership, we will complete in time for closing this week,” and suggested a call “to go through these issues one by one to resolve them today.” (PX1592 (JLI) at 001). Masoudi replied that same morning, “I will circle up with my team on this.” (RX1592 (JLI) at 001). To the extent that it suggests that any outstanding issues in December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth above in the second paragraph of the response to RPF 1111. (*See* Response to RPF 1111).

1119. Separately, Garnick advised his colleagues that the “deal may not survive the day” in light of a dispute over how to present the companies’ posture toward cigarettes—he had spoken to Willard and it was a “walk away point.” (RX0910 (Altria) at 001-02).

**Response to Finding No. 1119**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. It is incomplete and misleading to the extent that it suggests that Respondents in fact ended or even paused negotiations due to any dispute related to a proposed joint press release. In fact, Devitre reacted to the dispute over the joint press release as “a matter of semantics” and urged, “Surely some sensible solution can be found.” (PX4167 (Altria) at 010). Three days later, Willard informed him, “Issues resolved.” (PX4167 (Altria) at 011). To the extent that it suggests that any outstanding issues in December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same



reasons set forth above in the second paragraph of the response to RPF 1111. (See Response to RPF 1111).

1120. Willard explained that as of December 15, there were two walkaway issues for Altria. *First*, JLI was trying to dilute Altria's position by half a billion dollars. (PX4167 (Altria) at 010 (Willard and Devitre discussing JLI's "desire to dilute us by \$500mm more dollars," which Devitre describes as a "critical" issue on which Altria "should not give in")). *Second*, JLI wanted to issue a single press release but Altria thought its early drafts were "demeaning to cigarette smokers." (Willard (Altria) Tr. 1462-63). As Willard wrote in a text message to Devitre on December 15, "[i]f they do not give on both the deal will not proceed." (PX4167 (Altria) at 010).

### **Response to Finding No. 1120**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. In terms of the dispute related to valuation, the proposed finding is incomplete and misleading in that the cited text correspondence continued over the next few days and reflects that Altria and JLI resolved the issue without a pause in negotiations. Specifically, Willard continued updating Devitre, texting on December 17, "Kevin is searching for a compromise" and "We will keep working it," and then on the 18th, "Issues resolved," and "Looking good." (PX4167 (Altria) at 010-11). In terms of the dispute related to a joint press release, the proposed finding is incomplete and misleading in that Devitre responded to Willard's text message that the point was "a matter of semantics," and that "[s]urely some sensible solution can be found." (PX4167 (Altria) at 010). After Willard informed him that the issues had been resolved, Devitre responded, "Terrific!" (PX4167 (Altria) at 011). To the extent that it suggests that any outstanding issues in December 2018 caused negotiations to break down or delayed the parties' closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth in the second paragraph of the Response to Finding No. 1111. (See Response to RPF 1111).

1121. In light of those issues, the deal was far from certain as of mid-December. As Willard put it, "I've done a lot of deals. This one was not close to being finished." (Willard (Altria)

Tr. 1464; *see also* RX0920 (Altria) at 001 (partially redacted December 14 email describing an issue that, unless “somehow resolve[d] . . . today,” put “timely closing this month” “in substantial doubt”).

### **Response to Finding No. 1121**

The finding is vague and unreliable to the extent that it relies on the email from Garnick, which is almost entirely redacted for privilege, in no way identifies the nature of the “issue” it purports to address, does not include responses from any of the email’s recipients or indicate whether they agreed with Garnick, does not indicate whether Altria ultimately sent Garnick’s proposed email to JLI or ever raised the “issue” in negotiations, and does not indicate whether the “issue” resulted in an impasse between the parties. (RX0920 (Altria) at 001-04). Regardless, the “issue” apparently did not impact the closing schedule: as of late November 2018, the targeted closing date for the transaction was prior to Christmas 2018, which was met. (CCFF ¶ 839). Other than Garnick’s email, the proposed finding is unreliable in that it relies on the self-serving testimony of an Altria executive. To the extent that it suggests that any outstanding issues in December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth above in the second paragraph of the response to RPF ¶ 1111. (*See* Response to RPF ¶ 1111).

1122. On December 16, the parties hit yet another “impasse on valuation.” (RX1417 (JLI) at 001; *see also* PX4167 (Altria) at 010 (text message from Willard to Devitre: “We reached an impasse tonight on value . . .”).

### **Response to Finding No. 1122**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence. It is vague in referring to “yet another” impasse, as it fails to identify distinct, earlier impasses. It is incomplete and misleading in that the cited email from Devitre to Valani identifies the issue as an “approximately 1% value gap.” (RX1417 (JLI) at 001). Moreover, the cited text

correspondence continued over the next few days and reflects that Altria and JLI resolved the issue without a pause in negotiations. Specifically, Willard continued updating Devitre, texting on December 17, “Kevin is searching for a compromise” and “We will keep working it,” and then on the 18th, “Issues resolved,” and “Looking good.” (PX4167 (Altria) at 010-11). To the extent that it suggests that any outstanding issues in December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth above in the second paragraph of the response to RPF ¶ 1111. (*See* Response to RPF ¶ 1111).

1123. As a result, Willard did not have “any faith that th[e] deal would go through until the documents were signed on December 20.” (Willard (Altria) Tr. 1461; *see also* PX7000 Garnick (Altria) IHT at 88 (“We had undergone a year and a half of on-again, off-again negotiations, and until the deal was done, none of us were confident that the deal would get done.”)).

### **Response to Finding No. 1123**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-interested testimony of Altria executives. To the extent that it suggests that any outstanding issues in November or December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth above in the second paragraph of the response to RPF ¶ 1111. (*See* Response to RPF ¶ 1111).

1124. Then-CFO Billy Gifford shared this view. The deal “was on and off so many times” and the parties were often “so far apart” on terms that “it felt like there wasn’t going to be an agreement reached.” (Gifford (Altria) Tr. 2775). From his “vantage point, [he] was never sure until [the parties] actually signed the deal.” (Gifford (Altria) Tr. 2844).

### **Response to Finding No. 1124**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-interested testimony of an Altria executive. It is vague in that it fails to specify the relevant timeframe, the terms on which the parties were “so far apart,” or the magnitude of their disagreement. To the extent that it suggests that any outstanding issues in November or December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth above in the second paragraph of the response to RPF 1111. (See Response to RPF 1111).

1125. Indeed, in the final three days before the deal’s execution, “there was tremendous territory covered.” (PX7009 Burns (JLI) IHT at 160; *see also* PX7001 Devitre (Altria) IHT at 73 (“[T]here were changes taking place until the very last minute. The other side are very hard negotiators.”)).

#### **Response to Finding No. 1125**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-interested testimony of Altria and JLI executives. It is vague in that it fails to specify the nature of the “tremendous territory covered” to which it refers. To the extent that it suggests that any outstanding issues in December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth above in the second paragraph of the response to RPF 1111. (See Response to RPF 1111).

#### **B. On December 20, 2018, The Parties Executed The Transaction**

1126. On December 20, 2018, Altria and JLI finally reached an agreement. Altria invested \$12.8 billion in JLI in exchange for a 35 percent economic interest. (RX1001 (Altria) at 001; PX9081 (Altria) at 001; *see also, e.g.*, PX2141 (JLI) (final purchase agreement); PX1276

(JLI) (final relationship agreement); PX1275 (JLI) (final services agreement); PX2216 (JLI) (final voting agreement)).

**Response to Finding No. 1126**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the parties had not already agreed, before they executed the final transaction in December 2018, that Altria would stop competing in e-vapor. The record demonstrates that well before then Altria had already signaled its willingness to agree to JLI's demand that it had to stop competing in the closed-system e-cigarette market. (CCFF ¶¶ 968-86).

1127. The parties' agreement settled long-fought issues of governance and control: Altria obtained the right to appoint one-third of JLI's directors pending HSR approval and some restrictions on JLI's sale rights, while JLI imposed several guardrails preventing Altria from acquiring control. (*See, e.g.*, PX2216 (JLI) at 004-05, 052; PX1276 (JLI) at 029-32, 041). The deal also included a services agreement, pursuant to which Altria agreed to provide JLI with regulatory assistance in connection with the preparation and filing of JLI's PMTAs, among other services. (PX1275 (JLI) at 028).

**Response to Finding No. 1127**

The proposed finding is vague, incomplete, and misleading. It is vague in that its reference to "long-fought issues of governance and control" is vague. It is incomplete and misleading to the extent that it suggests that Altria and JLI had reached no understanding in terms of "issues of governance and control" until executing the final agreement. In fact, by October 29, 2018, the parties had "reached agreement on terms," (CCFF ¶ 821), sufficient to justify exchanging the "final term sheet" the next day, (CCFF ¶ 825), proceeding with due diligence, and drafting and finalizing long-form transaction documents throughout November and into December 2018. (CCFF ¶¶ 832-57). Complaint Counsel does not disagree that, under the executed agreement, Altria obtained the right to appoint one-third of JLI's directors pending HSR approval.

1128. Consistent with JLI's concern that those services would lead Altria to access proprietary information about JUUL, the final relationship agreement included a noncompete provision: Altria agreed "not to, directly or indirectly[,] . . . own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor Business" while the service

agreement remained in effect. (PX1276 (JLI) at 025 § 3.1). Consistent with the term sheets, however, that provision included a carveout permitting Altria to “engage in the business relating to [its existing e-vapor products] . . . as such business is presently conducted,” pending HSR approval. (PX1276 (JLI) at 026 § 3.1; Willard (Altria) Tr. 1194-95).

### **Response to Finding No. 1128**

The proposed finding is incomplete and misleading in that, by the time the parties executed the transaction on December 20, 2018, Altria had already pulled Elite off the market and had discontinued the sale and distribution of the MarkTen cigalike, so the “carveout” had no meaning. (CCFF ¶ 862). The products remained off the market (with the exception of leftover cigalike inventory selling through at retail), by the time Altria initiated the HSR review process in February 2019. (CCFF ¶ 866). The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that “JLI’s concern that those services would lead Altria to access proprietary information about JUUL” formed the sole, or even primary, basis for the noncompete provision. JLI’s Valani testified that JLI wanted to avoid the risk that Altria would have conflicting incentives if it continued to sell its own e-vapor products concurrent with an investment in JLI. (CCFF ¶¶ 870-72; *see also* CCFF ¶ 879). To the extent JLI was concerned about proprietary information, its ultimate concern was that Altria might use that information to compete against JLI. (CCFF ¶¶ 874-76). Thus, JLI’s Pritzker testified that he would have resisted any agreement that allowed Altria to continue market its MarkTen Elite and cigalike products indefinitely. (CCFF ¶ 877). The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that JLI saw the regulatory services specifically as creating the risk that Altria would access “proprietary information.” In fact, Pritzker identified the source of that risk as Altria’s presence on JLI’s Board. (CCFF ¶ 876). Moreover, the notion that JLI’s concern about Altria’s access to proprietary information through regulatory services formed the basis for the non-compete is flatly inconsistent with Respondents’ position that “[i]t was in fact

the regulatory support services, which *could* be provided upon closing even if Altria were still in the e-vapor marketplace, that were most desirable to JLI.” (See RPF ¶ 1069 (emphasis in original)).

1129. The noncompete provision was limited to Altria’s activities in “the e-Vapor Business,” and therefore did not limit Altria’s ability to market other inhalable alternatives such as IQOS and oral alternatives such as the On! product. (See PX1276 (JLI) at 025 § 3.1; Willard (Altria) Tr. 1195; Gifford (Altria) Tr. 2709-10). Additionally, the final relationship agreement included a six-year initial term length for the noncompete, making it set to expire on December 20, 2024 unless extended by the parties. (PX1276 (JLI) at 025 § 3.1(a) (relationship agreement) (noting the noncompete provision terminates at “the termination or expiration of the term (as set forth in the Services Agreement)”); PX1275 (JLI) at 005, 014 (services agreement) (defining the “Initial Discretionary Termination Date” for the services agreement as “the date that is the sixth (6<sup>th</sup>) anniversary of the date hereof”)).

### **Response to Finding No. 1129**

Complaint Counsel agrees that the noncompete between Respondents focuses exclusively on Altria’s electronic cigarettes.

1130. Although Altria had withdrawn MarkTen and MarkTen Elite from the market by this time, Altria still owned or held the rights to the intellectual property for these products, as it still does today. (Garnick (Altria) Tr. 1783-84). JLI believed that the final agreement’s carve-out provision permitted Altria to bring back the products it had withdrawn from the market, (Pritzker (JLI) Tr. 879), which was permitted under the Deeming Rule because the products had been on the market as of August 8, 2016, (Murillo (Altria/JLI) Tr. 3022).

### **Response to Finding No. 1130**

The proposed finding is misleading because it fails to mention that on December 9, 2018, two days after Altria pulled its products on December 7, Garnick personally confirmed to Masoudi that Altria was “not in the market anymore” and that it could not “get back into the market without getting a PMTA.” (CCFF ¶ 851).

To the extent that the proposed finding suggests that the final non-compete allowed Altria to place its discontinued products back on the market, the proposed finding is incorrect and unsupported by any evidence in the record. The proposed finding is also misleading because it misrepresents and takes out of context Pritzker’s testimony that his “understanding was that Altria

could have brought its withdrawn products ‘back on the market if [it] wished.’” (Pritzker (JLI) Tr. 879). Pritzker was responding to a question about whether Altria could have put its e-cigarettes back on the market *prior to signing the transaction* (and therefore prior to the non-compete going into effect). (Pritzker (JLI) Tr. 878-79). He was *not* suggesting that the final non-compete permitted Altria to put its e-cigarettes back on the market. In fact, Pritzker testified that the possibility that Altria could reintroduce its withdrawn products was a reason JLI still wanted a non-compete in the final transaction documents, even though Altria had withdrawn its products. (PX7021 (Pritzker (JLI), Dep. at 150-51)).

1131. The final purchase agreement provided that Altria would divest its e-vapor assets as needed to obtain HSR approval: “The Investor, to the extent permitted . . . shall, and shall cause its Affiliates to, (i) propose, negotiate, offer to commit and effect (and if such offer is accepted, commit to and effect) . . . the sale, divestiture, license, disposition or hold separate of such assets or businesses of the Investor or any of its Affiliates . . . in each case, as may be required in order to avoid the entry of any decree, judgment, injunction, or other order . . . that would restrain, prevent or delay the Antitrust Conversion.” (PX2141 (JLI) at 036).

### **Response to Finding No. 1131**

The proposed finding is incomplete and misleading in that, by the time the parties executed the transaction, on December 20, 2018, Altria had already pulled Elite off the market and had discontinued the sale and distribution of the MarkTen cigalike. (CCFF ¶ 862). Further, the products remained off the market (with the exception of leftover cigalike inventory selling through at retail), by the time Altria initiated the HSR review process, in February 2019. (CCFF ¶ 866).

1132. To date, the FTC has never asked Altria to divest or otherwise sell off these assets. (Garnick (Altria) Tr. 1784-87; *see also* RX2031 (FTC) at 002). If the FTC had ever made such a request, nothing in the parties’ deal would have prevented Altria from complying. (Garnick (Altria) Tr. 1787 (agreeing that FTC never inquired to see whether Altria could divest “at any time,” and “certainly” nothing would have prevented Altria from complying with an FTC divestiture request after July 2020); *see also* Valani (JLI) Tr. 935 (“I believe that the actual transaction documents still referred to the possibility of divestiture. I believe the term sheets after [Altria discontinued Elite and non-traditional cig-a-like flavors in response to FDA’s letter] still talk about divestment. I think, indeed, the assets that are there today could still be divested.”)).



**Response to Finding No. 1132**

The proposed finding is incomplete and misleading in that, by the time the parties initiated HSR review of the transaction in February 2019, (CCFF ¶ 866), Altria had already pulled Elite off the market, (CCFF ¶ 812), discontinued the sale and distribution of the MarkTen cigalikes, and begun the process of winding down Nu Mark, including discontinuing e-vapor research and development and terminating employees. (CCFF ¶ 848; PX1017 (Altria) at 002-03 (Dec. 9, 2018) (“There will be layoffs associated with this decision.”); PX1026 (Altria) at 001 (Dec. 10, 2018) (“the Altria announcement means we will stop work on BVR 2.8”); PX1530 (Altria) at 001 (Dec. 10, 2018) (“Smooore is currently working with us to halt cig-a-like production and associated supply chain”); PX1022 (Altria) (Dec. 20, 2018) (“Subsequent to today’s announcement, it is important to convene a communications approach for internal and external recipients to ensure a rapid and comprehensive closure to product development work associated with e-vapor.”)).

Furthermore, Valani’s testimony that “the actual transaction documents still referred to the possibility of divestiture” is incomplete and misleading in that the Relationship Agreement only permitted Altria to continue operating its e-vapor business “as such business is presently conducted.” (CCFF ¶ 1002). By that time, Altria’s only “presently conducted” e-vapor business was for retailers to sell through of any remaining cigalike inventory. (CCFF ¶ 1004). The proposed finding’s reference to “those assets” is also incomplete and misleading because it fails to mention that Altria shut down its e-cigarette R&D infrastructure pursuant to the noncompete with JLI, which included terminating all of Altria’s third party e-vapor collaboration agreements and [REDACTED] (CCFF ¶¶ 1006-15). Finally, the proposed finding is incomplete and misleading in that it fails to cite any evidence that Respondents themselves ever proposed any divestiture to the FTC.

**C. The Parties Amended The Agreements In January 2020**

1133. On January 28, 2020, Altria and JLI amended their agreements. (PX0010 (Altria) (amended purchase agreement); PX0011 (Altria) (amended relationship agreement); PX0012 (Altria) (amended services agreement)).

**Response to Finding No. 1133**

Complaint Counsel does not disagree.

1134. As a result of these amendments, Altria continues to provide regulatory affairs support for FDA filings but is not obligated to provide other services, including services related to distribution of JUUL, absent further agreement between the parties. (PX0012 (Altria) at 002 (terminating all distribution and other services except for services described in Sections II(F) (which would continue only through March 31, 2020) and IV(A) of the services agreement's "Initial Services"); PX1275 (JLI) at 028-29 (services agreement) (defining "Initial Services" II(F) to include regulatory services and IV(A) to include shelf-space placement); *see also* PX7040 Gifford (Altria) Dep. at 32 (confirming that following the amendments, "the gist of" the remaining services "was to support [JLI's] PMTA filing and their MRTP"))).

**Response to Finding No. 1134**

Complaint Counsel does not disagree.

1135. As described above, the noncompete provision of the final agreement included termination provisions, including a six-year initial term length for the noncompete. (*See supra* ¶ 1129). The amended relationship agreement provided two additional situations in which Altria may "permanently terminate" the noncompete provision: (1) if JLI were "prohibited as a matter of federal law" from selling e-vapor products in the United States for at least 12 months, unless a PMTA had been pending for at least six months; or (2) if the "aggregate value" of Altria's shares in JLI were written down to \$1.28 billion or less. (PX0011 (Altria) at 002-03).

**Response to Finding No. 1135**

The proposed finding is incomplete and misleading in that the final agreement also specified that the non-compete's initial term of six years is indefinitely extendable by three-year increments if not terminated by either party. (CCFF ¶ 38).

**D. HSR Review Process**

1136. Altria and JLI were able to sign and close the purchase agreement without first seeking HSR approval because the initial investment was for the acquisition of nonvoting shares. (PX2010 (JLI) at 007). Altria was allowed to, and did, appoint one nonvoting observed to

attend JLI Board meetings. (PX2010 (JLI) at 007; PX7006 Crosthwaite (Altria/JLI) IHT at 145).

### **Response to Finding No. 1136**

Complaint Counsel has no specific response.

1137. On February 4, 2019, Respondents filed for HSR clearance to convert Altria's nonvoting shares into voting securities and to grant Altria permission to appoint three of nine members to JLI's Board of Directors. (Willard (Altria) Tr. 1472-73; Garnick (Altria) Tr. 1679, 1783; PX2218 (JLI) at 003, 013; PX0027 (Altria) at 011 ¶ 21).

### **Response to Finding No. 1137**

Complaint Counsel has no specific response.

1138. On November 12, 2020, after the HSR clearance waiting period elapsed, Altria announced that it was converting its nonvoting shares in JLI to voting shares. (PX9099 (Altria) at 001; *see also* RX2031 (FTC) at 001).

### **Response to Finding No. 1138**

Complaint Counsel has no specific response.

1139. As Altria explained in the accompanying press release, it did not intend to "exercise its additional governance rights obtained upon conversion, including the right to elect directors to [JLI's] board, or to vote its [JLI] shares other than as a passive investor, pending the outcome of the U.S. Federal Trade Commission (FTC) litigation." (PX9099 (Altria) at 001; *see also* Pritzker (JLI) Tr. 799 ("Altria did convert shares, although they agreed to not vote those shares and agreed to not put anybody on the board."); Garnick (Altria) Tr. 1785 (explaining that Altria "could have converted and claimed board seats" but "chose not to do so pending the outcome of this litigation" and "remained just passive investors"); Gifford (Altria) Tr. 2849 (confirming that today, Altria does not have any active JLI Board seats)).

### **Response to Finding No. 1139**

Complaint Counsel has no specific response.

1140. Although it possesses the power to do so, the FTC has never sought an injunction to prevent Altria from converting its shares or getting Board seats or to otherwise prevent the transaction from going forward. (Garnick (Altria) Tr. 1784-87; *see also* RX2031 (FTC) at 002).

### **Response to Finding No. 1140**

Although Complaint Counsel does not disagree that it did not seek an injunction to prevent Altria specifically from converting its shares of JLI or gaining JLI Board seats, the proposed finding is nonetheless misleading and contrary to the weight of the evidence in that Altria's December 20, 2018 investment in JLI, for which Altria agreed to remove its e-vapor products from the market and to forbear from competing going forward, had already provided the basis for the FTC's complaint in this litigation. (PX0025 (FTC) at 014-15 (¶¶ 77-82) (Complaint)). Further, the FTC's complaint clearly contemplates relief related not only to Altria's passive investment in JLI, but also to its converting shares and obtaining board seats. Specifically, among other remedies, the complaint includes in its contemplated relief the "divestiture of Altria's equity stake in JLI," whether voting or non-voting, and a "prohibition against any officer or director of either Respondent serving on the other Respondent's board of directors or attending its meetings." (PX0025 (FTC) at 016 (Complaint)).

#### **E. Altria Has Written Down The Value Of Its Investment In JLI**

1141. Also in its November 12, 2020 press release, Altria indicated that it "expect[ed] to account for its investment in JUUL under the fair value option," meaning that "Altria's consolidated statement of earnings [would] include any cash dividends received from its investment in JUUL as well as any changes in the fair value of the investment, which [would] be calculated quarterly." (PX9099 (Altria) at 001). The practical effect was that Altria would assess the cost value of its investment in JLI each quarter rather than solely in response to a triggering event. (PX7040 Gifford (Altria) Dep. at 15).

#### **Response to Finding No. 1141**

Complaint Counsel has no specific response.

1142. Altria has since conducted these assessments of the investment on a quarterly basis, which on several occasions has led the company to record impairment charges related to its JLI investment. (Gifford (Altria) Tr. 2845; RX2040 (Altria) at 002; RX2041 (Altria) at 002; RX2042 (Altria) at 003; RX2043 (Altria) at 003).

#### **Response to Finding No. 1142**

Complaint Counsel has no specific response.

1143. In its 2019 third-quarter earnings results, Altria reported an “impairment charge of \$4.5 billion related to its investment in JUUL.” (RX2040 (Altria) at 002). This meant that about nine months after Altria’s investment, the total value of the investment had shrunk to approximately \$8.3 billion. (Gifford (Altria) Tr. 2846).

#### **Response to Finding No. 1143**

Complaint Counsel has no specific response.

1144. In its announcement, Altria noted that although “there was no single determinative event or factor” that led to the impairment, it had “considered impairment indicators in totality, including: increased likelihood of U.S. Food & Drug Administration (FDA) action to remove flavored e-vapor products from the market pending a market authorization decision, various e-vapor bans put in place by certain cities and states in the U.S. and in certain international markets, and other factors.” (RX2040 (Altria) at 002).

#### **Response to Finding No. 1144**

Complaint Counsel agrees that there were a number of external factors that had the potential to affect the value of Altria’s investment in JLI in 2019.

1145. As Gifford explained at trial, “there was looming FDA potential to make a -- a statement across the industry to remove flavors.” (Gifford (Altria) Tr. 2846). Because Altria “didn’t know which specifically the FDA would say, . . . [it] ran various scenarios, weighted those scenarios, and the result of that was a \$4.5 billion write-down of the original JUUL investment.” (Gifford (Altria) Tr. 2846).

#### **Response to Finding No. 1145**

Complaint Counsel has no specific response.

1146. In its 2019 fourth-quarter and full-year earnings results, Altria reported an additional “impairment charge of \$4.1 billion related to its investment in JUUL.” (RX2041 (Altria) at 002). It noted that for 2019 in total, “Altria recorded a total of \$8.6 billion in noncash pre-tax impairment charges to its JUUL investment, bringing the value of its JUUL investment to \$4.2 billion as of December 31, 2019.” (RX2041 (Altria) at 002).

#### **Response to Finding No. 1146**

Complaint Counsel has no specific response.

1147. The company explained that this second impairment was “primarily due to the increased number of legal cases pending against JUUL and the expectation that the number of legal cases against JUUL [would] continue to increase.” (RX2041 (Altria) at 002; *see also* Gifford (Altria) Tr. 2847).

**Response to Finding No. 1147**

Complaint Counsel has no specific response.

1148. In its 2020 third-quarter results, Altria reported another “impairment charge of \$2.6 billion related to its investment in JUUL.” (RX2042 (Altria) at 003). The company indicated that this impairment “was driven by Altria’s projections of lower JUUL revenues over time due to lower pricing assumptions and delays in JUUL achieving previously forecasted operating margin performance. These drivers were the result of (i) JUUL’s revised international expansion plans and (ii) the evolving U.S. e-vapor category and associated competitive dynamics.” (RX2042 (Altria) at 003).

**Response to Finding No. 1148**

The proposed finding is unreliable and vague. It is unreliable in that the cited announcement dates from October 30, 2020 (RX2042 (Altria) at 001), several months after Complaint Counsel had initiated this litigation (PX0025 (FTC) at 016 (Complaint)). The proposed finding is vague in that the phrase “the evolving U.S. e-vapor category and associated competitive dynamics” is vague and fails to specify the nature or extent of the referenced “competitive dynamics,” or to identify the specific contribution of those “dynamics” to Altria’s lower pricing assumptions and forecasted operating margin performance for JLI.

1149. In total, as of September 30, 2020, Altria valued its JLI investment at \$1.6 billion. (RX2042 (Altria) at 003). Gifford testified that at this time, Altria “saw significant competitive activity in the U.S., and JUUL had announced plans internationally to pull back in various markets in their international space.” (Gifford (Altria) Tr. 2848). This led Altria to have “lower revenue and lower pricing assumptions related to [its] discounted cash flow for JUUL.” (Gifford (Altria) Tr. 2848).

**Response to Finding No. 1149**

The proposed finding is unreliable and vague. The second sentence is unreliable in that it relies solely on the testimony of an Altria executive. It is also vague in that in that the phrase “significant competitive activity in the U.S.” is vague and fails to specify the nature or extent of the referenced “activity.”

The third sentence is unreliable in that it relies solely on the testimony of an Altria executive. It is also vague in that it fails to identify the specific contribution of the referenced “competitive activity” to Altria’s “lower revenue and lower pricing assumptions” for JLI.

1150. Finally, in its 2021 Q1 results, Altria reported an “unrealized loss of \$200 million as a result of a decrease in the fair value of JUUL.” (RX2043 (Altria) at 003). It attributed the loss to “(i) Altria’s projections of lower JUUL revenues over time due to lower JUUL volume assumptions resulting from a continuation of heightened competitive dynamics in the U.S. e-vapor category and (ii) an increase in the discount rate due to a change in market factors.” (RX2043 (Altria) at 003; *see also* Gifford (Altria) Tr. 2849). The company further indicated that the overall fair value of Altria’s JLI investment had fallen to \$1.5 billion as of March 31, 2021. (RX2043 (Altria) at 003; *see also* Gifford (Altria) Tr. 2849).

### **Response to Finding No. 1150**

The proposed finding is unreliable and vague. It is unreliable in that it cites an Altria announcement dating from April 29, 2021 (RX2043 (Altria) at 001), over a year after Complaint Counsel had initiated this matter by filing its complaint (PX0025 (FTC) at 016 (Complaint)). Moreover, the proposed finding is vague in that the phrase “heightened competitive dynamics in the U.S. e-vapor category” is vague and fails to specify the nature or extent of the referenced “heightened competitive dynamics,” or to identify the specific contribution of those dynamics to Altria’s “unrealized loss of \$200 million.”

### **F. Key Negotiation Themes**

1151. Certain themes emerge from the history of the negotiations (discussed *supra* Parts IV, VI, VIII, IX.C.2, IX.E, X.A-B) that refute Complaint Counsel’s assertion that JLI was using the exchange of proposed term sheets to communicate that Altria needed to remove its e-vapor products as a pre-condition of the investment.

### **Response to Finding No. 1151**

The proposed finding is unreliable in that it cites no evidence of any kind. To the extent that it means to point to the proposed findings set forth in Part X.F.1-5 below, Complaint Counsel points to its responses to those findings. (*See* Responses to RPPF ¶¶ 1152-214).

**1. Every Single Witness Involved In The Deal Negotiations Testified That There Was No Agreement To Pull Altria's E-Vapor Products**

1152. Complaint Counsel opened this trial with the statement: “This is a case about the leading U.S. tobacco company, Altria Group, Inc., agreeing to exit the e-cigarette business in exchange for a 35 percent equity stake in the dominant e-cigarette supplier, JUUL Labs., Inc.” (Tr. 12-13). But as every single witness involved in these negotiations testified under oath, there was no such agreement:

**Response to Finding No. 1152**

The proposed finding is unreliable in that it cites no evidence of any kind in support of the statement that “as every single witness testified under oath, there was no such agreement.” To the extent that it means to point to the proposed findings set forth in Part X.F.1 below, Complaint Counsel points to its responses to those proposed findings. (*See Responses to RPF 1153-61*).

1153. **Nicholas Pritzker (JLI Board Member and Member of the JLI Strategic Committee responsible for negotiations):** Pritzker is “absolutely not” aware of any agreement “that JLI had with Altria that Altria would take any particular action” with respect to its e-vapor products prior to a transaction. (Pritzker (JLI) Tr. 884). As he testified, Complaint Counsel’s allegation to the contrary “is absolutely incorrect. I had zero knowledge or any idea that any product would be withdrawn from the market prior to the time it was ruled upon by the FTC, nor desired that any product be removed prior to that time or any inclination that it would be removed. It was neither known to me nor desired by me.” (Pritzker (JLI) Tr. 885). Pritzker further testified that to his knowledge, no one at JLI had prior notice that Altria would withdraw its products on either October 25 or December 7, and he never requested Altria take these actions. (Pritzker (JLI) Tr. 884).

**Response to Finding No. 1153**

The proposed finding is unreliable, improper, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is improper to the extent that it relies the testimony of a fact witness for the legal conclusion as to the existence of an “agreement” within the meaning of the relevant antitrust laws, or as to whether Complaint Counsel’s allegation of such an agreement “is absolutely incorrect.”

In addition, the proposed finding is misleading and contrary to the weight of the evidence. The idea that Pritzker was unaware “that Altria would take any particular action” or “had prior



notice” of the specific timing of Altria’s actions attempts to obscure the basic fact that JLI had repeatedly identified a set of actions by which Altria could fulfill its obligation not to compete. Indeed, JLI’s initial term sheet, which Pritzker sent to Willard in July 2018, included not only a non-compete term, (CCFF ¶ 911), but also a term requiring Altria to dispose of its existing e-vapor business by divesting it to a third party, contributing it to JLI, or ceasing to operate it altogether. (CCFF ¶ 894). Although he may have believed divestiture was the most “acceptable way in terms of regulatory approval,” Pritzker testified that ultimately JLI’s “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.” (CCFF ¶ 898). Nonetheless, Pritzker acknowledged that the specific idea of Altria’s ceasing to operate its e-vapor business “might have come up as an idea of one thing that they [] might be able to do” (CCFF ¶ 973). In fact, on July 27, 2018, Pritzker received an email from Gross that he was “under the impression that [Altria] would just shut down Mark 10.” (CCFF ¶ 971). In the days leading up to this exchange, Gross had spoken directly with Altria’s negotiators about a potential deal. (CCFF ¶¶ 969-70).

Finally, the notion that Pritzker “never requested that Altria take these actions” is misleading and contradicted by other evidence in the record that JLI had made clear in mid-August that any non-compete ultimately must include Altria’s existing MarkTen products. (CCFF ¶¶ 914-24). For its part, Altria signaled to JLI that it understood the noncompete demand and would accede to it. (CCFF ¶¶ 946-86). Every term sheet the parties exchanged required Altria to exit the e-vapor category. (CCFF ¶¶ 957, 965-67).

1154. **Riaz Valani (JLI Board Member and Member of the JLI Strategic Committee responsible for negotiations):** Valani agreed that neither he nor anyone else he knows at JLI ever “reach[ed] any kind of agreement with anyone at Altria about withdrawing products” before the transaction was executed. (Valani (JLI) Tr. 956-57). Valani testified that he “absolutely [did] not” ask Altria for any kind of commitment that it would withdraw products from the market prior to the transaction, nor did anyone else from JLI to his

knowledge. (Valani (JLI) Tr. 956). He had no prior notice “whatsoever” that Altria would be discontinuing any products, and no one from Altria had given him an “indication” that it planned to take these actions—indeed, it was not until his deposition that he learned about Altria’s December 7, 2018 announcement. (Valani (JLI) Tr. 956-57).

### **Response to Finding No. 1154**

The proposed finding is unreliable, improper, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is improper to the extent that it relies the testimony of a fact witness for the legal conclusion as to the existence of an “agreement” within the meaning of the relevant antitrust laws.

In addition, the proposed finding is misleading and contrary to the weight of the evidence. The statements that Valani did not “ask Altria for any kind of commitment that it would withdraw products from the market prior to the transaction,” and that he had “no prior notice” that Altria would discontinue any products, are misleading and contradicted by other evidence in the record that JLI had repeatedly identified a set of actions by which Altria could fulfill its obligation not to compete. Indeed, JLI’s initial term sheet included not only a non-compete term, (CCFF ¶ 911), but also a term requiring Altria to dispose of its existing e-vapor business by divesting it to a third party, contributing it to JLI, or ceasing to operate it altogether. (CCFF ¶ 894). As Valani testified, exactly how Altria fulfilled its non-compete obligation was “really their problem, not ours,” and JLI was “more concerned about an end state.” (CCFF ¶ 900). Contemporary correspondence makes clear that Valani did in fact ask Altria for a commitment to dispose of its existing e-vapor business, in particular when he sent a list of “specific points” to Altria’s Devitre in August 2018, in which he reiterated JLI’s position that it was “not acceptable to us” that Altria retain the right to compete in e-vapor, including with its existing MarkTen products. (CCFF ¶¶ 917-24). For its part, Altria signaled to JLI that it understood the noncompete demand and would accede it. (CCFF ¶¶ 946-86). Every term sheet the parties exchanged required Altria to exit the e-vapor category. (CCFF ¶¶

957, 965-67). Moreover, at his investigational hearing, Valani testified that it was “very possible” that he heard about Altria’s discontinuation of MarkTen cigalikes around the time it occurred. (PX7011 (Valani (JLI), IHT at 135-36)).

1155. **Kevin Burns (Former JLI CEO and Member of the Strategic Committee responsible for negotiations):** Complaint Counsel did not call Burns to testify at trial, but in his deposition he agreed that there was not “any kind of agreement” between Altria and JLI that Altria would take the actions it announced on October 25 or December 7. (PX7025 Burns (JLI) Dep. at 216-18). Burns had no prior notice about either announcement, and JLI did not ask Altria “for any kind of commitment” to take the actions it took on October 25 or December 7. (PX7025 Burns (JLI) Dep. at 215-18).

### **Response to Finding No. 1155**

Complaint Counsel does not disagree that it “did not call Burns to testify at trial,” but notes that Respondents also did not do so. Regardless, the proposed finding is unreliable, improper, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is improper to the extent that it relies the testimony of a fact witness for the legal conclusion as to the existence of an “agreement” within the meaning of the relevant antitrust laws.

In addition, the proposed finding is misleading and contrary to the weight of the evidence. The totality of the record indicates that JLI made clear to Altria that it would have to dispose of its e-vapor business one way or another as part of any transaction. (CCFF ¶¶ 880-924). As Burns himself testified, JLI viewed a non-compete “as an important issue we needed to work through” during negotiations. (CCFF ¶¶ 878, 887-88). During negotiations, the parties discussed several options regarding how Altria could comply with JLI’s demand that it not compete in e-vapor, (CCFF ¶¶ 968-86), including that Altria might meet JLI’s demand by ceasing to operate its e-vapor business. (CCFF ¶¶ 969-86). And that is what Altria did on October 25 and December 7, 2018. (CCFF ¶¶ 987-88, 989-94).

1156. **Gerald Masoudi (Former JLI General Counsel):** Masoudi also testified at his deposition that he is not aware of any agreement between Altria and JLI that Altria would take its products off the market as it announced it would in its October 25 and December 7 announcements. (PX7035 Masoudi (JLI) Dep. at 127-29). To Masoudi's knowledge, neither he nor anyone else at JLI made a request to Altria that they take the actions described in the October 25 and December 7 announcements, and Masoudi had no prior notice that Altria would do so. (PX7035 Masoudi (JLI) Dep. at 126-28).

#### **Response to Finding No. 1156**

The proposed finding is unreliable, improper, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is improper to the extent that it relies the testimony of a fact witness for the legal conclusion as to the existence of an "agreement" within the meaning of the relevant antitrust laws.

The proposed finding is also misleading and contrary to the weight of the evidence. The totality of the record indicates that JLI made clear to Altria that it would have to dispose of its e-vapor business one way or another as part of any transaction. (CCFF ¶¶ 880-924). During negotiations, the parties discussed several options regarding how Altria could comply with JLI's demand that it not compete in e-vapor, (CCFF ¶¶ 968-86), including that Altria might meet JLI's demand by ceasing to operate its e-vapor business. (CCFF ¶¶ 969-86). And that is what Altria did on October 25 and December 7, 2018. (CCFF ¶¶ 987-88, 989-94).

1157. **Howard Willard (Former Altria CEO and Principal Negotiator):** As Willard testified at trial, it was his understanding that JLI would allow Altria to keep its existing e-vapor products on the market during the antitrust process. (Willard (Altria) Tr. 1410). Altria's decisions to discontinue Elite and flavored MarkTen cig-a-like products had "no connection to any agreement with JLI." (PX7031 Willard (Altria) Dep. at 272). "There was no agreement, and there was no deal, and we didn't -- we didn't have an understanding that a deal with JLI was possible until, ultimately, we came to a final agreement in December." (PX7031 Willard (Altria) Dep. at 272). It was never "[Willard's] understanding" at any point in the negotiations that to get a deal done with JLI, Altria had to pull its e-vapor products before it was allowed to invest in the company. (PX7031 Willard (Altria) Dep. at 279). "The principals at [JLI] had never expressed a concern about the impact our existing products might have on JUUL's performance in the marketplace." (PX7031 Willard (Altria) Dep. at 279-80).

#### **Response to Finding No. 1157**

The proposed finding is unreliable, improper, misleading, and contrary to the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is improper to the extent that it relies the testimony of a fact witness for the legal conclusion as to the existence of an “agreement” within the meaning of the relevant antitrust laws.

The statement that Willard understood that “JLI would allow Altria to keep its existing e-vapor products on the market during the antitrust process” is misleading and contrary to the weight of the evidence in that it attempts to obscure the basic fact that JLI demanded as a part of any transaction a non-compete that included Altria’s existing e-vapor business. (CCFF ¶¶ 880-924). Willard himself received JLI’s list of “specific points” reiterating that Altria’s retaining any right to compete with its existing e-vapor products was “not acceptable to us.” (CCFF ¶¶ 916-24). Contrary to Willard’s testimony that “[t]he principals [at JLI] had never expressed a concern about the impact [Altria’s] existing products might have on JUUL’s performance in the marketplace,” JLI’s specific points explicitly included Altria’s MarkTen products in its demand for a non-compete. (CCFF ¶¶ 916-24).

The conclusory statements that Altria’s decision to pull Elite from the market “had no connection to any agreement with JLI,” and that “[t]here was no agreement, and there was no deal,” are misleading and contrary to the weight of the evidence. The totality of the record demonstrates that Altria repeatedly communicated to JLI that it would comply with JLI’s demand for a non-compete, including by disposing of its existing e-vapor business. (CCFF ¶¶ 946-86). Indeed, on October 5, shortly before Altria pulled Elite from the market, Willard sent a letter to JLI reaffirming Altria’s commitment not to compete. (CCFF ¶¶ 961-62).

1158. **Billy Gifford (Altria CEO, Former Altria CFO, and Principal Negotiator):** Gifford testified that at no point in the negotiations did he understand that Altria had to pull any or all of its existing e-vapor products to invest in JLI, nor did anyone from JLI suggest as much. (Gifford (Altria) Tr. 2850). Instead, Altria discontinued its products and shut down

Nu Mark for “[s]eparate, independent business reasons.” (Gifford (Altria) Tr. 2850). Indeed, no one at JLI contacted Altria to applaud the decision to pull products, and Gifford did not believe that pulling Elite and flavored cig-a-like products was going to increase the likelihood of a deal with JLI. (Gifford (Altria) Tr. 2829-30).

### **Response to Finding No. 1158**

The proposed finding is unreliable, improper, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is improper to the extent that it relies on the testimony of a fact witness for the legal conclusion that “Altria discontinued its products and shut down Nu Mark for ‘[s]eparate, independent business reasons.’”

In addition, the proposed finding is misleading and contrary to the weight of the evidence. The notion that no one from JLI suggested that Altria had to “pull any or all of its existing e-vapor products to invest in JLI” is inconsistent with the totality of the record. In fact, JLI made clear to Altria that it would have to dispose of its e-vapor business one way or another as part of any transaction. (CCFF ¶¶ 880-924). According to Quigley, Gifford himself suggested pulling Elite at an internal August 3 meeting, (CCFF ¶¶ 1361-62), four days after Altria received JLI’s first term sheet containing the “cease to operate” provision, (CCFF ¶¶ 683-86, 688), but over a month before it received the FDA’s September 12 letter. (CCFF ¶ 766). Gifford himself sent the term sheet in which Altria attempted to strike this commitment, (CCFF ¶¶ 706, 915), and Gifford himself received JLI’s response that Altria’s proposed edit was “not acceptable to us” (CCFF ¶¶ 726, 916-18, 921). During negotiations, the parties discussed several options regarding how Altria could comply with JLI’s demand that it not compete in e-vapor, (CCFF ¶¶ 968-86), including that Altria might meet JLI’s demand by ceasing to operate its e-vapor business. (CCFF ¶¶ 969-86). And that is what Altria did on October 25 and December 7, 2018. (CCFF ¶¶ 987-88, 989-94).

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The totality of the record also demonstrates that Altria’s purported “[s]eparate, independent business reasons” are inconsistent with the evidence. (CCFF ¶¶ 1034-407). Gifford lacks foundation to speak to the PMTA prospects of Nu Mark’s products: as CFO, he had no direct responsibility for the preparation of any e-vapor PMTAs. (Gifford (Altria) Tr. 2867). In terms of Nu Mark’s financial performance, [REDACTED] (CCFF ¶¶ 1074-75), that Altria believed it was not unique as an e-vapor company suffering losses (though other companies did not exit the category), (Gifford (Altria) Tr. 2851-54), [REDACTED] [REDACTED] [REDACTED] (CCFF ¶¶ 1078-82).

1159. **K.C. Crosthwaite (JLI CEO, Former Altria Chief Growth Officer):** Crosthwaite testified in his deposition that he was “not aware” that the prospect of a deal with JLI “was a factor at all in [Altria’s] determination” to discontinue its e-vapor products. (PX7024 Crosthwaite (Altria/JLI) Dep. at 281). Similarly, he was not aware of JLI ever asking Altria or demanding that Altria discontinue its e-vapor products as a condition to the transaction. (PX7024 Crosthwaite (Altria/JLI) Dep. at 281).

### **Response to Finding No. 1159**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive. It is also unreliable because Crosthwaite did not have responsibility for negotiating deal terms (PX7024 (Crosthwaite (Altria/JLI), Dep. at 48, 69-70)).

The proposed finding is also misleading and contrary to the weight of the evidence. The totality of the record indicates that JLI made clear to Altria that it would have to dispose of its e-vapor business one way or another as part of any transaction. (CCFF ¶¶ 880-924). During negotiations, the parties discussed several options regarding how Altria could comply with JLI’s demand that it not compete in e-vapor, (CCFF ¶¶ 968-86), including that Altria might meet JLI’s

demand by ceasing to operate its e-vapor business. (CCFF ¶¶ 969-86). And that is what Altria did on October 25 and December 7, 2018. (CCFF ¶¶ 987-88, 989-94).

1160. **Murray Garnick (Altria General Counsel and Head of Regulatory Affairs And Sciences):** As Garnick testified, Altria’s decisions to discontinue Elite and MarkTen cig-a-like were not made to try to effectuate an investment in JLI, and JLI never suggested that Altria should shut down any of its e-vapor products before it could invest in JLI. (Garnick (Altria) Tr. 1763). Altria made its decision to withdraw pod-based and flavored cig-a-like products at a time when negotiations with JLI were suspended, and it did not discuss the decision with JLI before sending its letter to FDA announcing that decision on October 25, 2018. (Garnick (Altria) Tr. 1760-61, 1763-64). Garnick “expected that JLI would have a negative reaction” to Altria’s October 25 letter, because it said Altria “believed that pod products substantially contributed to the youth epidemic.” (Garnick (Altria) Tr. 1765). Accordingly, Garnick agreed that Altria did not discontinue its products “to please JLI or to move the deal forward”—this decision was made “independently of JLI.” (Garnick (Altria) Tr. 1767; *see also* Garnick (Altria) Tr. 1759 (“I was advocating and ultimately we decided to pull these products regardless of the Tree deal and totally independent of the Tree deal.”)). And JLI never suggested it was “pleased” by Altria’s decision to discontinue Elite and flavored cig-a-likes in response to FDA’s letter. (Garnick (Altria) Tr. 1776).

#### **Response to Finding No. 1160**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

It is unreliable in that it relies solely on the self-serving testimony of an Altria executive.

The statements that “Altria’s decisions to discontinue Elite and MarkTen cig-a-like were not made to try to effectuate an investment in JLI, and JLI never suggested that Altria should shut down any of its e-vapor products before it could invest in JLI,” and that Altria “did not discuss the decision [to withdraw its pod-based products] with JLI” are misleading and contrary to the record. The totality of the record demonstrates that as early as July 2018 the parties discussed several options regarding how Altria could comply with JLI’s demand that it not compete in e-vapor, including by ceasing to operate its e-vapor business. (CCFF ¶¶ 969-86). On several occasions, in fact, Altria indicated to JLI that it might meet JLI’s demand by ceasing to operate its e-vapor business. (CCFF ¶¶ 969-86). And that is what Altria did when it pulled Elite from the market in



October 2018, (CCFF ¶¶ 987-88), and discontinued the production and sale of its cigalikes in December 2018. (CCFF ¶¶ 989-94).

The statement that “Altria made its decision to withdraw pod-based and flavored cig-a-like products at time when negotiations with JLI were suspended” is misleading and contrary to the weight of the evidence in that, as Garnick himself testified, Altria continued to consider and discuss pursuing the JLI transaction in September 2018. (CCFF ¶¶ 752-72). Moreover, Altria did not announce its decision to pull Elite from the market until October 25, 2018, (CCFF ¶ 812), after Altria had reaffirmed its commitment not to compete in e-vapor. (CCFF ¶¶ 774-87).

Moreover, Garnick’s conclusory testimony that Altria decided to pull its products “regardless of the Tree deal and totally independent of the Tree deal” is misleading and contrary to the weight of the evidence. Although the proposed finding does not cite any evidence supporting this testimony or identify any of these “totally independent” reasons, the purported justifications Respondents have identified are inconsistent with the totality of the record. (CCFF ¶¶ 1034-407).

1161. Similarly, Nu Mark’s leaders who were not involved in the negotiations testified that they agreed with the decisions communicated in the October 25 and December 7 announcements to discontinue Nu Mark’s products, and they never heard that these decisions were made to facilitate a deal with JLI. (*See* Murillo (Altria/JLI) Tr. 2966-67 (explaining he “[a]bsolutely” believes leadership made the right decision to discontinue Elite and cig-a-like flavors in response to the FDA letter, and no one ever said this decision was made to facilitate a deal with JLI); Quigley (Altria) Tr. 2078-79 (agreeing it was the “right” decision to discontinue Elite and flavors, and recalling that he was involved in discussions at the Ranch and never heard anyone say the decision was made to facilitate a deal with JLI); Quigley (Altria) Tr. 1993 (agreeing that closing Nu Mark and discontinuing remaining cig-a-like business on December 7 was a “reasonable” business decision); Jupe (Altria) Tr. 2320-23 (recalling it was never suggested to him that the reason for discontinuing any of Nu Mark’s products was to facilitate a deal with JLI, and he has no reason to believe that it was; Jupe “was very pleased by the decision” to discontinue MarkTen cig-a-like in December “in that we were refocusing our resources, thinking forward, had the right approach in product development”)).

### **Response to Finding No. 1161**

The proposed finding is unreliable, incorrect, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of Altria executives, who admitted that they were not even involved in the deal negotiations and therefore were not aware of the JLI noncompete demand. It is incorrect to the extent that it identifies Murillo and Jupe among “Nu Mark’s leaders.” In fact, at the time of negotiations Murillo worked in Altria’s Regulatory Affairs group, (CCFF ¶ 2015), while Jupe worked in Altria’s Product Development group. (CCFF ¶ 2013). The statement that Quigley was “involved in discussions at the Ranch” is incomplete and misleading, as Quigley was not permitted to join the actual meetings with Altria’s Board, which was unusual. (CCFF ¶ 1372). The statement that Quigley agreed “it was the right decision to discontinue Elite” is incomplete and misleading, as Quigley testified that he was surprised by Gifford’s suggestion in early August 2018 that Altria pull Elite from the market, (CCFF ¶ 1362), four days after Altria had received JLI’s first term sheet containing the “cease to operate” provision, (CCFF ¶¶ 683-86), but over a month before it received the FDA’s September 12 letter. (CCFF ¶ 766). Indeed, contemporary ordinary-course documents reveal that Quigley expressed concern that Altria executives involved in the transaction presented “only the bad news version” of the MarkTen story, and that some of the points in their presentation to the Altria Board were “flat out incorrect,” pointing out that MarkTen was “growing volume” and “the second fastest growing brand in terms of volume behind JUUL.” (CCFF ¶ 1036).

## **2. Altria And JLI Were Assisted By Outside Counsel Throughout Negotiations**

1162. Altria and JLI were assisted in the negotiations by experienced outside counsel “every step of the way.” (Garnick (Altria) Tr. 1683; *see also* Pritzker (JLI) Tr. 789-90).

### **Response to Finding No. 1162**

To the extent that it attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since

Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

1163. JLI's July 30 term sheet, along with every other term sheet exchanged by the parties, "was written by lawyers." (Valani (JLI) Tr. 914). "All of the work" done to draft and revise term sheets, issues lists, and other deal documents was done by outside counsel for both parties—Wachtell Lipton for Altria, and Pillsbury for JLI. (Garnick (Altria) Tr. 1744; *see also* Willard (Altria) Tr. 1403; Pritzker (JLI) Tr. 789-90).

### **Response to Finding No. 1163**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. It is incomplete and misleading to the extent that it suggests that "term sheets, issues lists, and other deal documents" did not reflect the substance of discussions between the principals. Rather, as Pritzker acknowledged, the general process for preparing term sheets was that principals would first discuss concepts, then instruct their lawyers to put those concepts into term sheets, and then review those term sheets. (CCFF ¶ 893). Likewise, the Altria deal negotiators reviewed correspondence related to the term sheets that were exchanged during negotiations. (CCFF ¶¶ 688, 743). Finally, to the extent that it attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

1164. The negotiation principals discussed concepts, but it was outside counsel who reduced those concepts to writing in term sheets and letters. (Pritzker (JLI) Tr. 790).

### **Response to Finding No. 1164**

The proposed finding is unreliable, incomplete, misleading, and vague. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is incomplete and misleading to the extent that it suggests that "term sheets and letters" did not reflect the substance of

discussions between the principals. Rather, as Pritzker acknowledged, the general process for preparing term sheets was that principals would first discuss concepts, then instruct their lawyers to put those concepts into term sheets, and then review those term sheets. (CCFF ¶ 893). Further, the proposed finding is vague in that it does not define the process by which outside counsel “reduced” concepts to writing, and cites no evidence suggesting that the process failed to capture the substance of the concepts the principals discussed. The proposed finding is also incomplete and therefore misleading because it fails to mention that outside counsel were not always present during key meetings related to the deal negotiations, such as the meeting at the Park Hyatt Hotel after the exchange of the July 30 term sheet. (CCFF ¶¶ 689-91). Finally, to the extent that it attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

1165. The antitrust clearance and noncompete provisions consumed a “[v]ery, very small” amount of the negotiation teams’ time. (Pritzker (JLI) Tr. 791). It was clear early on that “counsel was going to work together to figure out how that would work from a legal perspective. The fine-tuning on the business side was a minor part of the conversation at that time . . . .” (Pritzker (JLI) Tr. 791-92).

### **Response to Finding No. 1165**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is misleading and contrary to the weight of the evidence to the extent that it suggests that the noncompete provision was not an important issue during negotiations. In fact, JLI’s lead negotiators testified that it was critical for JLI that Altria not be able to compete in e-vapor post-transaction. (CCFF ¶¶ 868-79). For example, in an August 2018 email, JLI principal Valani included the non-compete issue among eight “specific points” that outlined where JLI “will need

to draw the line before finalizing a commitment [to meet].” (CCFF ¶¶ 916-24). JLI noted that “we believe we need clarity on the above matters if there is to be any hope of a productive discussion this weekend.” (CCFF ¶ 924). Altria also understood the importance of the noncompete issue, highlighting it in both the August 5 draft talking points for Willard and in Willard’s October 5 letter to the principal JLI negotiators. (CCFF ¶¶ 978-80, 891). Finally, to the extent that it attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

### **3. Core Disputes Centered On Money And Control Rights, Not The State Of Altria’s E-Vapor Products**

#### **a. Control And Voting Power**

1166. The negotiations focused primarily on control rights, voting share, and deal structure, and not on the status of Altria’s existing e-vapor business. (Willard (Altria) Tr. 1218-19; Gifford (Altria) Tr. 2770-72). In addition to valuation issues and whether JLI would “split” its domestic and international business, “of key importance was actually the question of control. That was a threshold issue . . . .” (Pritzker (JLI) Tr. 792).

#### **Response to Finding No. 1166**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. It is misleading and contrary to the weight of the evidence to the extent that it suggests that “the status of Altria’s existing e-vapor business” was not an important issue during negotiations. In fact, JLI’s lead negotiators testified that it was critical for JLI that Altria not be able to compete in e-vapor post-transaction. (CCFF ¶¶ 868-79). In August 2018, JLI included the non-compete issue among eight “specific points” that outlined where JLI “will need to draw the line before finalizing a commitment [to meet].” (CCFF ¶¶ 916-24). JLI noted that “we believe we need clarity on the

above matters if there is to be any hope of a productive discussion this weekend.” (CCFF ¶ 924). Moreover, the specific points made clear that the non-compete that JLI required must apply against Altria’s existing MarkTen products. (CCFF ¶¶ 918, 921-22). Altria also understood the importance of the noncompete issue, highlighting it in both the August 5 draft talking points for Willard and in Willard’s October 5 letter to the principal JLI negotiators. (CCFF ¶¶ 978-80, 891).

1167. “[JLI’s] philosophy, the main business intent of [JLI,] was to convert smokers. And many of those smokers used Altria cigarettes. So for Altria actually to control the company that was intending to convert its core customers was, to [JLI], creating a conflict . . . .” (PX7021 Pritzker (JLI) Dep. at 76).

### **Response to Finding No. 1167**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is incomplete and misleading because it fails to note that one of Altria’s most senior executives became the CEO of JLI less than one year after the deal was finalized. (CCFF ¶¶ 2144-45).

1168. JLI did not want Altria to obtain a majority share because it was crucial to JLI that its customers and employees “understand that this was not a sellout to a cigarette company,” but rather was a partnership with Altria “to convert [cigarette] smokers . . . to [JLI’s] product,” in line with the company’s mission. (Pritzker (JLI) Tr. 808-09). “[A]s long as JLI controlled and Altria didn’t, we could make that statement with confidence without anybody thinking that we were turning over the reins, putting the fox in control of the henhouse . . . .” (Pritzker (JLI) Tr. 809).

### **Response to Finding No. 1168**

Complaint Counsel has no specific response except that the proposed finding is unreliable in that it relies solely on the self-serving testimony of a JLI executive and misleading because it fails to note that one of Altria’s most senior executives became the CEO of JLI less than one year after the deal was finalized. (CCFF ¶¶ 2144-45).

1169. But to Altria, JLI’s suggestion that Altria “give all of this money to get [a 45 percent] economic interest and . . . really only have 5 percent of the say” was “very appalling.” (Gifford (Altria) Tr. 2764-65). Additionally, Altria was dismayed by the lack of protection against dilution in JLI’s term sheets, because if it was going to lay out the funds to make a

45 percent investment, as contemplated in late July, it wanted to “make sure through time, regardless, whether there’s an IPO in the future or other stock sales, that [it had] the ability to maintain 45 percent ownership.” (Gifford (Altria) Tr. 2766).

### **Response to Finding No. 1169**

The proposed finding is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is also incomplete and therefore misleading because it fails to note that Willard’s August 5 draft talking points specifically cited the potential for Altria to exit its own e-cigarette business as one of the reasons why Altria required certain protections of its minority investment. (PX1390 (Altria) at 003).

1170. As Wappler explained, Altria was “seeking reasonable governance protections for an investment of this size and ownership stake.” (PX7028 Wappler (PWP) Dep. at 80).

### **Response to Finding No. 1170**

The proposed finding is incomplete and therefore misleading because it fails to note that Willard’s August 5 draft talking points specifically cited the potential for Altria to exit its own e-cigarette business as one of the reasons why Altria required certain protections of its minority investment. (PX1390 (Altria) at 003).

#### **b. Valuation And Payment Timing**

1171. As of July 30, the parties were “sufficiently far apart [on valuation] that it wasn’t worth putting in a number” in the initial term sheet. (Pritzker (JLI) Tr. 816). Later term sheets also kept the price blank, and there was still a “significant bid/ask issue around price” in early August. (Pritzker (JLI) Tr. 828).

### **Response to Finding No. 1171**

The proposed finding is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is also misleading in that it fails to mention that, regardless of other deal-related issues that ultimately needed to be finalized, by the time of the August 18 meeting in San Francisco, Altria had already signaled its willingness to agree to JLI’s demand that it had to stop competing in the closed-system e-cigarette market. (CCFF ¶¶ 947-58).

1172. Around the time of the August 18 meeting in San Francisco, “valuation was really becoming a problem.” (Pritzker (JLI) Tr. 845). Gifford agreed: The parties were not anywhere close to agreeing on price in August. (Gifford (Altria) Tr. 2771).

**Response to Finding No. 1172**

The proposed finding is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. It is also misleading in that it fails to mention that, regardless of other deal-related issues that ultimately needed to be finalized, by the time of the August 18 meeting in San Francisco, Altria had already signaled its willingness to agree to JLI’s demand that it had to stop competing in the closed-system e-cigarette market. (CCFF ¶¶ 947-58).

1173. As of August, the parties were discussing a \$12.6 billion payment for 45 percent of JLI’s U.S.-only business. The ultimate deal, while for a similar price, was for 35 percent of all of JLI’s business, both U.S. and international—representing a roughly \$8.5 billion increase from the August valuation. (Willard (Altria) Tr. 1193-94).

**Response to Finding No. 1173**

Complaint Counsel has no specific response except that the proposed finding is unreliable in that it relies solely on the self-serving testimony of an Altria executive.

1174. Valuation was “one of the most important terms of the deal,” and there were still issues surrounding that term as late as December 16—four days before the investment was finalized. (Willard (Altria) Tr. 1464).

**Response to Finding No. 1174**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. To the extent that it suggests that valuation issues in November or December 2018 caused negotiations to break down or delayed the parties’ closing schedule, or that the parties had not already agreed that Altria would stop competing in e-vapor, the proposed finding is also misleading and contrary to the weight of the evidence for the same reasons set forth above in the second paragraph of the response to RPF ¶ 1111. (*See* Response to RPF ¶ 1111). Indeed, in his text correspondence with



Devitre, Willard reported that the valuation issue was “resolved” only two days after the parties had “reached an impasse.” (PX4167 (Altria) at 010-11). Regardless of other deal-related issues that needed to be negotiated, JLI demanded and Altria understood that any deal had to result in the elimination of Altria as a competitor in the closed-system e-cigarette market. (CCFF ¶¶ 867-993).

**c. JLI’s International Business**

1175. Originally, Altria was interested in investing in JLI’s domestic business only. “Even though [JLI] was one large company, which had their U.S. and their international business, we were trying to understand what we could do to strike a deal for the U.S. business.” (Gifford (Altria) Tr. 2762-63). There were “heavy conversations” regarding whether JLI could “spin off” the international business so Altria could invest in only the U.S. business. (Gifford (Altria) Tr. 2763).

**Response to Finding No. 1175**

The proposed finding is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded and Altria understood that any deal had to result in the elimination of Altria as a competitor in the closed-system e-cigarette market. (CCFF ¶¶ 867-993).

1176. The international split was important to JLI because there were significant practical challenges with “hav[ing] a domestic company that was owned 45, 35 percent by Altria, and an international company that was owned 100 percent by JLI,” as this “created all kinds of issues about coordination, who would work for whom, who would the CEO be, who would people report to, who would own the intellectual property. All of this would create tremendous distraction and potentially decrease the value of international.” (Pritzker (JLI) Tr. 834-35). Over time, the practical implications that splitting the international business would have for dividing the IP and talent became a central issue for JLI. (Gifford (Altria) Tr. 2771).

**Response to Finding No. 1176**

The proposed finding is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. It is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded and Altria understood that any deal

had to result in the elimination of Altria as a competitor in the closed-system e-cigarette market. (CCFF ¶¶ 867-993).

1177. The international split also contributed to the parties' valuation challenges: "[I]n many respects the entire gap between what Altria was valuing the company at and what [JLI] might value it at was the international aspect of the company . . . ." (Pritzker (JLI) Tr. 835).

#### **Response to Finding No. 1177**

The proposed finding is unreliable in that it relies solely on the self-serving testimony of a JLI executive. The proposed finding is also misleading in that it fails to mention that, regardless of other deal-related issues that needed to be negotiated, JLI demanded and Altria understood that any deal had to result in the elimination of Altria as a competitor in the closed-system e-cigarette market. (CCFF ¶¶ 867-993).

#### **4. The Purpose Of The Noncompete Was To Protect JLI's Proprietary Information From Potential Misuse By Altria**

1178. Both Altria and JLI witnesses consistently testified that the purpose of the noncompete was to protect JLI's proprietary information, not to remove Altria's e-vapor products from the market because JLI viewed those products as a competitive threat. (*See infra* ¶¶ 1181-88).

#### **Response to Finding No. 1178**

Complaint Counsel points to its responses to the paragraphs cited in support of the proposed finding. (*See* Responses to RPF ¶¶ 1181-88).

1179. JLI believes it has "the most cutting-edge technologies of any group in the world." (Valani (JLI) Tr. 908).

#### **Response to Finding No. 1179**

Complaint Counsel has no specific response, except that the proposed finding is vague in that the term "most cutting-edge technologies" is vague, and is unreliable in that it relies solely on the self-serving testimony of a JLI executive.

1180. The services that JLI and Altria were contemplating as part of the transaction were "vitally strategic in nature," and "there would be very large access to proprietary information." (Valani (JLI) Tr. 908). "[T]he idea that an investor would have access to those technologies

and processes and be competing with their own products at the same time [was] of major concern to [JLI].” (Valani (JLI) Tr. 908).

### **Response to Finding No. 1180**

Complaint Counsel does not disagree that JLI viewed as “vitally strategic in nature” the services it and Altria were contemplating as part of the transaction. However, the remainder of the proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is also incomplete and misleading to the extent that it suggests that JLI’s demand for a non-compete rested on a concern about information sharing associated with regulatory services. In fact, the final transaction permitted regulatory services to proceed before the non-compete took effect (PX1276 (JLI) at 025-26 (Relationship Agreement); PX1275 (JLI) at 028 (Services Agreement)), as Respondents themselves appear to acknowledge. (*See* RPF 1069).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that “access to proprietary information” was JLI’s sole motivating factor for a non-compete. The record demonstrates that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”). Rather, as Valani himself testified, JLI wanted to avoid the risk that Altria would have conflicting incentives if it continued to sell its own e-vapor products concurrent with an investment in JLI. (CCFF ¶¶ 870-72; *see also* CCFF ¶ 879). Accordingly, as term sheets and other ordinary-course documents make clear, JLI’s insisted on a non-compete not only against products in development and future products, but also against Altria’s existing e-vapor products. (CCFF ¶¶ 880-924). Indeed, JLI left no room for doubt when, in August 2018, it called out as “not acceptable to us” any attempt by Altria to continue competing with its existing MarkTen products. (PX4171 (Altria) at 002; CCFF

¶¶ 914-24). From that point forward, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67).

1181. The noncompete provision in the contract was JLI's way to deal with the risk that Altria could use JLI's proprietary information to develop its own e-vapor portfolio. As Burns explained, this noncompete was necessary because of the deal structure and access that Altria sought: Altria "want[ed] to have a significant stake in the company, have transparency on all the major strategic and operational priorities, which are undoubtedly going to be around IP roadmap and product development." (PX7009 Burns (JLI) IHT at 138). "If, in fact, they were a minority, passive investor, had no governance rights over the company, and no access to our confidential information, I remember the discussions being that we would be far less concerned about them continuing to compete head to head against us in the marketplace." (PX7025 Burns (JLI) Dep. at 122-23).

### **Response to Finding No. 1181**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. Indeed, the first sentence cites no evidence at all and is therefore unsupported. The proposed finding is also incomplete and misleading to the extent that it suggests that JLI's demand for a non-compete rested on a concern about information sharing associated with regulatory services. In fact, the final transaction permitted regulatory services to proceed before the non-compete took effect (PX1276 (JLI) at 025-26 (Relationship Agreement); PX1275 (JLI) at 028 (Services Agreement)), as Respondents themselves appear to acknowledge. (*See* RPF ¶ 1069).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that "the risk that Altria could use JLI's proprietary information to develop its own e-vapor portfolio" was JLI's only motivating factor for a non-compete. The record demonstrates that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled "What Keeps Us Up at Night")). Rather, as Valani testified, JLI wanted to avoid the risk that Altria would have conflicting incentives if it continued to sell its own e-vapor products

concurrent with an investment in JLI. (CCFF ¶¶ 870-72). JLI CFO Danaher put it simply, if Altria was “going to become a 35-percent owner in our business, we didn’t want them competing with any product in the e-vapor business against us.” (CCFF ¶ 879). Accordingly, as term sheets and other ordinary-course documents make clear, JLI’s insisted on a non-compete not only against products in development and future products, but also against Altria’s existing e-vapor products. (CCFF ¶¶ 880-924). Indeed, JLI left no room for doubt when, in August 2018, it called out as “not acceptable to us” any attempt by Altria to continue competing with its existing MarkTen products. (PX4171 (Altria) at 002; CCFF ¶¶ 914-24). From that point forward, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67).

1182. JLI “did not feel like it was appropriate, natural, normal under any circumstances for a party that had access to all of [its] proprietary information” to be able to use that information to compete against them. (Valani (JLI) Tr. 933-34).

### **Response to Finding No. 1182**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive.

In addition, it is contrary to the weight of the evidence to the extent that it suggests that access to proprietary information was JLI’s only motivating factor for a non-compete. The record demonstrates that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”). Rather, as Valani himself testified, JLI wanted to avoid the risk that Altria would have conflicting incentives if it continued to sell its own e-vapor products concurrent with an investment in JLI. (CCFF ¶¶ 870-72; *see also* CCFF ¶ 879). Accordingly, as term sheets and other ordinary-course documents make clear, JLI’s insisted on a non-compete not only against products in development and future products, but also against Altria’s existing e-vapor products. (CCFF ¶¶ 880-924). Indeed, JLI left no room for doubt when, in August 2018, it

called out as “not acceptable to us” any attempt by Altria to continue competing with its existing MarkTen products. (PX4171 (Altria) at 002; CCFF ¶¶ 914-24). From that point forward, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67).

1183. As Masoudi, JLI’s former general counsel, explained: “[O]ur concern was that, as a shareholder, [Altria] would have informational rights. If they were on the Board, they would have rights. And . . . through the Services Agreement, there would be an exchange of information between the companies and they would have more information about where our products were sold, what our shelf space strategy was, what our distribution strategy was, so it was all of those kinds of information as a shareholder, as board members and as providers of commercial services to us.” (PX7035 Masoudi (JLI) Dep. at 129-30).

### **Response to Finding No. 1183**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence.

It is unreliable in that it relies solely on the self-serving testimony of a JLI executive.

In addition, it is misleading and contrary to the weight of the evidence to the extent that it suggests that Altria’s potential “informational rights” were JLI’s only motivating factor for a non-compete. Rather, as Valani testified, JLI wanted to avoid the risk that Altria would have conflicting incentives if it continued to sell its own e-vapor products concurrent with an investment in JLI. (CCFF ¶¶ 870-72; *see also* CCFF ¶ 879). Accordingly, as term sheets and other ordinary-course documents make clear, JLI’s insisted on a non-compete not only against products in development and future products, but also against Altria’s existing e-vapor products. (CCFF ¶¶ 880-924). Indeed, JLI left no room for doubt when, in August 2018, it called out as “not acceptable to us” any attempt by Altria to continue competing with its existing MarkTen products. (PX4171 (Altria) at 002; CCFF ¶¶ 914-24). From that point forward, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67).

1184. “[I]n the course of providing services to [JLI],” especially “regulatory services,” Altria would be privy to “technology, trade secrets, data, really everything that the company had.” (Pritzker (JLI) Tr. 821). “[G]iven the nature of the information that JLI was going to be

providing to Altria, it was important that Altria would not be able to take that information and use it to either modify an existing product that they had, of course assuming that they were complying with FDA regulations, or to create a new product that could compete against JLI, in addition to, obviously, Altria was going to be 35 percent owner in the business and was going to [have] board representation upon antitrust clearance.” (PX7042 Danaher (JLI) Dep. at 153-54).

### **Response to Finding No. 1184**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of JLI executives. It is also incomplete and misleading to the extent that it suggests that JLI’s demand for a non-compete rested on a concern about information sharing associated with regulatory services. In fact, the final transaction permitted regulatory services to proceed before the non-compete took effect (PX1276 (JLI) at 025-26 (Relationship Agreement); PX1275 (JLI) at 028 (Services Agreement)), as Respondents themselves appear to acknowledge. (*See* RPF 1069).

In addition, it is misleading and contrary to the weight of the evidence to the extent that it suggests that Altria’s potential access to proprietary information was JLI’s only motivating factor for a non-compete. Rather, as Valani testified, JLI wanted to avoid the risk that Altria would have conflicting incentives if it continued to sell its own e-vapor products concurrent with an investment in JLI. (CCFF ¶¶ 870-72; *see also* CCFF ¶ 879). Accordingly, as term sheets and other ordinary-course documents make clear, JLI’s insisted on a non-compete not only against products in development and future products, but also against Altria’s existing e-vapor products. (CCFF ¶¶ 880-924). Indeed, JLI left no room for doubt when, in August 2018, it called out as “not acceptable to us” any attempt by Altria to continue competing with its existing MarkTen products. (PX4171 (Altria) at 002; CCFF ¶¶ 914-24). From that point forward, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely, (CCFF ¶¶ 957, 965-67), and Pritzker himself

testified that he would have resisted any agreement that would have allowed Altria to do so. (CCFF ¶ 877).

1185. Altria understood these concerns. As Gifford explained, “[JLI’s] biggest concern that they portrayed to us was that we would work around their IP, if we got knowledge of it, or learn their process and be able to develop around that and compete against them in the marketplace.” (PX7040 Gifford (Altria) Dep. at 156-57). Gifford believed this concern was “reasonable.” (Gifford (Altria) Tr. 2774).

### **Response to Finding No. 1185**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive.

In addition, it is misleading and contrary to the weight of the evidence to the extent that it suggests that Altria’s potential access to proprietary information was JLI’s only motivating factor for a non-compete. Rather, as Valani testified, JLI wanted to avoid the risk that Altria would have conflicting incentives if it continued to sell its own e-vapor products concurrent with an investment in JLI. (CCFF ¶¶ 870-72; *see also* CCFF ¶ 879). Furthermore, the record demonstrates that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”). Accordingly, as term sheets and other ordinary-course documents make clear, JLI’s insisted on a non-compete not only against products in development and future products, but also against Altria’s existing e-vapor products. (CCFF ¶¶ 880-924). Indeed, JLI left no room for doubt when, in August 2018, it called out as “not acceptable to us” any attempt by Altria to continue competing with its existing MarkTen products. (PX4171 (Altria) at 002; CCFF ¶¶ 914-24). From that point forward, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67). By referring to a scenario where Altria would “potentially exit [its] own e-vapor business,” the August 5 draft talking points for Willard demonstrate that



Altria understood the full scope of JLI's noncompete demand. (CCFF ¶¶ 978-79; *see also* CCFF ¶ 982).

1186. According to Willard, JLI “thought that if we made an investment and joined their board and learned about all the inside information about what makes their business successful, they didn’t think it was appropriate for us to be able to then use that information against them.” (PX7031 Willard (Altria) Dep. at 229-30). To Willard, “that didn’t seem to be an unreasonable request on their part,” particularly because of the information Altria would obtain by providing services to JLI. (PX7031 Willard (Altria) Dep. at 230). “[O]ur intention in making an investment in [JLI], particularly given the lack of success we’ve had with our own products, was to work with [JLI] to help make their product more successful than it already was. We were going to provide some services and do some other things.” (PX7031 Willard (Altria) Dep. at 230; *see also* PX7031 Willard (Altria) Dep. at 229 (“[JLI’s] real interest in -- in this provision not to compete was really more related to the future. They didn’t want us to invest in JUUL, learn a whole lot about their product and what made it successful, and then, separate from our investment in JUUL, go out and create an e-vapor business based on their information, and that was a fairly reasonable expectation on their part.”)).

#### **Response to Finding No. 1186**

The proposed finding is unreliable in that it relies solely on the self-serving testimony of an Altria executive. Its lack of support is especially apparent in its failure to identify Willard’s foundation to speak to what JLI “thought,” or to “[JLI’s] real interest” in a non-compete provision. The proposed finding is also vague to the extent that it relies on Willard’s testimony that Altria was “going to provide some services and do some other things,” which is vague and undefined. It is also incomplete and misleading to the extent that it suggests that JLI’s demand for a non-compete rested on a concern about information sharing associated with regulatory services. In fact, the final transaction permitted regulatory services to proceed before the non-compete took effect (PX1276 (JLI) at 025-26 (Relationship Agreement); PX1275 (JLI) at 028 (Services Agreement)), as Respondents themselves appear to acknowledge. (*See* RPF ¶ 1069).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that Altria’s access to “inside information” was JLI’s only motivating factor for a non-compete. Rather, as Valani testified, JLI wanted to avoid the risk that Altria would

have conflicting incentives if it continued to sell its own e-vapor products concurrent with an investment in JLI. (CCFF ¶¶ 870-72; *see also* CCFF ¶ 879).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that JLI's demand for a non-compete was "really more related to the future," or limited to the risk that Altria might "go out and create an e-vapor business based on their information." The record demonstrates that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled "What Keeps Us Up at Night")). In fact, as term sheets and other ordinary-course documents make clear, JLI's insisted on a non-compete not only against products in development and future products, but also against Altria's existing e-vapor products. (CCFF ¶¶ 880-924). Indeed, JLI left no room for doubt when, in August 2018, it called out as "not acceptable to us" any attempt by Altria to continue competing with its existing MarkTen products. (PX4171 (Altria) at 002; CCFF ¶¶ 914-24). From that point forward, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67). Finally, Willard's own August 5 draft talking points refer to a scenario where Altria would "potentially exit [its] own e-vapor business," demonstrating that Altria understood the full scope of JLI's noncompete demand. (CCFF ¶¶ 978-79; *see also* CCFF ¶ 982).

1187. Similarly, as Wappler testified, JLI "was concerned that if Altria made an investment in [JLI] and had access to the boardroom [and] assistance on regulatory items," Altria "could use that against [JLI] over time." (PX7028 Wappler (PWP) Dep. at 66). To Wappler, it "made a lot of sense" that JLI "would reasonably be concerned" about misuse of their information absent a noncompete agreement, "and there was some work being done to try to ensure both parties were comfortable, again, within the scope of antitrust laws." (PX7028 Wappler (PWP) Dep. at 66).

### **Response to Finding No. 1187**

The proposed finding is unreliable, improper, misleading, and contrary to the weight of the evidence. It is unreliable in that it fails to identify Wappler's foundation to speak to what

“concerned” JLI. It is improper to the extent that it relies on the testimony of a fact witness to characterize the non-compete as “within the scope of antitrust laws,” which is a legal conclusion. It is also incomplete and misleading to the extent that it suggests that JLI’s demand for a non-compete rested on a concern about information sharing associated with regulatory services. In fact, the final transaction permitted regulatory services to proceed before the non-compete took effect (PX1276 (JLI) at 025-26 (Relationship Agreement); PX1275 (JLI) at 028 (Services Agreement)), as Respondents themselves appear to acknowledge. (*See* RPF 1069).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the potential for Altria’s “misuse of their information” was JLI’s only motivating factor for a non-compete. Rather, as Valani testified, JLI wanted to avoid the risk that Altria would have conflicting incentives if it continued to sell its own e-vapor products concurrent with an investment in JLI. (CCFF ¶¶ 870-72; *see also* CCFF ¶ 879). Accordingly, as term sheets and other ordinary-course documents make clear, JLI’s insisted on a non-compete not only against products in development and future products, but also against Altria’s existing e-vapor products. (CCFF ¶¶ 880-924). Indeed, JLI left no room for doubt when, in August 2018, it called out as “not acceptable to us” any attempt by Altria to continue competing with its existing MarkTen products. (PX4171 (Altria) at 002; CCFF ¶¶ 914-24). From that point forward, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67). Indeed, the email exchange between [REDACTED]

[REDACTED] (CCFF ¶ 982).

1188. The protections to JLI’s proprietary information provided by the noncompete facilitated the services agreement, which was “one of the most critical things [JLI] saw as a benefit to JLI of this deal.” (Pritzker (JLI) Tr. 760). This was particularly true of Altria’s regulatory services. “[T]he PMTA process was critical,” and “the services that Altria was offering in

terms of assistance to the regulatory process was a key part of the deal.” (Pritzker (JLI) Tr. 759-60). “[G]etting PMTA approval is literally existential for the company. You cannot operate without PMTA approval . . . . Altria’s team was the best in the country,” and their regulatory services were “in[]valuable.” (Pritzker (JLI) Tr. 820).

### **Response to Finding No. 1188**

Complaint Counsel does not disagree that the services agreement was “one of the most critical things [JLI] saw as a benefit to JLI of this deal.” Nonetheless, the proposed finding is unreliable, improper, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is improper to the extent that it relies on the testimony of a fact witness for the conclusory opinion that “Altria’s team was the best in the country.” It is also incomplete and misleading to the extent that it suggests that JLI’s demand for a non-compete rested on a concern about information sharing associated with regulatory services. In fact, the final transaction permitted regulatory services to proceed before the non-compete took effect (PX1276 (JLI) at 025-26 (Relationship Agreement); PX1275 (JLI) at 028 (Services Agreement)), as Respondents themselves appear to acknowledge. (*See* RPPF ¶ 1069).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that its proprietary information was JLI’s only motivating factor for a non-compete. Rather, as Valani testified, JLI wanted to avoid the risk that Altria would have conflicting incentives if it continued to sell its own e-vapor products concurrent with an investment in JLI. (CCFF ¶¶ 870-72; *see also* CCFF ¶ 879). Accordingly, as term sheets and other ordinary-course documents make clear, JLI’s insisted on a non-compete not only against products in development and future products, but also against Altria’s existing e-vapor products. (CCFF ¶¶ 880-924). Indeed, JLI left no room for doubt when, in August 2018, it called out as “not acceptable to us” any attempt by Altria to continue competing with its existing MarkTen products. (PX4171

(Altria) at 002; CCFE ¶¶ 914-24). From that point forward, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67).

**5. The Noncompete Did Not Apply To Existing Products Prior To HSR Clearance**

**a. JLI Was Not Concerned About Altria’s Existing E-Vapor Products Remaining In The Market**

1189. As Pritzker agreed, JLI included the carve-out because it “wanted [Altria] to keep [its] products on the market until they could be presented to the FTC for divestiture.” (Pritzker (JLI) Tr. 853).

**Response to Finding No. 1189**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is incomplete and misleading in that Pritzker himself testified that JLI’s “goal was for [Altria] not to be competing against Juul” and that he “didn’t care how that would come about.” (CCFF ¶ 898). Similarly, JLI’s Valani testified that, in terms of how Altria chose to fulfill its obligation not to compete, “this is really their problem, not ours” and that JLI was “more concerned about an end state.” (CCFF ¶ 900). Indeed, JLI’s first term sheet provided that Altria could dispose of its existing e-vapor business in any of three ways, including divesting it to a third party, contributing it to JLI, or ceasing to operate it. (CCFF ¶¶ 892-97). The proposed finding is also incomplete and misleading because the “carve-out” only allowed Altria to engage in its e-vapor business “as such business is presently conducted,” (CCFF ¶ 1002), and as of the time of the transaction Altria had already pulled Elite off the market and discontinued the production and distribution of its cigalike products. (CCFF ¶¶ 1003-04). Nor does the proposed finding cite any evidence that Altria’s products were in fact “presented to the FTC for divestiture.” Indeed, the record shows that Altria took no steps whatsoever towards preparing for a potential divestiture. (CCFF ¶¶ 939-40).

1190. It was “clear to [JLI] that a transaction of this kind would be subject to antitrust clearance.” (Pritzker (JLI) Tr. 817). As Pritzker confirmed at trial, the carve-out reflected the expectation that Altria would “leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s].” (Pritzker (JLI) Tr. 853). JLI was “perfectly happy” with this; “[they] were expecting it.” (Pritzker (JLI) Tr. 874). That is why JLI (like Altria) engaged outside counsel to draft the term sheets in a manner that was “above-board and [would] optimize the chance for a successful regulatory outcome.” (Pritzker (JLI) Tr. 784). JLI “was not worried about any of [Nu Mark’s] products over anybody else’s products.” (Pritzker (JLI) Tr. 794).

### **Response to Finding No. 1190**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is also incomplete and misleading. The statement that the “carve-out reflected the expectation that Altria would ‘leave MarkTen and MarkTen Elite on the market’” is entirely inconsistent with the fact that by the time of the transaction Altria had already pulled Elite off the market and discontinued the production and distribution of the MarkTen cigalike. (CCFF ¶¶ 1003-04). In fact, the “carve-out” permitted Altria to engage in its existing e-vapor business only “as such business is presently conducted,” which ensured that the products would remain off the market (except to the extent retailers sold off existing inventory of the cigalikes). (CCFF ¶¶ 1002, 1004). Further, the statement that “JLI (like Altria) engaged outside counsel to draft the term sheets in a manner that was ‘above-board’” is incomplete and misleading to the extent that it suggests that the principals had not discussed a non-compete well beforehand. (CCFF ¶¶ 880-91, 914-24). Moreover, the statement that JLI “was not worried about any of [Nu Mark’s] products over anybody else’s products” is incomplete and misleading, because JLI specifically called out its concerns about Altria’s products as early as August 2018, citing as “not acceptable to us” that Altria would retain the ability to compete not only with future products but its existing MarkTen products. (CCFF ¶¶ 914-24). Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since

Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

1191. Altria understood throughout the negotiations that it would be allowed to keep MarkTen and Elite on the market during the antitrust review process. (Gifford (Altria) Tr. 2774).

### **Response to Finding No. 1191**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a single Altria executive. It is vague in that it fails to specify a relevant timeframe. It is incomplete and misleading in that, by the time of the transaction, Altria could not “keep MarkTen and Elite on the market.” In fact, by that time Altria had already pulled Elite off the market and discontinued the production and distribution of its cigalike, (CCFF ¶¶ 1003-04), and the “carve-out” in the final deal preserved that status quo by permitting Altria to engage in the e-vapor business only “as such business is presently conducted.” (CCFF ¶ 1002). The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that Altria ever understood that it could “keep MarkTen and Elite on the market” indefinitely. The totality of the record is clear that JLI’s insistence on a non-compete ultimately encompassed Altria’s existing e-vapor products. (CCFF ¶¶ 880-924, 957, 965-67).

1192. Every draft term sheet and deal document exchanged by the parties included a carve-out exempting MarkTen cig-a-like and MarkTen Elite from the noncompete, as did the final agreement. (PX1300 (Altria) at 006 (July 30 term sheet); PX2570 (JLI) at 007 (Aug. 4 term sheet); PX2313 (JLI) at 017 (Aug. 9 term sheet); PX1432 (Altria) at 024 (Aug. 19 term sheet); PX1269 (Altria) at 008 (Oct. 15 term sheet); PX2503 (JLI) at 030 (Oct. 28 term sheet); RX0285 (Altria) at 024 (Oct. 30 term sheet); RX0838 (Altria) at 373 (Nov. 15 draft relationship agreement); RX1408 (JLI) at 026 (Nov. 29 draft relationship agreement); PX1276 (JLI) at 025-26 (Dec. 20 final relationship agreement)).

### **Response to Finding No. 1192**

The proposed finding is vague, incomplete, and misleading. It is vague as to the meaning of “carve-out.” It is incomplete and misleading to the extent that it suggests that the cited term

sheets “exempt[ed] MarkTen cig-a-like and MarkTen Elite from the noncompete” indefinitely. In fact, after JLI made clear to Altria that it was “not acceptable to us” that Altria would retain the right to compete, including with its existing MarkTen products, (CCFF ¶ 918), no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67). Further, it is incomplete and misleading as to the final agreement in particular, which only permitted Altria to continue engaging in its existing e-vapor business “as such business is presently conducted.” (CCFF ¶¶ 1002). Instead of “exempting MarkTen cig-a-like and MarkTen Elite from the noncompete,” this qualifying language actually ensured that Altria would continue not to compete, because by the time of the final transaction Altria had already pulled Elite from the market and discontinued the production and distribution of its cigalike products. (CCFF ¶¶ 1003-05).

1193. Pritzker was only concerned about Altria remaining in the e-vapor marketplace “to the extent that they had proprietary information from JUUL. Otherwise, [he] had no concern about what they were going to do in the e-cigarette market in the future. It didn’t bother [him] at all.” (PX7021 Pritzker (JLI) Dep. at 151-52).

### **Response to Finding No. 1193**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is misleading and contrary to the weight of the evidence to the extent that it suggests that the concern underlying JLI’s demand for a non-compete did not extend to Altria’s existing e-vapor products. The record demonstrates that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”). In fact, Pritzker himself testified that he would have resisted any agreement that allowed Altria to continue market its MarkTen Elite and cigalike products indefinitely. (CCFF ¶ 877). The totality of the record shows JLI’s repeated



insistence, in term sheets and correspondence, that Altria must ultimately dispose of its existing e-vapor business. (CCFF ¶¶ 880-924). Indeed, after JLI reiterated this point in August 2018, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67).

1194. Similarly, as Willard testified, “[t]he principals at [JLI] had never expressed a concern about the impact [Altria’s] existing products might have on JUUL’s performance in the marketplace.” While “JUUL was tremendously successful,” Altria’s products “were not very successful,” and Willard did not “think it was important to [JLI] that” Altria somehow removed these products from the market. “[I]t was not a point of concern for them.” (PX7031 Willard (Altria) Dep. at 279-80).

#### **Response to Finding No. 1194**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony, including hearsay, of an Altria executive. It is also vague in that the phrases “tremendously successful” and “not very successful” are vague.

To the extent that it suggests that Altria’s e-vapor business had not been improving or performing according to management’s expectations, the proposed finding is contrary to the weight of the evidence. Nu Mark’s financial performance had been improving. (CCFF ¶¶ 1088-111). Sales of Elite in particular had been increasing before Altria pulled it from the market in October 2018. (CCFF ¶¶ 1112-31). Moreover, Altria understood that long-term success in e-vapor required up-front investment and was willing to sacrifice short-term profits in pursuit of that goal. (CCFF ¶¶ 1064-87). Nu Mark was hardly unique among e-vapor companies in facing commercial challenges; it was only unique in its decision to exit the market. (CCFF ¶¶ 1132-43).

Finally, the proposed finding is contrary to the weight of the evidence to the extent that it suggests that the concern underlying JLI’s demand for a non-compete did not extend to Altria’s existing e-vapor products. The record demonstrates that JLI already viewed Altria as a significant

long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”). Moreover, the totality of the record shows JLI’s repeated insistence, in term sheets and correspondence, that Altria ultimately dispose of its existing e-vapor business. (CCFF ¶¶ 880-924). Indeed, after JLI reiterated this point in August 2018, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67).

1195. During negotiations, JLI made clear it was “not concerned about [MarkTen] as an effective competitor,” but did not want Altria “to learn everything about [JLI’s] business and then take what [was] learned and . . . compete with [JLI] in a vehicle outside of [Altria’s] investment in JUUL.” (Willard (Altria) Tr. 1273).

#### **Response to Finding No. 1195**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is misleading and contrary to the evidence to the extent that it suggests that the concern underlying JLI’s demand for a non-compete did not extend to Altria’s existing e-vapor products. The record demonstrates that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”). Moreover, the totality of the record shows JLI’s repeated insistence, in term sheets and correspondence that Altria ultimately dispose of its existing e-vapor business. (CCFF ¶¶ 880-924). Indeed, after JLI reiterated this point in August 2018, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965, 967).

1196. Pritzker thought that Altria’s ultimate decision to pull its Nu Mark products was “of no consequence” because he “didn’t think they were particularly competitive to Juul.” (PX7021 Pritzker (JLI) Dep. at 163-64).

#### **Response to Finding No. 1196**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is misleading and contrary to the evidence to the extent that it suggests that the concern underlying JLI's demand for a non-compete did not extend to Altria's existing e-vapor products. The record demonstrates that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled "What Keeps Us Up at Night")). Moreover, the totality of the record shows JLI's repeated insistence, in term sheets and correspondence, that Altria ultimately dispose of its existing e-vapor business. (CCFF ¶¶ 880-924). Indeed, after JLI reiterated this point in August 2018, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965, 967). Further, Pritzker's statement that he "didn't think [Nu Mark] products were particularly competitive to Juul" is misleading and contrary to the weight of the evidence, which shows that Altria and JLI engaged in both price and non-price head-to-head competition. (CCFF ¶¶ 1418-92).

1197. Masoudi recalls that "there may have been business discussions about how the Altria products were not particularly good competitors that [JLI] would be interested in having." This assessment was based on the fact that these products "didn't have very significant share of the market or consumer uptake." (PX7035 Masoudi (JLI) Dep. at 56).

#### **Response to Finding No. 1197**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive, whose vague recollection that "there may have been business discussions" in particular deserves little weight. It is vague to the extent that it relies on Masoudi's vague characterization of Altria's products as "not particularly good competitors," or cites as a "fact" his view that they lacked a "very significant share of the market or consumer uptake." The record demonstrates that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette

market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”). Moreover, that characterization is misleading and contrary to the weight of the evidence, which shows that Altria and JLI engaged in a range of both price and non-price head-to-head competition, (CCFF ¶¶ 1418-92), and that the loss of Altria as a competitor significantly increased concentration in the already-concentrated U.S. market for closed-system e-cigarettes. (CCFF ¶¶ 1736-63).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the concern underlying JLI’s demand for a non-compete did not extend to Altria’s existing e-vapor products. The totality of the record shows JLI’s repeated insistence, in term sheets and correspondence, that Altria must ultimately dispose of its existing e-vapor business. (CCFF ¶¶ 880-924). Indeed, after JLI reiterated this point in August 2018, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67).

1198. Gifford testified that “[JLI was not] worried about the products [Nu Mark] had in the marketplace. What they were worried about was that [Altria] would make an investment, learn what [JLI] had unlocked with the consumer, and that [Altria] would walk around that and then go compete on our own.” (Gifford (Altria) Tr. 2773).

### **Response to Finding No. 1198**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive, and fails in particular to identify his foundation to speak to what JLI was “worried about.” It is vague in its reliance on such vague phrases as “what [JLI] had unlocked with the consumer” and “that [Altria] would walk around that.”

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the concern underlying JLI’s demand for a non-compete did not extend to Altria’s existing e-vapor products. The record demonstrates that JLI already viewed Altria as a

significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”). In fact, the notion that “[JLI was not] worried about the products [Nu Mark] had in the marketplace” stands in stark contrast to JLI’s repeated insistence, in term sheets and correspondence, that Altria must ultimately dispose of its existing e-vapor business. (CCFF ¶¶ 880-924). Indeed, after JLI reiterated this point in August 2018, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. (CCFF ¶¶ 957, 965-67).

1199. In fact, as JLI witnesses testified, JLI was more concerned about potential competition from IQOS than from Nu Mark’s MarkTen products. (O’Hara (JLI) Tr. 529 (noting IQOS “had shown some strength in a couple of Asian markets, Japan and Korea,” and although O’Hara didn’t personally like the product and “thought that JUUL was better,” “[s]ome people liked IQOS . . . [and] IQOS was the kind of product that . . . [he] felt [JLI] should watch”); PX7033 O’Hara (JLI) Dep. at 112-13 (agreeing that PMI, through IQOS, is “a competitor to JUUL”); PX7032 Valani (JLI) Dep. at 139-40 (noting that PMI is “the leader in . . . harm reduction in the tobacco industry,” and “made a very bold push on IQOS with a lot of success”). Similarly, Isaac Pritzker and Zachary Frankel’s notes from the initial July 30, 2017 meeting between Altria and JLI reflect that the parties discussed potential competition between JUUL and IQOS for converting adult smokers, but not MarkTen products. (RX1459 (JLI) at 001, 003-04 (Isaac Pritzker stating, regarding converting smokers, “[Altria] must feel they are well positioned enough to take advantage of the switch from combustible to other delivery systems. If IQOS does as well in US as it has in Japan, maybe that’s true,” but doubting current JUUL users would “churn” to IQOS; Frankel listing “HNB [heat-not-burn] category building” as a “thing[] [Altria] think[s] will matter”; Frankel stating, regarding IQOS rollout, “[Altria] thinks some consumers want the tobacco flavor --> prefer hnb + iqos”).

### **Response to Finding No. 1199**

The first sentence is incomplete and misleading in that the cited O’Hara and Valani testimony do not compare JLI’s concern about competition from IQOS to that from Nu Mark’s MarkTen products; in fact, the cited testimony does not mention MarkTen. (O’Hara (JLI) Tr. 529; PX7033 (O’Hara (JLI), Dep. at 112-13); PX7032 (Valani (JLI), Dep. at 139-40). The reference to Isaac Pritzker and Zachary Frankel’s notes is incomplete and misleading, in that Pritzker in fact wrote, “I think that \*zero\* Juul users would churn to IQOS, vice versa different story.” (RX1459

(JLI) at 001). In addition, citing Frankel's impression from a meeting as to what Altria "think[s] will matter" does support the notion that JLI itself was concerned about competition from IQOS, let alone that it was more concerned about IQOS than MarkTen.

The proposed finding is also contrary to the weight of the evidence as the record demonstrates that JLI already viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled "What Keeps Us Up at Night")). Moreover, as Respondents themselves acknowledge, the noncompete provision applied to Altria's e-cigarette products, not to IQOS. (RPFF ¶ 1200).

1200. The noncompete did not apply to IQOS because it is not an e-vapor product. (Pritzker (JLI) Tr. 824). Altria has continued to market that product. (Pritzker (JLI) Tr. 811).

#### **Response to Finding No. 1200**

Complaint Counsel does not disagree.

1201. Pritzker never heard anyone suggest that the transaction would be a good opportunity to eliminate MarkTen Elite from competition. (Pritzker (JLI) Tr. 794).

#### **Response to Finding No. 1201**

The proposed finding is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is also misleading and contrary to the weight of the evidence. Regardless of whether Pritzker ever "heard anyone suggest that the transaction would be a good opportunity to eliminate MarkTen Elite from competition" the basic fact remains that during negotiations JLI had insisted upon a non-compete, and made clear that it must ultimately include both Altria's existing e-vapor products and Altria's future e-vapor products. (CCFF ¶¶ 880-924). JLI and Altria repeatedly discussed ways that Altria could fulfill its obligation not to compete, including ceasing to operate its existing e-vapor business. (CCFF ¶¶ 969-86). Altria indicated to JLI that it might take this path, (CCFF ¶¶ 969-86), and its decisions to pull Elite from the market in October 2018, in the midst of transaction negotiations, and to discontinue the production and distribution of its

cigalikes in December 2018, on the eve of the transaction, were entirely consistent with taking that direction. (CCFF ¶¶ 987-94).

1202. JLI never asked Altria to remove its products from the market prior to finalizing the transaction in order to be permitted to invest. (Gifford (Altria) Tr. 2774).

### **Response to Finding No. 1202**

The proposed finding is unreliable in that it relies solely on the self-serving testimony of an Altria executive. Gifford's unreliable testimony is also misleading and contrary to the weight of the evidence. The totality of the record is replete with term sheets, correspondence, and other ordinary-course documents that, taken together, stand in stark contrast to Gifford's unreliable testimony. During negotiations JLI had insisted upon a non-compete, and made clear that it must ultimately include Altria's existing e-vapor products. (CCFF ¶¶ 880-924). JLI and Altria repeatedly discussed ways that Altria could fulfill its obligation not to compete, including ceasing to operate its existing e-vapor business. (CCFF ¶¶ 969-86). Altria indicated to JLI that it might take this path, (CCFF ¶¶ 969-86), and its decisions to pull Elite from the market in October 2018, in the midst of transaction negotiations, and to discontinue the production and distribution of its cigalikes in December 2018, on the eve of the transaction, were entirely consistent with taking that direction. (CCFF ¶¶ 987-94).

#### **b. JLI Contemplated That Altria's Treatment Of Altria's Existing Products Would Be Undertaken Pursuant To FTC Review**

1203. At every step of the negotiations, the parties intended—and the term sheets proposed—that any actions taken with respect to Altria's existing products as a result of the transaction would be “subject to scrutiny by the FTC in the course of its regulatory review.” (Pritzker (JLI) Tr. 821-22). “It was clear that if we were going to pursue a transaction of this nature, that it would be closely scrutinized by regulatory agencies, and that antitrust counsel would have to be brought in at an early stage so that any conversations around control, board seats, existing products, all of that would be structured in a way so as to be above-board and to optimize the chance for a successful regulatory outcome.” (Pritzker (JLI) Tr. 784).

### **Response to Finding No. 1203**

The proposed finding is unreliable, improper, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. Indeed, it fails to cite any term sheets in support of its reference to term sheets proposing that actions would be subject to FTC scrutiny. It is also improper to the extent that it relies on the conclusory testimony of a fact witness to characterize the transaction structure as “above-board.” It is also incomplete and misleading to the extent that it suggests that there were any “existing products” for the FTC to scrutinize by the time its review process began. In fact, by the time Altria initiated the HSR review in February 2019, it had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05). The proposed finding is also incomplete and misleading because, although Pritzker felt that the divestiture of Altria’s e-vapor business would be the most acceptable route to regulatory approval, ultimately, he testified, JLI’s “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.” (CCFF ¶ 898). Likewise, JLI’s Valani testified that exactly how Altria fulfilled its obligation not to compete was “really their problem, not ours” and that JLI was “more concerned about an end state.” (CCFF ¶ 900). Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

1204. JLI’s request that Altria not compete against it after the transaction was “subject to complete and total regulatory sanction.” (Valani (JLI) Tr. 934). It was “extremely . . . important to [JLI] that [Altria] used the appropriate means” to achieve that outcome “per regulatory sanction.” (Valani (JLI) Tr. 911-12).

#### **Response to Finding No. 1204**



The proposed finding is unreliable, improper, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is also improper to the extent that it relies on the conclusory testimony of a fact witness to characterize Altria's conduct as "appropriate means." It is also incomplete and misleading in that Valani himself testified that the means by which Altria fulfilled its obligation not to compete against JLI was "really their problem, not ours," and that JLI was "more concerned about an end state." (CCFF ¶ 900). Similarly, although Pritzker felt that the divestiture of Altria's e-vapor business would be the most acceptable route to regulatory approval, ultimately, he testified, JLI's "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." (CCFF ¶ 898). The proposed finding is also incomplete and misleading because Altria had already taken steps to fulfill its non-compete obligation before "complete and total regulatory sanction." Indeed, by the time Altria initiated HSR review in February 2019, it had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05). Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

1205. Throughout negotiations, Altria understood that the FTC would review any transaction and determine whether Altria needed to divest its products or take any other concessionary measure. As a result, Altria recognized early on that to secure antitrust clearance, it would "potentially" need to "exit [its] own vapor business" by divesting or contributing its e-vapor assets, (PX1389 (Altria) at 001), and it "[tried] to structure the deal . . . to have flexibility" to comply with any FTC requirements, (Willard (Altria) Tr. 1400).

### **Response to Finding No. 1205**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that the entire first sentence cites no evidence for support. Complaint Counsel does not disagree that Altria “recognized early on” that it might “potentially exit [its] own vapor business,” as it noted in an August 5, 2018 draft script for a discussion with JLI. (PX1389 (Altria) at 001). However, the proposed finding is incomplete and misleading in that the cited document nowhere connects this language to the antitrust review process, nor does it anywhere refer to “divesting or contributing” Altria’s e-vapor business as the only options available to Altria. (PX1389 (Altria) at 001). In fact, another version of the cited document makes clear that, in terms of ultimately disposing of its existing e-vapor business, Altria was expressing its willingness to take “concessionary measures” for JLI, not the FTC. Specifically, in addition to the language cited above, it noted that “Altria has come a long way to accommodate you in this process, including . . . [Demonstrating flexibility with our existing vapor business, if necessary, in order to form the partnership.]” (PX1390 (Altria) at 003-04 (brackets in original); CCF 977-80). Again, nowhere does the script connect this language with a need to comply with FTC requirements. (PX1390 (Altria) at 003-04).

In addition, the proposed finding is misleading and contrary to the weight of the evidence. The language in Altria’s draft scripts is consistent with the totality of the record, which makes clear that JLI was insisting upon a non-compete, (CCF 880-924), that JLI and Altria repeatedly discussed ways that Altria could fulfill its obligation not to compete, including ceasing to operate its existing e-vapor business, (CCF 969-86), and that Altria indicated to JLI that it might take this path. (CCF 969-86). Moreover, Altria’s own executives acknowledge that Altria never took any steps to explore a potential divestiture of its e-vapor assets. (CCF 939-40).

Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

1206. Pritzker believed that Altria would keep MarkTen cig-a-like and Elite on the market until they could be contributed or divested pursuant to FTC review, and Altria never “push[ed] back on that notion.” (PX7021 Pritzker (JLI) Dep. at 199-200).

### **Response to Finding No. 1206**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is incomplete and misleading in that, as Pritzker acknowledged, Altria did on one occasion attempt to “push back” on the notion when it struck from a JLI term sheet a provision requiring it to divest, contribute, or cease to operate its e-vapor business. (CCFF ¶ 706). In response, JLI made clear that it was “not acceptable to us” that Altria could indefinitely retain the right to compete against JLI, including with Elite and the MarkTen cigalike. (CCFF ¶ 722). Even if Pritzker felt that the divestiture of Altria’s e-vapor business would be the most acceptable route to regulatory approval, ultimately, he testified, JLI’s “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.” (CCFF ¶ 898). Likewise, JLI’s Valani testified that exactly how Altria fulfilled its obligation not to compete was “really their problem, not ours” and that JLI was “more concerned about an end state.” (CCFF ¶ 900). The proposed finding is also incomplete and misleading in that Altria in fact did not “keep MarkTen cig-a-like and Elite on the market until they could be contributed or divested pursuant to FTC review.” Pritzker himself received the word from Willard that Altria had decided to pull Elite from the market, weeks before the final transaction, (CCFF ¶ 813), and Altria publicly announced its decision to discontinue the production and distribution of the MarkTen cigalike on December 7, 2018. (CCFF ¶ 848). On

December 9, two days after Altria's announcement of the Nu Mark shutdown decision, Garnick personally confirmed to Masoudi that Altria was "not in the market anymore" and could not "get back into the market without getting a PMTA." (CCFF ¶ 851). Thus, by the time Altria initiated HSR review on February 2019, Altria was no longer marketing any e-vapor products. (CCFF ¶¶ 48, 1003-04).

1207. As Masoudi testified, "as reflected in the term sheets, it was contemplated that divestiture [or] contribution would be part of the Federal Trade Commission review process and so of necessity, [Altria] would be continuing to operate [their e-vapor business] through . . . some period of time." (PX7035 Masoudi (JLI) Dep. at 73).

### **Response to Finding No. 1207**

It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is incomplete and misleading in that term sheets reference not only divestiture or contribution, but also Altria's "ceas[ing] to operate" and "otherwise exiting" its e-vapor business. (CCFF ¶¶ 683-86, 800-02, 828-29). As Pritzker testified, ultimately JLI's "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." (CCFF ¶ 898). Likewise, JLI's Valani testified that exactly how Altria fulfilled its obligation not to compete was "really their problem, not ours" and that JLI was "more concerned about an end state." (CCFF ¶ 900). On December 9, two days after Altria's announcement of the Nu Mark shutdown decision, Garnick personally confirmed to Masoudi that Altria was "not in the market anymore" and could not "get back into the market without getting a PMTA." (CCFF ¶ 851). Further, Altria's own executives acknowledge that Altria never took any steps to explore a potential divestiture of its e-vapor assets. (CCFF ¶¶ 939-40). Instead, by the time Altria initiated HSR review in February 2019, it had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05). Finally, to the extent that the proposed finding attempts to

absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

**c. JLI Assumed Divestiture Would Be The Most Likely Outcome Of Regulatory Review, Which Would Keep Altria's Products In The Market**

1208. Pritzker “expected the FTC would likely require a divestiture of existing products.” (Pritzker (JLI) Tr. 674). In Pritzker’s mind, divestiture would achieve the goal of Altria not competing with JLI after receiving JLI’s proprietary information, “and at the same time maintain those products in the marketplace.” (PX7021 Pritzker (JLI) Dep. at 70).

**Response to Finding No. 1208**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is incomplete and misleading because, by the time Altria initiated the HSR review in February 2019, it had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05). Altria’s own executives acknowledge that Altria never took any steps to explore a potential divestiture of its e-vapor assets. (CCFF ¶¶ 939-40). Even if Pritzker “expected the FTC would likely require a divestiture,” ultimately, he testified, JLI’s “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.” (CCFF ¶ 898). Likewise, JLI’s Valani testified that exactly how Altria fulfilled its obligation not to compete was “really their problem, not ours” and that JLI was “more concerned about an end state.” (CCFF ¶ 900). Accordingly, term sheets exchanged between the parties referenced not only the potential for divestiture, but also the alternative routes of contribution or simply Altria’s “ceasing to operate” or “otherwise exiting” the e-vapor business. (CCFF ¶¶ 683-86, 800-02, 828-29). Finally, to the

extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

1209. Pritzker’s views on divestiture stemmed from his recollection of the merger between Reynolds and Lorillard—“two large cigarette companies”—where the companies were required to sell one or more brands, which were divested and remained in the market. (Pritzker (JLI) Tr. 787).

### **Response to Finding No. 1209**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive, and cites no other facts supporting the substance of Pritzker’s vague recollection. It is also incomplete and misleading in that Pritzker himself testified that JLI’s “goal was for [Altria] not to be competing against Juul” and that he “didn’t care how that would come about.” (CCFF ¶ 898).

1210. Conversations about divestiture were “usually in relation to dealing with the antitrust approval process.” (PX7040 Gifford (Altria) Dep. at 130). For antitrust issues, the parties “usually ha[d] counsel on both sides deal with that topic versus detailed discussion [between] the principals. [The principals] usually dealt with more of the business terms of the agreement.” (PX7040 Gifford (Altria) Dep. at 130; *see also* PX7031 Willard (Altria) Dep. at 185-86 (resolving potential antitrust issues involving Altria’s existing products “wasn’t a topic that rose to the senior people who were negotiating the most important terms of the deal”)).

### **Response to Finding No. 1210**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of Altria executives.

The first sentence is incomplete and misleading to the extent that it suggests that Altria ever seriously considered divesting its e-vapor business. In fact, Altria executives testified that Altria never seriously pursued that option. (CCFF ¶¶ 939-40). The first sentence is also incomplete and misleading in that term sheets and other ordinary-course correspondence make clear that

divestiture was one of a set of alternatives by which Altria could fulfill JLI's demand that it exit the e-vapor business. As Pritzker testified, JLI's "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." (CCFF ¶ 898). Likewise, JLI's Valani testified that exactly how Altria fulfilled its obligation not to compete was "really their problem, not ours" and that JLI was "more concerned about an end state." (CCFF ¶ 900). Accordingly, term sheets exchanged between the parties referenced not only the potential for divestiture, but also the alternative routes of contribution or simply Altria's "ceasing to operate" or "otherwise exiting" the e-vapor business. (CCFF ¶¶ 683-86, 800-02, 828-29).

The remainder of the proposed finding is incomplete and misleading to the extent that it suggests that the principals did not discuss divestiture within the broader context of JLI's demand that Altria exit the e-vapor category. In fact, JLI's Valani, a principal, sent a list of "specific points" to Altria Board member Devitre that made JLI's position clear that it was "not acceptable to us" that Altria could avoid a commitment to divest MarkTen or, more broadly, retain the right to compete in e-vapor. (CCFF ¶¶ 916-24). Altria's Willard and Gifford, both principals, also received this list of specific points. (CCFF ¶¶ 921-23). As Valani testified, [REDACTED] (CCFF [REDACTED]) (CCFF ¶ 919).

Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

1211. As Pritzker testified, "[t]here were conversations that suggested to [Pritzker] that [Altria was] willing to divest if necessary, and [he] believed that they would be. This was not a

gating issue. . . . [I]t ha[d] not gotten to the point where there was any additional agreement required, as far as [he] was concerned, on that issue.” (PX7021 Pritzker (JLI) Dep. at 133).

### **Response to Finding No. 1211**

The proposed finding is unreliable, vague, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is vague as to the meaning of the term “gating issue.” It is incomplete and misleading because, by the time Altria initiated the HSR review in February 2019, it had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05). Altria’s own executives acknowledge that Altria never took any steps to explore a potential divestiture of its e-vapor assets. (CCFF ¶¶ 939-40). Even if Pritzker “expected the FTC would likely require a divestiture,” ultimately, he testified, JLI’s “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.” (CCFF ¶ 898). Likewise, JLI’s Valani testified that exactly how Altria fulfilled its obligation not to compete was “really their problem, not ours” and that JLI was “more concerned about an end state.” (CCFF ¶ 900). Accordingly, term sheets exchanged between the parties referenced not only the potential for divestiture, but also the alternative routes of contribution or simply Altria’s “ceasing to operate” or “otherwise exiting” the e-vapor business. (CCFF ¶¶ 683-86, 800-02, 828-29).

1212. Pritzker believed that the FTC would likely require divestiture even before the parties exchanged the first draft term sheet. On the evening of July 27, Peter Gross, JLI’s investment banker from Goldman Sachs, emailed Pritzker: “I was under the impression that [Altria] would just shut down Mark 10. We don’t want them thinking that they will receive any consideration for contributing it to newco.” (PX2330 (JLI) at 001; *see also* Pritzker (JLI) Tr. 795 (identifying Gross)). During the trial, Complaint Counsel made much of this line in isolation, (Pritzker (JLI) Tr. 702-03), while ignoring Pritzker’s response: “I think they may need to sell it,” (PX2330 (JLI) at 001). As Pritzker explained at trial, “by ‘sell it,’ what [he] was referring to was divestiture, . . . selling the product to another company so that those products would remain in the market.” (Pritzker (JLI) Tr. 680). This is consistent with Pritzker’s expectation that “the FTC would require a divestiture and that the product would then stay in the market with a different ownership,”



and that Altria should be obligated to cooperate with the FTC in that regard. (Pritzker (JLI) Tr. 681; *see also supra* ¶¶ 1017, 1208).

### **Response to Finding No. 1212**

The proposed finding is incomplete and misleading. Regardless of his expectation that “the FTC would require a divestiture,” Pritzker testified that ultimately JLI’s “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.” (CCFF ¶ 898). Likewise, JLI’s Valani testified that exactly how Altria fulfilled its obligation not to compete was “really their problem, not ours” and that JLI was “more concerned about an end state.” (CCFF ¶ 900). Accordingly, term sheets exchanged between the parties, including the term sheet JLI sent to Altria three days after Gross’s email to Pritzker, referenced not only the potential for divestiture, but also the alternative routes of contribution or simply Altria’s “ceasing to operate” or “otherwise exiting” the e-vapor business. (CCFF ¶¶ 683-86, 800-02, 828-29). In any event, by the time Altria initiated the HSR review in February 2019, it had already pulled its pod products from the market, discontinued the production and distribution of its cigalike products, and begun the process of winding down Nu Mark. (CCFF ¶¶ 48, 1003-05). Finally, to the extent that the proposed finding attempts to absolve the principals of antitrust liability by raising an advice of counsel defense, the proposed finding is misleading and wholly unsupported since Respondents asserted privilege to prevent the development of any evidence relating to the legal advice outside counsel provided. (CCFF ¶ 994; Pritzker (JLI) Tr. 670-73).

1213. Complaint Counsel declined to call Gross at trial to testify about his email in PX2330. In his deposition, Gross explained that he had not heard from anyone, either at Altria or JLI, that Altria was planning to “shut down” MarkTen. (PX7043 Gross (Goldman Sachs) Dep. at 35). Similarly, as Pritzker explained at trial, he did not know where Gross had “got[ten] any of these ideas”; no one, including Gross, had ever told Pritzker that he or she had heard Altria would discontinue any products. (Pritzker (JLI) Tr. 796).

### **Response to Finding No. 1213**

The proposed finding is unreliable, incomplete and misleading. It is unreliable to the extent that it relies on the testimony of a third party engaged on JLI's behalf in connection with the transaction. Indeed, his assignment was to "help them negotiate an agreement with Altria." (CCFF ¶ 609). It is also incomplete and misleading. Gross was involved in negotiating directly with Altria and its advisers. (CCFF ¶¶ 611-13). In fact, an email from July 24, 2018, three days before Gross's email, refers to a planned conversation between Gross and Altria's Willard. (CCFF ¶¶ 673, 970). Gross had also spoken with Willard on July 18. (CCFF ¶ 671). Also, whether anyone had told Pritzker that he or she had specifically "heard Altria would discontinue any products," the fact remains that Gross wrote to Pritzker that he was "under the impression that [Altria] would just shut down Mark 10." (CCFF ¶ 675). Gross's statement came three days before JLI's first term sheet to Altria, which contemplated an obligation that Altria divest, contribute, or cease to operate its e-vapor business. (CCFF ¶¶ 892-97).

1214. Gross's focus "was on just the valuation." (PX7043 Gross (Goldman Sachs) Dep. at 32). Because Gross had "heard . . . that [Altria's e-vapor] products, including MarkTen, were inferior products that had no traction in the market," (PX7043 Gross (Goldman Sachs) Dep. at 36), "[w]hat [he] wanted to avoid was Altria believing that they could" pay a lower price in exchange for contributing their "inferior product[s]" to JLI, (PX7043 Gross (Goldman Sachs) Dep. at 38, 36). Gross "assumed [Altria] attributed no value to MarkTen." (PX7043 Gross (Goldman Sachs) Dep. at 34).

#### **Response to Finding No. 1214**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the testimony of a third party engaged on JLI's behalf in connection with the transaction. Indeed, his assignment was to "help them negotiate an agreement with Altria." (CCFF ¶ 609). It is also incomplete and misleading. Gross was involved in negotiating directly with Altria and its advisers. (CCFF ¶¶ 611-13). In fact, an email from July 24, 2018, three days before Gross's email, refers to a planned conversation between Gross and Altria's Willard. (CCFF ¶¶ 673, 970). Gross had also spoken with Willard on July 18. (CCFF ¶ 671). And, the fact remains that Gross

wrote to Pritzker that he was “under the impression that [Altria] would just shut down Mark 10.” (CCFF ¶ 675). Gross’s statement came three days before JLI’s first term sheet to Altria, which contemplated an obligation that Altria divest, contribute, or cease to operate its e-vapor business. (CCFF ¶¶ 892-97).

To the extent that the proposed finding suggests that Altria’s e- “were inferior products that had no traction in the market,” the proposed finding is contrary to the weight of the evidence. Nu Mark’s financial performance had been improving. (CCFF ¶¶ 1088-111). Sales of Elite in particular had been increasing before Altria pulled it from the market in October 2018. (CCFF ¶¶ 1112-31). On July 26, 2018, Willard himself had informed Altria’s investors that MarkTen Elite and Bold were “[t]he drivers of the growth in second quarter and first half” and were “getting traction with consumers.” (CCFF ¶ 1113).

## **XI. FOLLOWING THE INVESTMENT, ALTRIA PROVIDED CRITICAL REGULATORY SERVICES TO JLI**

### **A. From The Beginning Of The Investment, Altria And JLI Contemplated That Altria Could Provide Services Assisting JLI In Its Regulatory Applications**

1215. At the same time that Altria made its 35 percent investment in JLI on December 20, 2018, the parties entered into a separate services agreement. (PX1275 (JLI)). This agreement contemplated that Altria would provide enumerated services to JLI at JLI’s request. (PX1275 (JLI) at 007-08).

#### **Response to Finding No. 1215**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. Instead, the totality of the record demonstrates that Respondents have not substantiated their efficiencies claims, and that JLI likely could have achieved comparable benefits absent the Services Agreement. (CCFF ¶¶ 1884-995).

1216. The services agreement specified “Government and Regulatory Affairs” as one of the enumerated categories of services. (PX1275 (JLI) at 028).

**Response to Finding No. 1216**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. Instead, the totality of the record demonstrates that Altria's regulatory services are not cognizable. (CCFF ¶¶ 1889-955). Specifically, they are not verifiable because Respondents' claims as to their benefits are unsubstantiated, (CCFF ¶¶ 1891-97), and because predictions about JLI's likelihood of PMTA success are speculative. (CCFF ¶¶ 1898-917). Moreover, Altria's regulatory services are not merger specific, as JLI testimony and documents confirm, (CCFF ¶¶ 1918-24): other companies have managed to submit timely PMTAs absent Altria's services, (CCFF ¶¶ 1925-28); JLI took numerous stand-alone measures to accelerate and improve its PMTA submission, (CCFF ¶¶ 1929-41); and Altria was only one of many parties that contributed to JLI's PMTA. (CCFF ¶¶ 1942-55).

1217. Among other things, the services agreement contemplated that Altria, "[a]s requested," would "provide legal, project management[,] and other support for advancing [JLI's] products through the PMTA, MRTP and other regulatory (including respect to the FDA) authorization or approval processes on behalf of [JLI], including, after July 2020, to the extent [Altria] has available capacity, providing histologic data, testing and analytical support and sourcing for product evaluation." (PX1275 (JLI) at 028).

**Response to Finding No. 1217**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

1218. The services agreement also contemplated that Altria, "[a]s requested," would "provide leadership, organization, coordination and support in the execution of FDA-related compliance, regulatory reporting and engagement activities." (PX1275 (JLI) at 028).

**Response to Finding No. 1218**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

1219. JLI was interested in Altria’s services because it knew “Altria ha[d] resources and knowledge” that would help JLI to file a timely, higher quality PMTA. (RX1522 (JLI) at 001; *see also* { [REDACTED] }; RX0678 (Altria) at 001 (“[JLI] want[s] to take advantage of our learnings and capabilities, especially as they start pulling together their PMTA.”)).

### **Response to Finding No. 1219**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable to the extent that it relies on the cited documents for the proposition that Altria’s services did in fact help JLI “file a timely, higher quality PMTA,” because the documents date from February and March of 2019. (RX1522 (JLI) at 001; PX2193 (JLI) at 002 (*in camera*); RX0678 (Altria) at 001). According to JLI’s corporate representative to testify on efficiencies, that timeframe “preceded a lot of the PMTA work with Altria.” (PX7008 (Cullen (JLI), IHT at 127)).

In addition, although Complaint Counsel does not disagree that “JLI was interested in Altria’s services,” including regulatory services, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products. However, the proposed finding fails to cite any reliable evidence demonstrating that JLI could not have found relevant expertise outside Altria’s services. In fact, JLI has engaged third-party consultants with relevant expertise, (CCFF

¶¶ 1942-50), and even hired multiple former Altria employees, including Murillo, who have since performed work on JLI's PMTA submission. (CCFF ¶¶ 1934-40).

1220. As Pritzker testified at trial, the possibility of Altria providing regulatory services was discussed from the outset of the negotiations and “definitely got [JLI’s] attention.” (Pritzker (JLI) Tr. 776; *see also* Pritzker (JLI) Tr. 759-60, 820; PX7021 Pritzker (JLI) Dep. at 161 (Altria’s regulatory capabilities were “highly desirable”); *see supra* Part III.A.4, III.A.7). Pritzker testified that he ultimately voted in favor of the Altria-JLI transaction in part because Altria’s services would be “extremely helpful,” (Pritzker (JLI) Tr. 886), and, of all the services to be provided, the regulatory services were “a key part of the deal,” and “one of the most critical” components from JLI’s perspective, (Pritzker (JLI) Tr. 759-60, 820, 871-72).

### **Response to Finding No. 1220**

Although Complaint Counsel does not disagree that JLI was interested in Altria’s regulatory services, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

1221. The provision of regulatory services was critical to JLI because as Pritzker explained, “getting PMTA approval is literally existential for the company. You cannot operate without PMTA approval, and it was pending, and it was the company’s view that as good a team that JUUL had put together, that Altria’s team was the best in the country, and that their willingness to provide services through that team was [invaluable].” (Pritzker (JLI) Tr. 820; *see also* Murillo (Altria/JLI) Tr. 3009).

### **Response to Finding No. 1221**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. The statement that a company “cannot operate without PMTA approval” is incomplete and misleading. In fact, a company could sell a deemed e-vapor product without PMTA approval until the PMTA deadline, after which it could continue to sell the product so long as it had submitted an application by the deadline and that application remained under review by the FDA. (PX7007 (Murillo (Altria/JLI), IHT at 23)).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products. However, the proposed finding fails to cite any reliable evidence demonstrating that JLI could not have found relevant expertise outside Altria's services. In fact, JLI has engaged third-party consultants with relevant expertise, (CCFF ¶¶ 1942-50), and even hired multiple former Altria employees, including Murillo, who have since performed work on JLI's PMTA submission. (CCFF ¶¶ 1934-40).

1222. The PMTA's importance was "existential" because if JLI's PMTA were denied by FDA, the company would "have to exit the marketplace." (PX7009 Burns (JLI) IHT at 74; *see also* [REDACTED]). At that point, JLI "essentially would have no business." (PX7024 Crosthwaite (Altria/JLI) Dep. at 285-86).

### **Response to Finding No. 1222**

Although Complaint Counsel does not disagree that JLI was interested in Altria's regulatory services, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

1223. JLI had relatively little experience in regulatory matters, compared to Altria. (Murillo (Altria/JLI) Tr. 2973 (noting that while Altria "had been through, by this point, hundreds, if not thousands of applications to the Center for Tobacco Products," JLI "had been through none"); PX7021 Pritzker (JLI) Dep. at 161 (describing JLI as a "neophyte[]" with respect to the regulatory process)).

### **Response to Finding No. 1223**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives.

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF 1216).

Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products. However, the proposed finding fails to cite any reliable evidence demonstrating that JLI could not have found relevant expertise outside Altria's services. In fact, JLI has engaged third-party consultants with relevant expertise, (CCFF 1942-50), and even hired multiple former Altria employees, including Murillo, who have since performed work on JLI's PMTA submission. (CCFF 1934-40).

1224. By contrast, Altria had "set up a fairly effective regulatory process and had lots of experience on the science and the regulatory aspects of these products." (Murillo (Altria/JLI) Tr. 2983-84). Altria could provide JLI with "[e]quipment and methodologies and systems and . . . 20 years of working with FDA matters." (Murillo (Altria/JLI) Tr. 3073).

#### **Response to Finding No. 1224**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive.

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF 1216).

Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products. However, the proposed finding fails to cite any reliable evidence demonstrating that JLI could not have found relevant expertise outside Altria's services. In fact, JLI has engaged third-party consultants with relevant expertise, (CCFF 1942-50), and even hired multiple former Altria employees, including Murillo, who have since performed work on JLI's PMTA submission. (CCFF 1934-40).



1225. Altria had “dozens of experts” with deep regulatory and scientific expertise. (Murillo (Altria/JLI) Tr. 2973, 2980-81). As Murillo testified, having these “very specific expertises” was unique to Altria: “A lot of these folks, for example, had developed the methods in chemistry, right? So it’s one thing to hire a lab, but some of the folks on the chemistry group [at Altria] had invented any number of methods to actually assess products.” (Murillo (Altria/JLI) Tr. 2975).

### **Response to Finding No. 1225**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive.

In addition, although Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

Specifically in terms of chemistry work, Altria itself engaged third-party laboratories such as Enthalpy Analytics and Battelle to assist with the regulatory services it provided to JLI. (CCFF ¶¶ 1952-53).

1226. Critically, Altria had substantial experience with regulatory applications: By the spring of 2019, Altria had worked on “well over a thousand” nonreduced-risk product applications, and dozens of different reduced-risk products in preparation for FDA applications, including oral products. (Murillo (Altria/JLI) Tr. 2909-10; *see also* Murillo (Altria/JLI) Tr. 2973; PX7024 Crosthwaite (Altria/JLI) Dep. at 287 (“[G]iven their experience with the [C]enter for [T]obacco [P]roducts, PMTA applications . . . [Altria was] uniquely positioned[] as a service provider to JLI.”)).

### **Response to Finding No. 1226**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives.

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products. However, the proposed finding fails to cite any reliable evidence demonstrating that JLI could not have found relevant expertise outside Altria's services. In fact, JLI has engaged third-party consultants with relevant expertise, (CCFF ¶¶ 1942-50), and even hired multiple former Altria employees, including Murillo, who have since performed work on JLI's PMTA submission. (CCFF ¶¶ 1934-40).

1227. As Gardner explained, "Altria has been working with the agency -- 'the agency' being FDA -- since . . . tobacco products became regulated by the agency[;] we had been working with the agency since then, and we had hundreds, literally hundreds of product applications either authorized or, you know, in the process of review at the agency." (Gardner (Altria) Tr. 2609).

### **Response to Finding No. 1227**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive.

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products. However, the proposed finding fails to cite any reliable evidence demonstrating that JLI could not have found relevant expertise outside Altria's services. In fact, JLI has engaged third-party consultants with relevant expertise, (CCFF ¶¶ 1942-50), and even hired multiple former Altria employees, including Murillo, who have since performed work on JLI's PMTA submission. (CCFF ¶¶ 1934-40).

1228. In particular, Altria had “a much broader scope [of experience] than other manufacturers that ha[d] pursued [the PMTA] pathway.” (PX7017 Magness (Altria) Dep. at 90; *see also* Jupe (Altria) Tr. 2221-22 (describing Altria’s broad and considerable PMTA experience and the “onerous” PMTA standard)). For example, Altria had assisted PMI’s PMTA for IQOS. (Garnick (Altria) Tr. 1687-88; King (PMI) Tr. 2524; Murillo (Altria/JLI) Tr. 2908; PX7017 Magness (Altria) Dep. at 90; PX7027 Murillo (Altria/JLI) Dep. at 64). Altria had also filed its own PMTA for Verve. (Garnick (Altria) Tr. 1777-78).

### **Response to Finding No. 1228**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives, and fails to identify their foundation to speak to the scope of experience of manufacturers other than Altria. It is incomplete and misleading in that other manufacturers nonetheless managed to submit timely e-vapor PMTAs. (CCFF ¶¶ 1925-28).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products. However, the proposed finding fails to cite any reliable evidence demonstrating that JLI could not have found relevant expertise outside Altria’s services. In fact, JLI has engaged third-party consultants with relevant expertise, (CCFF ¶¶ 1942-50), and even hired multiple former Altria employees, including Murillo, who have since performed work on JLI’s PMTA submission. (CCFF ¶¶ 1934-40).

1229. Through its work on these other applications, Altria was “constantly learning something about how [FDA] wanted things, their process, their -- the documentation they were looking for.” (Murillo (Altria/JLI) Tr. 2910-11). Altria learned FDA’s “scientific expectations, as well as which science and study designs were necessary to answer questions that they had.” (Gardner (Altria) Tr. 2610).

### **Response to Finding No. 1229**

The proposed finding is unreliable, incomplete, and misleading. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. Further, although Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products, the proposed finding is incomplete and misleading to the extent that it suggests that a company could only learn “how [FDA] wanted things” through the repeated submission of PMTAs. Indeed, Murillo pointed to other sources of information available to potential applicants, including the relevant statute, a draft rule, and guidance from the FDA (PX7027 (Murillo (Altria/JLI), Dep. at 41-42). Regardless of Altria’s experience submitting PMTAs for other types of product, Murillo testified that e-vapor is a “relatively new subcategory for [FDA] and so it has been an iterative and still unclear process to determine, with any level of comfort, what the requirements are.” (PX7027 (Murillo (Altria/JLI), Dep. at 41-42). Even assuming experience through repeated submissions is relevant, the proposed finding is incomplete and misleading to the extent that it suggests that JLI could not acquire relevant expertise on a stand-alone basis. On the contrary, JLI has even hired multiple former Altria employees who have since performed work on JLI’s PMTA submission. (CCFF ¶¶ 1934-40). JLI hired Murillo himself away from Altria, and he acknowledged that, as JLI’s CRO, he has brought his same regulatory expertise to bear and helped to facilitate and accelerate the preparation of JLI’s PMTA submission. (CCFF ¶¶ 1936-38).

1230. Even third parties recognized the value of Altria’s regulatory experience: Sheetz’s representative acknowledged at trial that Altria was “good at meeting the FDA rules and achieving high standards in doing so” and any assistance it could provide JUUL in meeting those rules “would be beneficial.” (Crozier (Sheetz) Tr. 1561). [REDACTED]; *see also* PX7020 King (PMI) Dep. at 65 (agreeing that even for a company of PMI’s size and stature, with a successful PMTA under its belt, Altria’s assistance can “lead to a higher likelihood of success and a faster likelihood of success”).

**Response to Finding No. 1230**

The proposed finding is unreliable, misleading, and contrary to the weight of the evidence. Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products. However, the first sentence of the proposed finding is unreliable in that it fails to cite any personal knowledge that Crozier has of any assistance Altria has in fact provided to JLI, nor does it cite any personal knowledge he has of any alternative sources of assistance available to JLI. (Crozier (Sheetz) Tr. 1561-62). Crozier is a category manager for cigarettes and tobacco products at Sheetz, a convenience store chain that sells, among other things, tobacco products. (Crozier (Sheetz) Tr. 1476).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

**B. Altria Provided Substantial Regulatory Services To JLI, Which Required Access To Confidential Information**

1231. Altria and JLI began working on providing regulatory services “almost immediately” after the transaction. (Murillo (Altria/JLI) Tr. 2970-71). In January 2019, Murillo (then Senior Vice President in Regulatory Affairs at Altria) “present[ed]” to the JLI team on “on some of [Altria’s] regulatory capabilities,” including the areas in which Altria had particular expertise. (Murillo (Altria/JLI) Tr. 2971-73; *see also* RX2055 (Altria) at 008 (highlighting areas where Altria could be of particular assistance to JLI)). Murillo presented the same overview that he had used with Altria executives when reviewing the PMTA requirements as applied to Altria’s products. (Murillo (Altria/JLI) Tr. 2971-72).

**Response to Finding No. 1231**

The proposed finding is vague, incomplete, and misleading. It is vague in that it fails to identify any specific services or the timing of those services. It is also incomplete and misleading to the extent that it suggests that JLI only began work on its PMTA after Altria began providing regulatory services. In fact, Murillo himself testified { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } JLI had also already done some work toward compiling a literature review. (CCFF ¶ 1930). Even by the time Altria became involved, { [REDACTED] [REDACTED] }

1232. Murillo testified at trial that JLI seemed excited to get Altria's regulatory expertise. He recalled that a number of people, including JLI Board members, approached him at a reception after the presentation to talk about Altria's capabilities and when it could begin work. (Murillo (Altria/JLI) Tr. 2975-76 (“[Murillo] was just surrounded by people asking [him] . . . when [Altria] could start . . .”).

### **Response to Finding No. 1232**

The proposed finding is misleading and contrary to the weight of the evidence. Complaint Counsel does not disagree that Altria's services, including its regulatory services, were a motivating factor for JLI in negotiating and executing the transaction, or that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products. However, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

1233. Accordingly, in late February 2019, Altria and JLI entered into an initial consultation agreement through which Altria would provide regulatory services for JLI's PMTA. (RX1288 (Altria) (Statement of Work #7: outlining regulatory services to run from February to August 2019); *see also* RX0980 (Altria) (Statement of Work #12: superseding Statement of Work #7 as of July 26, 2019)).

### **Response to Finding No. 1233**

Complaint Counsel has no specific response.

1234. The parties then met in March for a day-long meeting to review the work that JLI was doing for the PMTA. (Murillo (Altria/JLI) Tr. 2984; *see also* RX0702 (Altria) at 001).

For this meeting, Altria sent its “deepest experts in the different areas” who, by necessity, “would have to see confidential information of JLI.” (Murillo (Altria/JLI) Tr. 2980-82).

### **Response to Finding No. 1234**

Although Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products, the proposed finding is vague, misleading, and contrary to the weight of the evidence. It is vague in that it fails to specify the nature of the referenced “confidential information of JLI,” nor does it identify the reasons that Altria “by necessity” would have to access that information.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the non-compete was necessary to protect JLI’s confidential information while Altria provided regulatory services. In fact, under the Services Agreement, regulatory services are defined as an Initial Service (PX1275 (JLI) at 028 (Services Agreement)), which, under the Relationship Agreement, Altria could provide to JLI before the non-compete took effect (PX1276 (JLI) at 025-26 (Relationship Agreement) (specifying that the non-compete would take effect upon the earlier of (1) the date on which Extended Services commence, or (2) December 20, 2019)).

In addition, former JLI CFO Danaher did not recall any discussions at JLI in 2018 about potentially using the alternative of an information firewall in connection with Altria’s provision of services to JLI. (CCFF ¶ 1919).

1235. After the meeting, JLI reflected that “Altria has resources and knowledge that will greatly enhance our probability of success.” (RX1522 (JLI) at 001).

### **Response to Finding No. 1235**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence. Although Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products, the proposed finding is

vague in that the cited document fails to identify the specific “resources and knowledge” that the author believed would help JLI. (RX1522 (JLI) at 001-04). Nor does it attempt to quantify JLI’s “probability of success” or the extent to which the author believed Altria’s services would “enhance” that probability. (RX1522 (JLI) at 001-04). Nor does it point to the basis for the author’s conclusory statement. (RX1522 (JLI) at 001-04). As Murillo acknowledged, { [REDACTED]

[REDACTED] } The proposed finding is also incomplete and misleading in that the cited document does not identify sources of “resources and knowledge” other than Altria that JLI concluded would not be practicable. In fact, JLI “did not formally analyze alternatives to using Altria’s [regulatory] services.” (CCFF ¶ 1918).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

1236. Ultimately, Altria’s regulatory team assisted JLI with essentially all aspects of the PMTA for JUUL. (Gardner (Altria) Tr. 2613, 2618 (discussing RX0630 (Altria) at 005)).

### **Response to Finding No. 1236**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence. It is vague in that the phrase “essentially all aspects of the PMTA” is undefined. (*See* Response to RPF ¶ 1231). It is unreliable in that the cited document does not identify any specific aspects of JLI’s PMTA; rather, the only products it references are Altria’s own products. (RX0630 (Altria) at 001-19). Moreover, the email dates from March 2018, long before the parties even executed the Services Agreement. (RX0630 (Altria) at 001). The proposed finding is also incomplete and misleading because an October 2019 Altria presentation indicates



that Altria would only “[a]ctively support 6 JUUL PMTA Workstreams (out of 14 total).” (PX4122 (Altria) at 004)).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216).

1237. Altria employees were responsible for much of the application’s chemistry section, which included stability and in vitro testing and analysis of HPHC levels and the ingredients in JUUL’s e-liquid formulation. (*See* Murillo (Altria/JLI) Tr. 3001, 3003-05; RX0811 (JLI) at 005, 008 (listing workstreams assigned to Altria scientists); RX0967 (Altria) at 004 (describing Dr. Gardner’s oversight of “ALCS deliverables in support of JUUL PMTA”); RX0966 (Altria) at 003-04 (identifying eight areas of project-specific work to fill critical gaps in JLI’s application)).

#### **Response to Finding No. 1237**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence. It is vague in that the phrase “much of the application’s chemistry section” is undefined. It is also unreliable to the extent that it relies on RX0811, which dates from March of 2019. (RX0811 (Altria) at 001). According to Cullen, that timeframe “preceded a lot of the PMTA work with Altria” (PX7008 (Cullen (JLI), IHT at 127)). It is also incomplete and misleading to the extent that it relies on RX0967, which refers to “proposed ALCS roles/infrastructure,” but does not identify any specific executed statements of work. (RX0967 (Altria) at 001, 008). It is also incomplete and misleading to the extent that it relies on RX0966, which again refers to an “Altria proposal” and draft statements of work, yet only identifies a single “approved” statement of work related to an in vitro study. (RX0966 (Altria) at 003-04). Further, the document itself does not refer to any “critical gaps” in JLI’s PMTA. (RX0966 (Altria) at 001-04). The proposed finding is also incomplete and misleading to the extent that it suggests that Altria alone performed the referenced testing and analysis. In fact, the document referencing the in vitro study also identifies the third party Enthalpy, an external chemistry laboratory that Altria itself engaged in connection with its

services for JLI. (RX0966 (Altria) at 004; CCFF ¶ 1952). Further, the proposed finding cites no facts demonstrating that JLI could not have found alternative means of performing the referenced testing and analysis. Indeed, JLI itself had directly engaged Enthalpy for other work in the past. (CCFF ¶ 1952).

In addition, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPFF ¶ 1216). In terms of JLI's ability to hire expertise on a stand-alone basis, Complaint Counsel notes that both Elizabeth Copeland, author of RX0967, and Murillo, author of the cited portion of RX0966, were Altria employees that JLI hired in connection with its PMTA work. (CCFF ¶¶ 1935-39).

1238. Dr. Gardner summarized Altria's provision of regulatory services at trial, explaining each of the statements of work according to which Altria performed services for JLI following the investment. (Gardner (Altria) Tr. 2623-29, 2633-35; *see also* RX1288 (Altria) (Statement of Work #7); RX0980 (Altria) (Statement of Work #12); PX2209 (JLI) (Statement of Work #15); PX4066 (Altria) (Statement of Work #19); PX4067 (Altria) (Statement of Work #20); PX4068 (Altria) (Statement of Work #21); PX4069 (Altria) (Statement of Work #22); RX0985 (Altria) (Statement of Work #23); PX2221 (JLI) (Statement of Work #25); { [REDACTED] }).

### **Response to Finding No. 1238**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPFF ¶ 1216). In fact, Altria relied on numerous third-party vendors in connection with the cited statements of work. (PX2209 (JLI) at 004 (identifying Enthalpy study as accounting for majority of scheduled charges; PX4066 (Altria) at 005 (identifying "Vendor Services" as accounting for majority of scheduled charges); PX4067 (Altria) at 004 (identifying "Vendor Services" as accounting for majority of scheduled charges); PX2221 (JLI) at 006 (identifying "Vendor Services" as accounting for majority of scheduled

charges); PX4068 (Altria) at 004 (identifying “Vendor Services” among scheduled charges); PX4069 (Altria) at 005 (identifying “Vendor Services” among scheduled charges)). Nor does the proposed finding attempt to parse or quantify the extent to which Altria, as opposed to any third party, contributed to any benefit that JLI received in connection with any statement of work.

1239. Dr. Gardner testified:

- (a). Altria helped JLI analyze the chemical composition of the aerosol produced by the JUUL device and pods. (Gardner (Altria) Tr. 2621-23).
- (b). Altria helped JLI with in vitro toxicology studies of the aerosol produced by the JUUL device and pods. (Gardner (Altria) Tr. 2624 -25).
- (c). Altria helped JLI with in vivo or animal studies of the aerosol produced by the JUUL device and pods. (Gardner (Altria) Tr. 2625-26).
- (d). Altria helped JLI with studies of second- and third-hand exposure to the aerosol produced by the JUUL device and pods. (Gardner (Altria) Tr. 2626).
- (e). Altria helped JLI with consumer behavior studies for the PMTA application. (Gardner (Altria) Tr. 2625).
- (f). Altria helped JLI with population modeling of potential harm or impact associated with a PMTA being granted. (Gardner (Altria) Tr. 2627).
- (g). Altria helped JLI with compiling scientific literature reviews for the PMTA application. (Gardner (Altria) Tr. 2627-28).

### **Response to Finding No. 1239**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products. However, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216). In fact, as set forth in detail below, Altria relied on numerous third-party vendors in connection with the referenced projects. Nor does the proposed finding attempt

to parse or quantify the extent to which Altria, as opposed to any of these third parties, contributed to any benefit that JLI received in connection with any statement of work.

Subpart (a) is incomplete and misleading in that Altria relied on a third-party vendor to help it perform the analysis. (PX4069 (Altria) at 005 (Statement of Work #22) (identifying Eurofins Lancaster Laboratories services among scheduled charges and specifying that JLI expected to pay \$1,431,765 to third-party vendors and \$1,433,917 to Altria for the services associated with the Statement of Work)).

Subpart (b) is incomplete and misleading in that Altria relied on a third-party vendor to help it perform the studies. (PX2209 (JLI) at 004 (Statement of Work #15) (identifying “Enthalpy Analytics study” as accounting for majority of scheduled charges and specifying that JLI expected to pay \$60,000 to Enthalpy Analytics and \$31,906 to Altria for the services associated with the Statement of Work)).

Subpart (c) is incomplete and misleading in that Altria relied on a third-party vendor to help it perform the studies. (PX4067 (Altria) at 004 (Statement of Work #20) (identifying “Vendor Services” among scheduled charges and specifying that JLI expected to pay \$194,600 for Vendor Services and \$35,913 to Altria for the services associated with the Statement of Work)).

Subpart (d) is incomplete and misleading in that Altria relied on a third-party vendor to help it perform the studies. (PX4068 (Altria) at 004 (Statement of Work #21) (identifying “Vendor Services” among scheduled charges and specifying that JLI expected to pay \$60,000 for Vendor Services and \$94,500 to Altria for the services associated with the Statement of Work)).

Subpart (e) is incomplete and misleading in that Altria relied on third-party vendors to help it perform the studies. (PX4066 (Altria) at 005 (Statement of Work # 19) (identifying “Vendor

Services” among scheduled charges and specifying that JLI expected to pay \$1,078,100 for Vendor Services and \$738,832 to Altria for the services associated with the Statement of Work)).

Subpart (f) is incomplete and misleading in that Altria did not develop its population model on its own but in collaboration with external public health scientists. (CCFF ¶ 1955). In addition, JLI also relied on outside consultant Pinney Associates for work in connection with population modeling. (CCFF ¶¶ 1943-45).

Subpart (g) is incomplete and misleading in that JLI had already performed work toward compiling a literature review. (CCFF ¶ 1930). Moreover, Altria relied on a third-party vendor to help it compile the literature review. (PX2221 (JLI) at 006 (Statement of Work #25) (identifying “Vendor Services” among scheduled charges and specifying that JLI expected to pay \$3,525,000 for Vendor Services and \$570,145 to Altria for the services associated with the Statement of Work)).

1240. Murillo also described at trial several areas of support where Altria provided regulatory services to JLI. (Murillo (Altria/JLI) Tr. 3003-06; *see also* [REDACTED]

});

- (a). Altria “did a lot of the chemistry work in support of the application, particularly in the area of stability testing, and within that, especially in the area of nontargeted analysis, looking for the formation of different compounds over time with respect to the products. This was sort of an important aspect of the application, and luckily, Altria had the expertise and people ready to devote to that.” (Murillo (Altria/JLI) Tr. 3003).
- (b). Altria helped with gas chromatograph and mass spectrometry fingerprinting, which is a chemical analysis to characterize everything that is coming out of an aerosol. Anyone can purchase the relevant machines but “Altria had the methods and the personnel and -- particularly with respect to this type of analysis that [JLI] needed.” (Murillo (Altria/JLI) Tr. 3004).
- (c). “Altria provided extensive support in the toxicology area with respect to things like air liquid interface analysis, supporting the risk assessment for ingredients, both the qualitative risk assessment and the quantitative risk assessment, and some of the in vitro and in vivo interpretation.” (Murillo (Altria/JLI) Tr. 3005).

- (d). JLI “had not done perception studies . . . for some of the labeling. And so those are studies that Altria had done any number of times before, they had expertise in, and they were able to deploy those very quickly.” (Murillo (Altria/JLI) Tr. 3006).
- (e). “On the risks and benefits to the population, in addition to helping conceptualize some of the argumentation in the framework, [JLI] used the Altria population model, which was a validated age-based model that had been developed by Altria scientists with external public health scientists as well over the years, and [JLI was] able to essentially plug in [its] data to that model to demonstrate the population health impact of the product being marketed as suggested by FDA guidance.” (Murillo (Altria/JLI) Tr. 3006).

### **Response to Finding No. 1240**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products. However, the proposed finding is contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF ¶ 1216). In fact, as set forth in detail below, Altria relied on numerous third-party vendors in connection with the referenced projects. Nor does the proposed finding attempt to parse or quantify the extent to which Altria, as opposed to any of these third parties, contributed to any benefit that JLI received in connection with any statement of work.

Subparts (a) and (b) are incomplete and misleading in that Altria relied on a third-party vendor to help it perform the referenced analysis. (PX4069 (Altria) at 005 (Statement of Work #22) (identifying Eurofins Lancaster Laboratories services among scheduled charges)).

Subpart (c) is incomplete and misleading in that Altria relied on third-party vendors to help it perform the referenced analyses. (PX2209 (JLI) at 004 (Statement of Work #15) (identifying Enthalpy study as accounting for majority of scheduled charges); PX4067 (Altria) at 004 (Statement of Work #20) (identifying “Vendor Services” as accounting for majority of scheduled charges)).

Subpart (d) is incomplete and misleading in that Altria relied on third-party vendors to help it perform the referenced studies. (PX4066 (Altria) at 005 (Statement of Work #19) (identifying “Vendor Services” as accounting for majority of scheduled charges)).

In terms of Subpart (e), Complaint Counsel does not disagree that Altria’s population model had been developed in collaboration with “external public health scientists,” and notes that outside consultant Pinney Associates, which JLI had directly engaged for a variety of work, also performed work related to the population model. (CCFF ¶¶ 1943-45).

1241. Murillo also explained that Altria assisted JLI with bridging, which allows an e-vapor manufacturer to use data generated from testing on one product for the PMTA application of another, “sufficiently similar” product. (Murillo (Altria/JLI) Tr. 3004). “Altria had developed the concept of bridging” and had “particular expertise that was deployed with respect to bridging enforceability testing.” (PX7027 Murillo (Altria/JLI) Dep. at 74-75).

#### **Response to Finding No. 1241**

The proposed finding is vague, unreliable incomplete, misleading, and contrary to the weight of the evidence. Although Complaint Counsel does not disagree that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products, the proposed finding is nonetheless vague in that it fails to specify exactly how Altria “assisted JLI with bridging,” or to identify the “particular expertise that was deployed.” It is also unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive. In particular, regardless of whether Altria “developed the concept of bridging,” Murillo lacks foundation to speak to whether other e-vapor companies have nonetheless utilized bridging in preparing their PMTAs. The proposed finding is also incomplete and misleading to the extent that it suggests that JLI could not have employed the concept of bridging except by accessing Altria’s “expertise” through its services. In fact, in the past JLI has accessed Altria expertise on a stand-alone basis by hiring former Altria employees, including Murillo, to work on its PMTA. (CCFF ¶¶ 1934-40).

More broadly, the proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF 1216).

1242. Bridging “was an important way to accelerate some of the work.” (Murillo (Altria/JLI) Tr. 3004). { [REDACTED]

### **Response to Finding No. 1242**

The proposed finding is vague, unreliable, incomplete, misleading, and contrary to the weight of the evidence. Complaint Counsel does not disagree that bridging can help accelerate some of the work associated with a PMTA submission, or that Altria had regulatory expertise, making it well-equipped to prepare PMTAs for its own e-vapor products. However, the proposed finding is nonetheless vague as to the phrase { [REDACTED]

[REDACTED] } It is also vague in that it fails to quantify the extent to which bridging { [REDACTED] [REDACTED] }. It is also unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive. It is also incomplete and misleading to the extent that it suggests that JLI could not have employed the concept of bridging except by accessing Altria’s [REDACTED] through its services, because JLI has in fact accessed Altria expertise in the past by hiring former Altria employees, including Murillo, to work on its PMTA. (CCFF ¶¶ 1934-40).

More broadly, the proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that any of the regulatory services Altria has provided to JLI under the Services Agreement are cognizable efficiencies. (*See* Response to RPF 1216).



1243. Providing the PMTA assistance to JLI that is described above required Altria employees to have access to JLI's confidential information. (Murillo (Altria/JLI) Tr. 2981-82, 3006-07; Gardner (Altria) Tr. 2618-19).

**Response to Finding No. 1243**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the non-compete was necessary to protect JLI's confidential information while Altria provided regulatory services. In fact, under the Services Agreement, regulatory services are defined as an Initial Service (PX1275 (JLI) at 028 (Services Agreement)), which, under the Relationship Agreement, Altria could provide to JLI before the non-compete took effect (PX1276 (JLI) at 025-26 (Relationship Agreement) (specifying that the non-compete would take effect upon the earlier of (1) the date on which Extended Services commence, or (2) December 20, 2019)).

In addition, former JLI CFO Danaher did not recall any discussions at JLI in 2018 about potentially using the alternative of an information firewall in connection with Altria's provision of services to JLI. (CCFF ¶ 1919).

1244. As a general matter, PMTAs contain confidential information and are not disclosed to the public. (Gardner (Altria) Tr. 2619). "The PMTA process is meant to be a private process between the agency and the applicant." (Murillo (Altria/JLI) Tr. 3018).

**Response to Finding No. 1244**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the non-compete was necessary to protect JLI's confidential information while Altria provided regulatory services. (*See* Response to RPF ¶ 1243).

1245. In addition, some PMTA work required Altria scientists to access trade secret information regarding the JUUL product. (Gardner (Altria) Tr. 2619).

**Response to Finding No. 1245**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the non-compete was necessary to protect JLI's confidential information while Altria provided regulatory services. (*See* Response to RPF ¶ 1243).

1246. As Murillo recalled at trial, the “confidential sensitive information” that Altria received from JLI fell into two buckets: “One was sort of the most sensitive product composition information about the product, because it’s hard to do the chemistry and to do the toxicology and to comment on product design and control without having detailed information about every component and ingredient and so forth. The other bucket . . . was in terms of the forward-looking product strategy, marketing strategy, et cetera, which was super important for purposes of the narrative and also to conceptualize the population health impact. And for that, it was absolutely necessary that [JLI’s] colleagues at Altria have the information about how [JLI was] planning to market the product and future products.” (Murillo (Altria/JLI) Tr. 3007).

#### **Response to Finding No. 1246**

The proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the non-compete was necessary to protect JLI's confidential information while Altria provided regulatory services. (*See* Response to RPF ¶ 1243).

#### **C. Altria’s Services Enabled JLI To File A Timely PMTA And Substantially Increased The Quality Of That PMTA**

1247. With the help of Altria’s regulatory services, JLI was able to submit a strong PMTA application to FDA. (Gardner (Altria) Tr. 2639). JLI filed timely PMTAs for its JUUL products in July 2020. (RX1950 (JLI)).

#### **Response to Finding No. 1247**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence.

The first sentence of the proposed finding is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is also vague as to the mere characterization of JLI’s PMTA application as “strong.”

The first sentence of the proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is

verifiable. With or without Altria's services, JLI has little insight into the FDA's PMTA deliberations, and it faces a range of potential outcomes, including the outright denial of its application. (CCFF ¶¶ 1898-911). Moreover, even now, the prevalence of youth vaping poses a particular risk to JLI's PMTA submission. (CCFF ¶¶ 1248-53, 1323-44, 1912-17).

The first sentence of the proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests JLI could not have submitted a "strong" and timely PMTA absent Altria's services. Certainly, other companies, including {REDACTED}, Reynolds, and Imperial, managed to submit timely e-vapor PMTAs without resorting to services from Altria. (CCFF ¶¶ 1925, 1927-28; CCFF ¶ 1926 (*in camera*)). Further, the record shows that JLI had available, and in fact took, numerous stand-alone measures to accelerate and improve its PMTA submission, including the hiring of former Altria employees. (CCFF ¶¶ 1929-41). Moreover, Altria was only one of several parties that ultimately contributed to JLI's PMTA: not only did JLI directly engage third parties to support its efforts, (CCFF ¶¶ 1942-50), but also Altria itself engaged third parties to assist with the regulatory services it provided to JLI. (CCFF ¶¶ 1951-55). The proposed finding does not purport to parse the specific impact that Altria, as opposed to any third party or stand-alone measure, had on JLI's likelihood of PMTA success.

Complaint Counsel has no specific response to the second sentence of the proposed finding, except to note that the cited announcement nowhere credits Altria in connection with JLI's PMTA submission. On the contrary, it notes that "Juul Labs has committed all necessary resources" and that "[a]s part of the PMTA process, Juul Labs has built a comprehensive research program." (RX1950 (JLI) at 001-02).

1248. This effort cost JLI over \$100 million. (Murillo (Altria/JLI) Tr. 3074).

### **Response to Finding No. 1248**

Complaint Counsel has no specific response.

1249. As explained below, Altria's regulatory services assisted in both the quality of the PMTA filing and the ability to file the application on time:

**Response to Finding No. 1249**

The proposed finding should be disregarded because it contains no citations to the record, and is deficient for the reasons set forth in Complaint Counsel's responses to the proposed findings below. (*See Responses to RPF ¶¶ 1250-64*).

1250. **Quality.** Altria's assistance "[a]bsolutely" "had an effect on the quality of the JLI PMTA." (Murillo (Altria/JLI) Tr. 3009). "[T]heir help with the narrative alone, their ability to generate data quickly, their experience in generating such data and in -- you know, the hundreds of applications that Altria has worked on was very valuable." (Murillo (Altria/JLI) Tr. 3010; *see also* Murillo (Altria/JLI) Tr. 3009 (agreeing that JLI could "[a]bsolutely not" "have made its PMTA filing without Altria's assistance"); PX7010 Gifford (Altria) IHT at 126 (Altria initially estimated that it could increase JLI's probability of success on its PMTA from 50/50 to 70 percent); PX7010 Gifford (Altria) IHT at 51-52 (explaining that facility with addressing FDA's questions during the PMTA process "builds higher probability of success . . . and also shorten[s] the window, if you will, and make[s] it more efficient versus sometimes conducting studies that the FDA doesn't need").

**Response to Finding No. 1250**

The proposed finding is unreliable, vague, improper, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives.

In terms of Murillo's testimony, the proposed finding is also vague as to conclusory phrases such as "very valuable," and "[a]bsolutely" had an effect, yet nowhere points to evidence that quantifies that value or that effect. It is also vague in referencing Altria's ability to "generate data quickly" and it fails to identify the relevant data or the specific impact such ability had in connection with JLI's PMTA. It is also improper to the extent that it relies on a fact witness for the proposition that "JLI could '[a]bsolutely not' 'have made its PMTA filing without Altria's assistance,'" which is both speculation and a legal conclusion as to whether Altria's services were merger specific.

In terms of Gifford's testimony, the proposed finding is also vague in that it fails to specify how Altria "buil[t] a higher probability of success" or "shorten[ed] the window," nor does it identify any instances in which Altria's services prevented JLI from "conducting studies that the FDA doesn't need." It is also unreliable in that Gifford lacks foundation to speak to JLI's PMTA prospects, never having been directly involved in the preparation of a PMTA. (Gifford (Altria) Tr. 2867). It is also incomplete and misleading in that the reference to Altria's estimate that it could "increase JLI's probability of success on its PMTA from 50/50 to 70 percent" dates from April 2018, at least six months before Altria began due diligence on JLI, and was based on the judgment of Altria executives, who, as Gifford testified, "didn't have a detailed assessment of [JLI's] regulatory capability. (CCFF ¶ 1897).

In addition, the entire proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria's regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria's services. (*See* Response to RPF ¶ 1247).

1251. As Murillo explained, Altria had "read every bit of word that the FDA put out" about PMTAs, looked to a number of different public health concepts, and used its "best judgment based on what [it] thought would be the key components" to develop a "theory and a plan or framework . . . for what it would take to get a PMTA." (Murillo (Altria/JLI) Tr. 2908-10). When it then came to the JUUL PMTA, Altria was able to "leverage all of the work that [it] had done on the vapor applications at Altria to that point. So a lot of the -- for example, the outlines, the detailed flow charts, a lot of the analysis that [it] had accomplished for, say, MarkTen cigalike" could be used for the benefit of the JUUL PMTA. (Murillo (Altria/JLI) Tr. 3024).

### **Response to Finding No. 1251**

The proposed finding is vague, unreliable, misleading, and contrary to the weight of the evidence. It is vague in that it fails to identify any specific outlines, flow charts, or analyses that Murillo claims Altria leveraged for JLI's PMTA. Nor does it specify or attempt to quantify the specific impact of leveraging such work on JLI's PMTA. It is unreliable in that it relies solely on

the self-serving testimony of an Altria and JLI executive. It is also unreliable in that it fails to cite evidence showing why JLI, either on its own or using third-party consultants, could not also “read every bit of word that the FDA put out,” or “look[] to a number of different public health concepts,” or use its “best judgment” to develop a “theory and a plan or framework.”

Likewise, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPF ¶ 1247).

1252. Altria’s regulatory services were particularly important because JLI faced “hurdles” in preparing its PMTA. (Gardner (Altria) Tr. 2588-89 (JLI was “facing some hurdles” in the PMTA process); *see also* { [REDACTED] } [REDACTED] }).

### **Response to Finding No. 1252**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. It is incomplete and misleading to the extent that it suggests that Altria alone was responsible for JLI’s overcoming any “hurdles” in the PMTA process, or that JLI would have been unsuccessful absent Altria’s services. The cited document dates from [REDACTED], (RX0945 (Altria) at 001 (*in camera*)), [REDACTED] the PMTA deadline moved forward from August 2022. (CCFF ¶ 201). According to Murillo, in response to the PMTA deadline moving to May 2020, JLI undertook “a very broad a deep effort to very quickly shore up the [PMTA] work that was required,” accelerating many aspects of studies, spending faster, and hiring extra people, consultants, and vendors. (CCFF ¶¶ 1923-24).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPF ¶ 1247).

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1253. By April 2019, Altria had “concerns” about the PMTA plan that JLI had developed on its own. (Gardner (Altria) Tr. 2629; *see also* [REDACTED]).

#### **Response to Finding No. 1253**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. It is vague in that it does not identify the nature or basis of Altria’s “concerns.” It is incomplete and misleading to the extent that it suggests that Altria alone was responsible for JLI’s overcoming any “concerns” about its PMTA plan. April 2019 was shortly before the PMTA deadline had moved forward from August 2022. (CCFF ¶ 201). According to Murillo, in response to the new PMTA deadline moving to May 2020, JLI undertook “a very broad a deep effort to very quickly shore up the [PMTA] work that was required,” accelerating many aspects of studies, spending faster, and hiring extra people, consultants, and vendors. (CCFF ¶¶ 1923-24).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPFF ¶ 1247).

1254. An internal Altria memo circulated just before an April 2019 initial meeting between Altria and JLI noted that { [REDACTED] }.

#### **Response to Finding No. 1254**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. It is incomplete and misleading in that the cited document is a draft memo, and the preface to the cited language makes clear that it merely reflects { [REDACTED] } (RX0353 (Altria) at 002 (*in camera*)). JLI’s CEO did not necessarily share this view: Burns testified that, during his tenure,

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JLI had “[l]iterally hundreds” of people involved in the preparation of its PMTA, and that JLI’s Board of Directors was “incredibly supportive” in terms of making resources available. (CCFF ¶¶ 1931-32). The sentence from which the proposed finding takes excerpts also notes { [REDACTED] [REDACTED] [REDACTED] }, which is consistent with the record evidence that, even now, the prevalence of youth vaping poses a particular risk to JLI’s PMTA submission. (CCFF ¶¶ 1248-53, 1323-44, 1912-17). In addition, the document dates from April 2019, shortly before the PMTA deadline had moved forward from August 2022. (CCFF ¶ 201). According to Murillo, in response to the new PMTA deadline moving to May 2020, JLI undertook “a very broad a deep effort to very quickly shore up the [PMTA] work that was required,” accelerating many aspects of studies, spending faster, and hiring extra people, consultants, and vendors. (CCFF ¶¶ 1923-24).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPFF ¶ 1247).

1255. Accordingly, Altria conducted a complete PMTA gap analysis, and came to the April 2019 meeting with a proposal to help fill the gaps it had identified: “[T]here were very specific things that [Altria] thought were missing or could be missing,” including a “big picture story of why this product is appropriate for the protection of the public health.” (Murillo (Altria/JLI) Tr. 2985; *see also* Gardner (Altria) Tr. 2633 (explaining JLI had not devised a narrative to “explain the data” or present the “overall story”). JLI had “little to no science” supporting a number of its applications, had not undertaken an “assessment of the scientific literature,” which is required and “specifically called out in the PMTA rules and draft guidances and final guidances,” and had not identified a viable drafter for the applications, employing “an outside contractor” that Altria previously “determined . . . [was] incapable of doing scientific writing for a tobacco product application.” (Gardner (Altria) Tr. 2631-32, 2634-36; *see also* PX7007 Murillo (Altria/JLI) IHT at 77-78 (“I [thought] they needed help in every aspect of the application . . . starting with program management, the program management for the application was unclear. . . . The chemistry section needed a lot of



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support. And in fact, they were trying to determine how to do various types of [stability] studies. . . . They needed a lot of help in the toxicology areas in terms of understanding how to do or what to do for the risk assessment . . . . They -- their theory of how to do the actual use and behavioral work was still in development. . . . [I]n terms of perceptions, they hadn't done any work, at least of the type that, you know I was thinking was necessary in that area[.] . . . They really had not gotten very far in the population effects area, certainly in terms of the modeling . . . . So those are some of the areas that come to mind. There were others.”); [REDACTED]; PX1102 (Altria) at 001 (“JUUL is currently working to address gaps in their PMTA strategies and plans.”)).

### **Response to Finding No. 1255**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

The first sentence of the proposed finding is incomplete and misleading in that it does not cite evidence demonstrating the necessity of a “big picture story” to securing PMTA approval.

The second sentence of the proposed finding is incomplete and misleading in that Murillo testified that JLI in fact had already done some work toward compiling a literature review before engaging Altria. (CCFF ¶ 1930). In addition, { [REDACTED]

[REDACTED] } Indeed, the Statement of Work relating to the literature review for JLI’s PMTA identifies “Vendor Services” as accounting for a majority of the scheduled charges to JLI. (PX2221 (JLI) at 006 (Statement of Work #25)).

The parenthetical quotation of testimony from Murillo’s investigational hearing is also incomplete and misleading in that Murillo also testified that at the time Altria became involved,

{ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] }

The proposed finding is also incomplete and misleading to the extent that it relies on RX0945, which also notes {

[REDACTED]

Regardless of any gaps that Altria “thought were missing or could be missing” as of April 2019, that timeframe was shortly before the PMTA deadline had moved forward from August 2022. (CCFF ¶ 201). According to Murillo, in response to the new May 2020 PMTA deadline, JLI undertook “a very broad and deep effort to very quickly shore up the [PMTA] work that was required,” accelerating many aspects of studies, spending faster, and hiring extra people, consultants, and vendors. (CCFF ¶¶ 1923-24).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPF ¶ 1247).

1256. ***Timeliness.*** Altria’s assistance also was critical to ensuring JLI met FDA’s PMTA deadline, which was accelerated. JLI originally had been preparing its PMTA under the assumption that it would be due in August 2022, (Gardner (Altria) Tr. 2632; *see also* [REDACTED]), but the deadline was ultimately advanced to September 2020, (*see supra* Part I.D.5).

### **Response to Finding No. 1256**

Although Complaint Counsel does not disagree that the PMTA deadline ultimately moved to September 2020, (CCFF ¶ 201 (citing JX0001)), or that the cited document assumed the deadline

at the time would stand at 2022, the proposed finding is nonetheless vague, misleading, and contrary to the weight of the evidence. It is vague in that it merely characterizes Altria's assistance as "critical" but fails to define the term or quantify the extent to which JLI benefitted from Altria's services.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria's regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria's services. (*See* Response to RPF 1247). Specifically in response to the new May 2020 PMTA deadline, JLI undertook "a very broad and deep effort to very quickly shore up the [PMTA] work that was required," accelerating many aspects of studies, spending faster, and hiring extra people, consultants, and vendors. (CCFF ¶¶ 1923-24). The proposed finding does not attempt to parse the specific impact that Altria, as opposed to any third party or stand-alone measure, had on JLI's likelihood of PMTA success. Moreover, any predictions about that likelihood are speculative. (CCFF ¶¶ 1898-917).

1257. The accelerated PMTA deadline "caught [JLI] a little bit flat footed." (PX7011 Valani (JLI) IHT at 153).

### **Response to Finding No. 1257**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is vague as to the meaning of "a little bit flat footed."

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria's regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria's services. (*See* Response to RPF 1247). Specifically in response to the new May 2020 PMTA deadline, JLI undertook "a very broad and deep effort to very quickly shore up the [PMTA] work that was required," accelerating many

aspects of studies, spending faster, and hiring extra people, consultants, and vendors. (CCFF ¶¶ 1923-24). The proposed finding does not attempt to parse the specific impact that Altria, as opposed to any third party or stand-alone measure, had on JLI's likelihood of PMTA success. Moreover, any predictions about that likelihood are speculative. (CCFF ¶¶ 1898-917).

1258. At the time the PMTA deadline was moved up, JLI's internal PMTA workstream tracker showed that, assuming a May 2020 deadline, it was at "[r]isk of missing [the] deadline" in half of its PMTA workstreams. (RX0964 (Altria) at 007-08).

### **Response to Finding No. 1258**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. It is incomplete and misleading in that the referenced tracker identifies none of the listed workstreams as "[l]ikely to miss milestone" (color red). (RX0964 (Altria) at 007-08). It is also incomplete and misleading in that the PMTA deadline was ultimately extended to September 2020. (CCFF ¶ 201). It is also incomplete and misleading in that the cited document also notes that, in addition to Altria's services, JLI had engaged third-party consultants "Synchrogenix, Pinney, Cambridge Associates, ERM to support submission timeline." (RX0964 (Altria) at 004). This is consistent with the record evidence that in response to the new deadline JLI undertook "a very broad and deep effort to very quickly shore up the [PMTA] work that was required," accelerating many aspects of studies, spending faster, and hiring extra people, consultants, and vendors. (CCFF ¶¶ 1923-24). The proposed finding does not attempt to parse the specific impact that Altria, as opposed to any third party or stand-alone measure, had on JLI's likelihood of PMTA success. Moreover, any predictions about that likelihood are speculative. (CCFF ¶¶ 1898-917).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria's regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria's services. (*See* Response to RPF ¶ 1247).

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1259. [REDACTED]

**Response to Finding No. 1259**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence.

It is incomplete and misleading in that the cited document does not identify the basis for { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria's regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria's services. (*See* Response to RPF ¶ 1247).

1260. Altria scrambled to assist JLI with the accelerated PMTA deadlines. (RX0948 (Altria) at 001). Altria provided to JLI one of its top program directors as the full-time program lead and offered the full-time services of Dr. Gardner. (RX0966 (Altria) at 002). Altria also contributed a dozen scientists on a full-time basis and several dozen more on a part-time basis. (Gardner (Altria) Tr. 2639; *see also* PX4122 (Altria) at 005 ("43 ALCS employees allocated to supporting JUUL PMTA activities.")). A new statement of work was signed to increase the number of people at Altria providing services to JLI. (Gardner (Altria) Tr. 2624).

**Response to Finding No. 1260**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of the evidence. It is vague as to the term "scrambled." It is incomplete and misleading to the extent that it relies on RX0948, which, though largely redacted for privilege, does not contain the word

“scrambled” and nowhere presents the conclusion that JLI would be unable to submit a timely PMTA. (RX0948 (Altria) at 001). Instead, in his email Dr. Gardner suggested that JLI “start writing or at least start framing sections now with existing data,” and noted that even then JLI already had “several studies that tell a decent, albeit incomplete, story in clinical.” (RX0948 (Altria) at 001). Likewise, he did not conclude that existing data are insufficient “for acceptance to file” the PMTA, just that it “it remains unclear.” (RX0948 (Altria) at 001). In addition, his email relates to whether certain studies could be completed “in time to include in the initial PMTA filing,” but does not preclude the possibility of submitting additional studies after the deadline via a supplemental or amended filing. (RX0948 (Altria) at 001). Even after JLI submitted its PMTA, Murillo indicated that it may submit additional information post-deadline in response to a “deficiency letter” from the FDA. (*See* PX7027 (Murillo (Altria/JLI), Dep. at 35-36, 38). Dr. Gardner testified that, for some portions of a PMTA, a manufacturer may file interim data with its initial filing and then file completed data in a supplemental filing. (Gardner (Altria) Tr. 2692-93).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPPF ¶ 1247).

1261. Altria ultimately devised strategies to help JLI substantially accelerate its application. (Gardner (Altria) Tr. 2634). Altria drafted the chemistry stability and bridging sections of JLI’s PMTA, and oversaw countless scientific studies. (Gardner (Altria) Tr. 2621-28, 2635; Murillo (Altria/JLI) Tr. 3001, 3003-05). In addition, Altria’s experts joined JLI and “hole[d] up at [JLI’s] offices here in Washington” in a “PMTA pod.” (Murillo (Altria/JLI) Tr. 3008). Altria’s personnel could not have done this work without seeing JLI’s confidential information. (Murillo (Altria/JLI) Tr. 2981-82).

### **Response to Finding No. 1261**

The proposed finding is unreliable, vague, misleading and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. It is vague as to the term “substantially accelerate,” which it fails to define or quantify.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPF ¶ 1247).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the non-compete was necessary to protect JLI’s confidential information while Altria provided regulatory services. (*See* Response to RPF ¶ 1243).

1262. The testimony was consistent that JLI could not have made its PMTA filing on time without Altria’s regulatory services. (Gardner (Altria) Tr. 2638-39; PX7008 Cullen (JLI) IHT at 129 (“I’m not aware of any other way that we could meaningfully accelerate the timeline as quickly as having the option to engage Altria on these services.”); PX7024 Crosthwaite (Altria/JLI) Dep. at 287 (explaining Altria’s services were “instrumental for [JLI]”)).

### **Response to Finding No. 1262**

The proposed finding is unreliable, improper, vague, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. It is also improper to the extent that it relies on the testimony of fact witnesses for the statement that “JLI could not have made its PMTA filing on time without Altria’s regulatory services,” which is speculative and, to the extent that it suggests Altria’s services are merger specific, a legal conclusion. The proposed finding is also vague in that it relies on terms such as “meaningfully accelerate” and “instrumental,” without defining or quantifying the specific impact of Altria’s services. It is also incomplete and misleading in that Cullen also acknowledged that if JLI had not entered the Services Agreement, it “would have [had] to in a way” move its internal timeline forward once the PMTA deadline moved forward. (CCFF ¶ 1921).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria's regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria's services. (*See* Response to RPF ¶ 1247).

1263. JLI estimates that Altria's services "sav[ed] 17 to 28 months on [the PMTA] process." (PX7008 Cullen (JLI) IHT at 123).

### **Response to Finding No. 1263**

The proposed finding is incorrect, incomplete, misleading, and contrary to the weight of the evidence. It is incorrect and misleading in that Cullen did not testify that JLI estimated that Altria had in fact saved it 17-28 months; rather, his testimony was that "the value of saving 17 to 28 months on this process is -- would be difficult very difficult to overstate." (PX7008 (Cullen (JLI), IHT at 123)). Thus, Cullen's testimony did not relate to an after-the-fact assessment of time Altria had saved JLI; rather, it related to a before-the-fact estimate presented in JLI's Narrative Response to the Second Request (PX2160 (JLI) at 088), which in turn cited to { [REDACTED]

[REDACTED]}. As Cullen acknowledged, this slide deck "preceded a lot of the PMTA work with Altria." (CCFF ¶ 1892). { [REDACTED]

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria's regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria's services. (*See* Response to RPF ¶ 1247).

1264. In sum, the value of ensuring that JLI could "continue operating in the United States" by submitting a strong and timely PMTA "would be very difficult to overstate." (PX7008



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Cullen (JLI) IHT at 123). The value of such assistance was “substantial,” (PX7008 Cullen (JLI) IHT at 132-33), [REDACTED].

#### **Response to Finding No. 1264**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is vague in that it relies on terms such as “strong” and “substantial,” and on phrases such as “difficult to overstate” and { [REDACTED] } but fails to define or quantify the specific “value” of Altria’s assistance or { [REDACTED] }.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPF ¶ 1247).

#### **D. Altria Continues To Assist JLI With Its PMTA Work**

1265. Today, JLI is “deep in the process of [FDA’s] scientific review” of its PMTA and is “in back-and-forth with the FDA as they have questions.” (Murillo (Altria/JLI) Tr. 3008).

#### **Response to Finding No. 1265**

The proposed finding is unreliable in that it relies solely on the self-serving testimony of a JLI executive.

1266. Altria continues to provide JLI with regulatory services to assist with this and other applications. For example, Altria is helping JLI pursue a Modified Risk Tobacco Product Application, which if successful would allow JLI to make reduced exposure claims about its products. (Murillo (Altria/JLI) Tr. 3010).

#### **Response to Finding No. 1266**

The proposed finding is unreliable and vague. The first sentence is unreliable in that it cites no facts in the record for support. The first sentence is also vague in that it fails to specify the nature of the assistance it claims Altria continues to provide to JLI in connection with JLI’s existing

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PMTA submission, or how such assistance benefits consumers. Nor does it quantify any such consumer benefits.

Complaint Counsel has no specific response to the second sentence of the proposed finding.

1267. Altria also is helping JLI { [REDACTED] }.

**Response to Finding No. 1267**

The proposed finding is unreliable and vague. It is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive. It is vague in that it refers to { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } is also vague.

1268. [REDACTED]

**Response to Finding No. 1268**

The proposed finding is unreliable, vague, and irrelevant. It is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive.

The first sentence is also unreliable in that it fails to identify { [REDACTED] } [REDACTED] } In fact, Murillo did not join JLI until October 2019, ten months after the transaction. (CCFF ¶ 2016). The first sentence is also vague in that it fails to define { [REDACTED] }

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The second and third sentences are irrelevant in that they relate to a product JLI { [REDACTED] } [REDACTED] }. They are also vague in that they rely on characterizations such as [REDACTED] } but fail to cite facts defining those terms.

The fourth sentence is vague in that it claims that [REDACTED] } but does not specify a timeframe. Nor does it attempt to quantify the extent to which the [REDACTED] }

#### **E. There Were No Less-Restrictive Alternatives**

1269. Complaint Counsel’s attempts to offer less-restrictive alternatives that would have still allowed JLI to submit PMTAs on time and of the quality that it ultimately submitted are refuted by the record, as explained below. (*See infra* Part XI.E.1-4).

#### **Response to Finding No. 1269**

The proposed finding is unreliable in that it cite to no evidence in the record. To the extent that it refers to Respondents’ proposed findings in Part XI.E.1-4, Complaint Counsel refers to its responses to those proposed findings. (*See Responses to RPF 1270-83*).

#### **1. Firewalls Are Not Feasible**

1270. Requiring Altria to cordon off employees providing regulatory services to JLI would have disincentivized Altria from putting its best people on the job—undermining the value of the services. As a result, the “dozens and dozens,” (Murillo (Altria/JLI) Tr. 3073), of Altria employees needed to provide regulatory assistance to JLI could not simply be walled off from e-vapor products at Altria, (Murillo (Altria/JLI) Tr. 2982 (“I don’t see how we could do that.”)). They were too critical to both companies’ work to be isolated, because they had “very unique expertise” built over “almost ten years [of working] on these issues.” (Murillo (Altria/JLI) Tr. 2982; *see also* Murillo (Altria/JLI) Tr. 2983-84 (describing Altria’s regulatory expertise)).

#### **Response to Finding No. 1270**

The proposed finding is unreliable, vague, improper, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive.

The first sentence is also unreliable in that it cites no evidence of any kind for support. The first sentence is also vague as to the meaning of “cordon off,” and fails to identify any specific reasons that implementing a firewall would have “disincentivized” Altria. Nor does it identify evidence that JLI could not have prepared a timely PMTA submission absent Altria’s “best people on the job.”

The second sentence is also improper to the extent that it relies on the testimony of a fact witness for the speculative and conclusory statement that Altria employees “could not simply be walled off from e-vapor products at Altria.” The second sentence is also unreliable in that it cites no evidence that Murillo or anyone else ever considered the possibility of a firewall at the time of the transaction. In fact, JLI CFO Danaher did not recall any discussions at JLI in 2018 about potentially using an information firewall instead of a non-compete agreement in connection with Altria’s services. (CCFF ¶ 1919). In addition, the reference to “e-vapor products at Altria” is incomplete and misleading in that, by the time of the transaction, Altria no longer sold e-vapor products (aside from the sell-through of excess cigalike inventory at retailers), and had discontinued its e-vapor R&D. (CCFF ¶¶ 1003-15).

The third sentence is also vague in that it fails to identify any specific reasons that any Altria employees providing services to JLI were “too critical . . . to be isolated,” nor does it identify the “very unique expertise” or “these issues.”

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the non-compete was necessary to protect JLI’s confidential information while Altria provided regulatory services. (*See* Response to RPF ¶ 1243).

## **2. NDAs Provide Inadequate Safeguards**

1271. The two companies had confidentiality agreements in place, but these were insufficient to protect JLI’s confidential information and trade secrets, which to JLI were of the utmost importance. (Murillo (Altria/JLI) Tr. 3007-08).

**Response to Finding No. 1271**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive. It is vague in that it characterizes the confidentiality agreements as “insufficient” but fails to identify any specific deficiencies in those agreements, or any reasons at all that support the conclusory remark. Nor does it specify any of the “confidential information and trade secrets” to which it refers. It is also vague as to the meaning of “utmost importance,” and fails to identify Murillo’s specific foundation to speak to JLI’s views as the time of the transaction, as Murillo did not join JLI until October 2019. (CCFF ¶ 2016).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the non-compete was necessary to protect JLI’s confidential information while Altria provided regulatory services. (*See* Response to RPF ¶ 1243).

1272. JLI’s tremendous success did not come overnight; to the contrary, it had taken JLI several years to develop internally its JUUL products. (Pritzker (JLI) Tr. 771). It was precisely because JLI was “one of the few groups in the industry to design [its] own products” and had “the most cutting-edge technologies of any group in the world” that its “proprietary information” was so “highly sensitive.” (Valani (JLI) Tr. 908).

**Response to Finding No. 1272**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of JLI executives. It is vague as to the meaning of “tremendous success” and “cutting-edge technologies,” and fails to identify any specific “proprietary information” that was so “highly sensitive.”

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the non-compete was necessary to protect JLI’s confidential information while Altria provided regulatory services. (*See* Response to RPF ¶ 1243).

1273. Altria, for its part, understood that JLI's intellectual property was what "made them the number one player in the e-vapor market," and thus was of critical importance for JLI to protect. (Willard (Altria) Tr. 1273; *see also* Pritzker (JLI) Tr. 821 ("[I]n the course of providing services to JUUL, especially . . . the regulatory services, . . . Altria would be privy to . . . technology, trade secrets, data, really everything that the company had that might actually work to the detriment of JUUL if Altria would actually apply that information to their own product portfolio.")).

### **Response to Finding No. 1273**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. It is vague in that it fails to identify any specific intellectual property, trade secrets, or data that JLI considered at risk in connection with the regulatory services. Nor does it cite evidence that identifies any specific reasons that NDAs were an inadequate safeguard against any such risk. It is also incomplete and misleading in its reference to Altria's "own product portfolio," because, by the time of the transaction, Altria no longer had one. (CCFF ¶¶ 1003-15).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the non-compete was necessary to protect JLI's confidential information while Altria provided regulatory services. (*See* Response to RPF ¶ 1243).

1274. A nondisclosure agreement would have been a nonstarter for JLI, as it would do nothing to prevent Altria from using JLI's proprietary technology to design its own e-vapor products in the event of a breach. (Valani (JLI) Tr. 912-13 ("[Altria] would definitely have a lot of access to proprietary -- you know, very specific information . . . which could be used to develop products that would . . . benefit from that information, which didn't seem like a rational thing to us, particularly if they were providing the bulk of services, including very specialized regulatory services to JUUL."); PX7032 Valani (JLI) Dep. at 54 ("Well, if they were developing products, if they had access to all of the JLI . . . product roadmap, technology roadmap, and they were developing markets and they were a major shareholder of JLI and supporting JLI with . . . services, then it's kind of a risky position for JLI to be in . . ."); PX7021 Pritzker (JLI) Dep. at 82-83 ("[I]f there was going to be a -- some kind of minority investment by Altria in Juul, it would give them access to data and information that was proprietary to Juul that it was not going to be viable for them to be spending their energies on other e-cigarette products or to use information they were getting from Juul to be able to enhance their product or develop new products that would be injurious to Juul's business."); PX7040 Gifford (Altria) Dep. at 156 ("Their biggest concern that they portrayed to us was that we would work around their IP, if we got knowledge of it, or learn

their process and be able to develop around that and compete against them in the marketplace.”)).

### **Response to Finding No. 1274**

The proposed finding is unreliable, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of Altria and JLI executives. It is also unreliable in that the cited testimony relates solely to JLI’s general concern about its proprietary information, but nowhere addresses any reasons that NDAs specifically “would have been a nonstarter” or “would do nothing” to address concerns. In fact, none of the cited testimony refers to NDAs at all. The proposed finding is also incomplete and misleading in its reference to Altria’s “own product portfolio,” because, by the time of the transaction, Altria no longer had one. (CCFF ¶¶ 1003-15).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that the non-compete was necessary to protect JLI’s confidential information while Altria provided regulatory services. (*See* Response to RPF ¶ 1243).

### **3. JLI Hiring Away Altria’s Top Employees Was No Substitute For Altria’s Full Suite Of Regulatory Services**

1275. JLI could not have hired everyone it needed with relevant PMTA experience from Altria. (Murillo (Altria/JLI) Tr. 3073).

### **Response to Finding No. 1275**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive, who was himself hired away from Altria by JLI. It is also vague as to the meaning of “everyone it needed,” nor does it identify any specific reasons supporting the conclusory statement that “JLI could not have hired” such people.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that JLI could not have accessed “relevant PMTA experience,” absent Altria’s services, by relying on a combination of stand-alone hiring and third-party consultants. Although JLI certainly could—and did—hire people away from Altria to work on its PMTA, (CCFF ¶¶ 1934-40), it was by no means limited to that option. Companies other than Altria managed to submit timely e-vapor PMTAs, (CCFF ¶¶ 1925-28), and the proposed finding does not identify reasons that JLI could not have hired people with relevant expertise from them or other sources. In fact, for example, JLI hired a former PMI employee who had worked on the IQOS PMTA. (CCFF ¶ 1933). Moreover, JLI’s past experience has shown that it was capable of hiring large numbers of people to meet the demands of preparing a PMTA. As Burns testified, during his tenure as CEO JLI expanded its scientific affairs department from three to 100 people, (CCFF ¶ 1929), and employed “[I]terally hundreds” of people involved in the preparation of its PMTA. (CCFF ¶ 1931). Indeed, in the past Altria itself has relied on external hiring to fill its own gaps in PMTA capabilities. (CCFF ¶ 1941).

In addition, the proposed finding fails to identify reasons that JLI could not have supplemented its hiring efforts by engaging third-party consultants. Here again, the record shows that, despite having Altria at its disposal, JLI did engage “many” third parties to help it respond to the new PMTA deadlines. (CCFF ¶¶ 1942-50). And again, Altria itself relied on third parties to help it perform its regulatory services for JLI. (CCFF ¶¶ 1951-55).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPF ¶ 1247).



1276. {

[REDACTED]

### **Response to Finding No. 1276**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive.

Nor does it identify {

[REDACTED]}. Indeed, JLI itself acknowledged it “did not formally analyze alternatives to using Altria’s [regulatory] services.” (CCFF ¶ 1918).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that JLI could not have accessed relevant PMTA experience, absent Altria’s services, by relying on a combination of stand-alone hiring and third-party consultants. (*See* Response to RPF ¶ 1275).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPF ¶ 1247).

1277. The services Altria provided were holistic consulting services that involved many people across the company, so JLI would need to hire “dozens and dozens of people, which would pretty much eviscerate, among other things, the chemistry and toxicology groups.” (Murillo (Altria/JLI) Tr. 3073). And Altria had “unique” “[e]quipment and methodologies and systems and . . . collective experience” that could not be obtained from former employees. (Murillo (Altria/JLI) Tr. 3073).

### **Response to Finding No. 1277**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive. It is vague as to terms such as “holistic consulting services,” and “dozens and dozens of people,” nor does it identify any of the “equipment and methodologies and systems” that it merely characterizes as “unique,” nor the “collective experience” to which it refers.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that JLI could not have accessed relevant PMTA experience, absent Altria’s services, by relying on a combination of stand-alone hiring and third-party consultants. (*See* Response to RPF ¶ 1275).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPF ¶ 1247).

#### **4. Third-Party Contractors Lack The Necessary Expertise And Resources**

1278. Nor could JLI “have replaced Altria’s experience and specialized know-how with consultants,” as Murillo agreed at trial. (Murillo (Altria/JLI) Tr. 3073). Complaint Counsel’s suggestion that JLI could have obtained equivalent services through other means, like using third parties, is “completely unrealistic.” (Murillo (Altria/JLI) Tr. 3009).

#### **Response to Finding No. 1278**

The proposed finding is unreliable, improper, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive. Nor does it identify Murillo’s specific foundation to speak to what services JLI could or could not have obtained through consultants. Indeed, JLI itself acknowledged it “did not formally analyze alternatives to using Altria’s [regulatory] services.” (CCFF ¶ 1918). The proposed finding is also improper to the extent that it relies on the testimony of a fact witness for

the conclusory opinion that “Complaint Counsel’s suggestion” about alternatives is “completely unrealistic.” It is also vague in that it fails to identify the specific “experience and specialized know-how” that it claims JLI could not have replaced with consultants.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that JLI could not have accessed relevant PMTA experience, absent Altria’s services, by relying on a combination of stand-alone hiring and third-party consultants. (*See* Response to RPF ¶ 1275).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPF ¶ 1247).

1279. As Murillo testified, “it’s one thing to hire a lab, but some of the folks on the chemistry group [at Altria] had invented any number of methods to actually assess products.” (Murillo (Altria/JLI) Tr. 2975). Altria’s gas chromatography/mass spectrometry methods and equipment, for example, could not have been provided by any third-party commercial laboratory. (Gardner (Altria) Tr. 2621-23; PX4069 (Altria) at 003).

#### **Response to Finding No. 1279**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria and JLI executive. Nor does it identify Murillo’s specific foundation to speak to what services JLI could or could not have obtained through consultants. Indeed, JLI itself acknowledged it “did not formally analyze alternatives to using Altria’s [regulatory] services.” (CCFF ¶ 1918). The proposed finding is also vague in that it claims people at Altria had invented “any number of methods,” but only identifies one example, and cites no evidence demonstrating that those specific “methods and equipment” were necessary to JLI’s PMTA success. Specifically in terms of the “gas chromatography/mass spectrometry methods and equipment,” the proposed finding is also

incomplete and misleading in that Altria relied on a third-party vendor to help it perform that analysis. (PX4069 (Altria) at 005 (Statement of Work #22) (identifying Eurofins Lancaster services among scheduled charges)).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that a company cannot prepare a timely PMTA unless it has “invented any number of methods.” Regardless of what methods Altria may have “invented,” other companies, including {REDACTED}, Reynolds, and Imperial, managed to submit timely e-vapor PMTAs without resorting to services from Altria. (CCFF ¶¶ 1925, 1927-28; CCFF ¶ 1926 (*in camera*)).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that JLI could not have accessed relevant PMTA experience, absent Altria’s services, by relying on a combination of stand-alone hiring and third-party consultants. (*See* Response to RPF ¶ 1275).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPF ¶ 1247).

1280. And beyond specific scientific methods and equipment, Gardner agreed that Altria’s “awareness of what it is like to go through a regulatory process as a company being criticized by the public health community” was unique, specialized expertise that no consultant could ever replicate. (Gardner (Altria) Tr. 2638).

### **Response to Finding No. 1280**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. Nor does it identify Dr. Gardner’s specific foundation to speak to the expertise a consultant could or could not replicate. Indeed, JLI itself acknowledged it “did not formally analyze alternatives to

using Altria's [regulatory] services." (CCFF ¶ 1918). The proposed finding is also vague in that it fails to identify or define any salient characteristics of the "awareness" or of the "unique, specialized expertise" to which it refers. Nor does it point to any specific statement of work reflecting Altria's provision of such "expertise." Nor does it cite any evidence identifying the impact any such "expertise" had on the timeliness of JLI's PMTA or its likelihood of success.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that JLI could not have accessed relevant PMTA experience, absent Altria's services, by relying on a combination of stand-alone hiring and third-party consultants. (*See* Response to RPF ¶ 1275).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria's regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria's services. (*See* Response to RPF ¶ 1247).

1281. For example, the PMTA could not have been written as well by any contractor because "[i]t's all about . . . adequately interpreting the information and telling it in a way that . . . a nonexpert -- as the FDA is not an expert on the JUUL product -- it's being able to communicate the complex scientific information in a way that makes it clear that the product is appropriate for the protection of public health. Contractors with little to no experience in the tobacco industry, we had learned that they -- they were incapable, especially under tight deadlines." (Gardner (Altria) Tr. 2635-36).

### **Response to Finding No. 1281**

The proposed finding is unreliable, vague, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of an Altria executive. Nor does it identify Dr. Gardner's specific foundation to speak to the capabilities of any specific contractor, or his specific basis for characterizing any of them as "incapable." Indeed, JLI itself acknowledged that it "did not formally analyze alternatives to using Altria's [regulatory] services." (CCFF ¶ 1918). The proposed finding is also vague in that it fails to identify the specific

statement(s) of work relevant to the referenced activities. It is also vague in that it fails to identify any of the contractors to which it refers. It is also vague in that it fails to specify or quantify the impact of Altria's services, as compared to those of any contractor, on JLI's chances of PMTA success. The proposed finding is also incomplete and misleading to the extent that it suggests that the third parties JLI engaged in connection with its PMTA "had little to no experience in the tobacco industry." In fact, Pinney Associates, for example, had, according to Murillo, "worked on harm reduction matters for other companies for some time and had significant expertise." (PX7027 (Murillo (Altria/JLI), Dep. at 49)).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that JLI could not have accessed relevant PMTA experience, absent Altria's services, by relying on a combination of stand-alone hiring and third-party consultants. (*See* Response to RPPF ¶ 1275).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria's regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria's services. (*See* Response to RPPF ¶ 1247).

1282. [REDACTED]

### **Response to Finding No. 1282**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence. It is unreliable in that it relies solely on the self-serving testimony of a JLI executive. It is also vague as to the meaning of { [REDACTED] } It is also incomplete and misleading in that Cullen himself acknowledged that if JLI had not entered the

Services Agreement, it “would have [had] to in a way” move its internal timeline forward once the PMTA deadline moved forward. (CCFF ¶ 1921).

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that JLI could not have accessed relevant PMTA experience, absent Altria’s services, by relying on a combination of stand-alone hiring and third-party consultants. (*See* Response to RPF ¶ 1275).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPF ¶ 1247).

1283. Indeed, both Altria and JLI had learned that there were no third-party contractors available who could accomplish the necessary PMTA work. Long before it began providing services to JLI, Altria had “combed the world” to find third-party laboratories that were qualified to perform e-vapor product analyses, but ultimately was unsuccessful and had to expand its internal capacity so that it could run the large volume of tests required for a PMTA. (PX7017 Magness (Altria) Dep. at 72-75, 80). [REDACTED]

### **Response to Finding No. 1283**

The proposed finding is unreliable, vague, incomplete, misleading, and contrary to the weight of the evidence.

The first sentence is unreliable in that it fails to cite any evidence of any kind. It is also vague as to the specific meaning of “the necessary PMTA work.”

The second sentence is unreliable in that it relies solely on the self-serving testimony of an Altria executive. It is also unreliable to the extent that it relies on a search Altria conducted “[l]ong before it began providing services to JLI” as a basis for the claim that there were still “no third-

party contractors available” at the time Altria did begin performing services. It is also vague as to the specific meaning of “e-vapor product analyses.”

The third sentence is incomplete and misleading in that the cited document also notes that

{ [REDACTED]  
[REDACTED]  
[REDACTED] }. The third sentence is also incomplete and misleading in that Altria itself relied on third-parties in providing its regulatory services to JLI, (CCFF ¶ 1951-55), including specifically in connection with the referenced analysis (PX4069 (Altria) at 005 (Statement of Work #22) (identifying Eurofins Lancaster services among scheduled charges)). The proposed finding does not attempt to parse the specific impact that Altria, as opposed to any third party, had on JLI’s likelihood of PMTA success.

The proposed finding is also misleading and contrary to the weight of the evidence to the extent that it suggests that JLI could not have accessed relevant PMTA experience, absent Altria’s services, by relying on a combination of stand-alone hiring and third-party consultants. (*See* Response to RPF ¶ 1275).

More broadly, the proposed finding is misleading and contrary to the weight of the evidence to the extent that it suggests that the impact of Altria’s regulatory services is verifiable, or that JLI could not have submitted a timely PMTA absent Altria’s services. (*See* Response to RPF ¶ 1247).

## **XII. FOLLOWING THE INVESTMENT, COMPETITION IN THE E-VAPOR MARKETPLACE FLOURISHED**

1284. [REDACTED] }, and significant swings in the market shares of the remaining manufacturers, (PX7012 Eldridge (ITG Brands) Dep. at 110-14).



**Response to Finding No. 1284**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria’s exit from the closed-system e-cigarette market has harmed competition. (CCFF ¶¶ 1408-730). The proposed finding is incomplete and misleading because it takes a narrow view of competition and ignores non-price harm. (CCFF ¶¶ 1408-526). Specifically, the transaction eliminated non-price competition for shelf space, (CCFF ¶¶ 1442-62); for product features, (CCFF ¶¶ 1463-81), including flavors, (CCFF ¶¶ 1466-71), nicotine strength, (CCFF ¶¶ 1472-76), and other features, (CCFF ¶¶ 1477-81); and for product improvement. (CCFF ¶¶ 1482-

92). The proposed finding also ignores evidence that the transaction also harmed future competition. (CCFF ¶¶ 1527-87). The market remains highly concentrated post-transaction, (CCFF ¶¶ 1748-61), and pre-existing competition from other e-cigarette rivals has not replaced the lost competition due to Altria's exit. (CCFF ¶¶ 1823-46).

In addition, the proposed finding is unsupported, incomplete, and misleading because it does not accurately quote Huckabee's testimony and presents the quote in misleading manner.

{  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] }

The proposed finding is unreliable, incomplete, and misleading to the extent that it relies on device shares because “[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products.” (CCFF ¶ 1763 (quoting Dr. Rothman, who used share of consumables (i.e., cartridges, pods, and disposables) to calculate market shares); *see also* Huckabee (Reynolds) Tr. 398-99, 401 (testifying that while device share “is a good indicator for the amount of consumers that are trying our products,” pod share gives Reynolds “an indication for the amount of consumer purchases and uses of our product”)).

Finally, the proposed finding is incomplete and misleading because it does not accurately quote Eldridge's testimony. Nowhere in the cited passages does Eldridge testify about “significant swings in the market shares of the remaining manufacturers” since December 2018. (PX7012 Eldridge (ITG Brands) Dep. at 110-14). In the four pages of the transcript that cover Eldridge's testimony about competition from 2012 to 2019, Complaint Counsel repeatedly objected on grounds that Respondents' questions were vague, compound, and leading. Accordingly, this

citation does not supported the proposed finding and should be disregarded. (PX7012 Eldridge (ITG Brands) Dep. at 110-14).

**A. Two New Entrants—NJOY Ace And Vuse Alto—Used Steep Discounting To Drive Trial And Steal Market Share Away From JUUL**

1285. In the second half of 2018, NJOY and Reynolds both commercialized pod-based products that—unlike Elite—used nicotine salts. (RX1456 (JLI) at 001-02; O’Hara (JLI) Tr. 633-34; *see also* { [REDACTED] }). And, recognizing that they each had a product capable of satisfying both cigarette smokers and existing JUUL customers, the two companies engaged in what amounted to a “price war” to incentivize trial. (RX1061 (PMI) at 010; *see also infra* Part XII.A.1-2).

**Response to Finding No. 1285**

The proposed finding is incomplete and misleading because it ignores evidence that establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407).

The proposed finding is also incomplete and misleading because it ignores evidence that prior to the transaction and its exit from the market, Altria sold a closed-system e-cigarette with four percent nicotine and nicotine salts, the MarkTen Bold. (CCFF ¶¶ 135, 1196). The proposed finding is further incomplete and misleading because it ignores evidence that before entering into the transaction, Altria was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1542-51).

The second sentence of the proposed finding is unsupported and unreliable because, in purporting to explain NJOY’s and Reynolds’s motivations, it cites only a third-party’s (PMI’s) document. (RX1061 (PMI) at 010; *see also* Responses to RPF ¶¶ 1287-307).

Finally, the proposed finding is incomplete and misleading because it ignores evidence that Elite was not the only closed-system e-cigarette without nicotine salts. (*See* Response to RPF ¶ 1330).

1286. Both of those products—NJOY’s Ace and Reynolds’s Vuse Alto—outperformed Elite’s sales during their first eight months on the market, (RX1217 Murphy Report ¶ 165), and succeeded in stealing share from JUUL, (RX1217 Murphy Report ¶ 106, Fig. VI.2).

**Response to Finding No. 1286**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also incomplete, misleading, and vague. First, as explained in response to RPF ¶ 1284, Altria exited the closed-system e-cigarette market and but for the transaction, Altria would have continued to compete in the closed-system e-cigarette market, and thus, the transaction harmed competition. (*See* Response to RPF ¶ 1284). Second, the proposed finding is vague as to the timeframe being addressed; in reality, {

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\_\_\_\_\_ }.

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Finally, the proposed finding is unsupported, incomplete, and misleading in its citations to the Murphy report because Dr. Murphy conceded that he failed to investigate, quantify, or demonstrate that any sales expansion by third parties post-Altria's exit was in fact in response to Altria's exit. (CCFF ¶¶ 2123-24). The proposed finding is also unsupported, vague, incomplete, and misleading to the extent that it relies on paragraph 106 and Figure VI.2 of the Murphy report, which is cited as support for this proposed finding. Paragraph 106 and Figure VI.2 cite to no sources of data or include any definitions of the data used as a basis for Dr. Murphy's analysis. (RX1217 at 078-79 (¶ 106, Fig. VI.2) (Murphy Report)). Furthermore, the proposed finding ignores that Dr. Murphy failed to take into consideration various confounding factors while performing his analyses. (CCFF ¶¶ 1830-31).

#### **1. NJOY Launched A 99-Cent Promotion**

1287.

[REDACTED]

#### **Response to Finding No. 1287**

The proposed finding is incomplete and misleading to the extent that it implies that there has been no harm from Altria's exit from the market. The proposed finding ignores the substantial evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

1288.

[REDACTED]

[REDACTED] ; *see also* Farrell (NJOY) Tr. 362 (confirming all NJOY products currently on the market contain nicotine salts)).

#### **Response to Finding No. 1288**

The proposed finding is vague and misleading as to what it means to be [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* CCFF ¶ 1169).

Furthermore, the proposed finding is incomplete and misleading because it ignores evidence demonstrating that Elite sales were also growing in 2018 before Altria removed Elite from the market, (CCFF ¶¶ 1112-31), and that Altria also had a closed-system e-cigarette with four percent nicotine and nicotine salts, the MarkTen Bold. (CCFF ¶¶ 135, 1196).

The proposed finding is also incomplete and misleading because it fails to acknowledge that some e-cigarette customers prefer lower nicotine levels. (CCFF ¶ 1177 (citing the trial testimony of Dr. Gardner conceding that some consumers prefer e-vapor products with lower levels of nicotine); Huckabee (Reynolds) Tr. 395 (noting that some consumers, including Huckabee himself, “prefer a lower nicotine strength product”); *see also* CCFF ¶¶ 1178-88; PX4015 (Altria) at 008 (Jody Begley’s Nov. 2017 Investor Day presentation and speaker notes) (emphasizing that “different segments of adult smokers and vapers are looking for a range of different product formats, flavors, nicotine levels and vapor volumes”)).

1289. These attributes indicated to other e-vapor manufacturers that NJOY was “targeting the dominant player in the space,” JUUL. (PX7020 King (PMI) Dep. at 193).

**Response to Finding No. 1289**

The proposed finding is vague because it does not identify what it means by “These attributes.” The proposed finding is also unsupported and misleading because King only specifically addressed nicotine levels, not other attributes of NJOY Ace: “the nicotine strength, 5 percent is much closer to where JUUL's nicotine liquid concentration is, so it seemed like they were targeting the dominant player in the space.” (PX7020 King (PMI) Dep. at 193). Furthermore, the proposed finding is unsupported and unreliable because it relies on the testimony of a PMI executive about how and why another manufacturer (NJOY) was designing the attributes of NJOY’s products.

The proposed finding is also incomplete and misleading because it ignores evidence demonstrating that Elite sales were also growing in 2018 before Altria removed Elite from the market, (CCFF ¶¶ 1112-31), and that Altria also had a closed-system e-cigarette with four percent nicotine and nicotine salts, MarkTen Bold. (CCFF ¶¶ 135, 1196).

The proposed finding is further incomplete and misleading because it fails to acknowledge that some consumers prefer lower nicotine levels. (CCFF ¶ 1177 (citing the trial testimony of Dr. Gardner conceding that some consumers prefer e-vapor products with lower levels of nicotine); Huckabee (Reynolds) Tr. 395 (noting that some consumers, including Huckabee himself, “prefer a lower nicotine strength product”); *see also* CCFF ¶¶ 1178-88; PX4015 (Altria) at 008 (Jody Begley’s Nov. 2017 Investor Day presentation and speaker notes) (emphasizing that “different segments of adult smokers and vapers are looking for a range of different product formats, flavors, nicotine levels and vapor volumes”)).

1290. {

} A JUUL device, by comparison,

retailed at the time for approximately \$34.99. (RX1217 Murphy Report ¶ 91, Fig. V.11 (showing JUUL device price in January 2019 as approximately \$35); RX1605 (JLI) at 001 (listing the MSRP of a JUUL device as \$34.99)).

### **Response to Finding No. 1290**

The proposed finding is incomplete and misleading for the reasons stated in response to RPF 1284 and 1286 regarding post-transaction competition and harm after Altria's exit. (*See* Responses to RPF 1284, 1286).

The proposed finding is also unreliable, incomplete, and misleading to the extent that it relies on device shares because “[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products.” (CCFF ¶ 1763 (quoting Dr. Rothman, who used share of consumables (i.e., cartridges, pods, and disposables) to calculate market shares); *see also* Huckabee (Reynolds) Tr. 398-99, 401 (testifying that while device share “is a good indicator for the amount of consumers that are trying our products,” pod share gives Reynolds “an indication for the amount of consumer purchases and uses of our product”)).

The proposed finding is also unsupported, vague, incomplete, and misleading to the extent that it relies on paragraph 91 and Figure V.11 of the Murphy report, which is cited as support for this proposed finding. Paragraph 91 and Figure V.11 cite to no sources of data or include any definitions of the data used. (RX1217 at 070-71 (¶ 91, Fig. V.11) (Murphy Report)). Thus, it is unclear what measure of device price is being reported in this paragraph and figure. The proposed finding suggests the price may be “MSRP,” which generally stands for manufacturer’s suggested retail price and does not account for any discounts or coupons that may have been given on the actual purchase. (*See* Robbins (JLI) Tr. 3253 (describing a promotional flyer with the deal “Buy a pack of pods for \$8.99 and get the device kit, a \$20 MSRP, for free” meaning that the device was free (or the consumer paid a \$0 price), if one bought a pod pack for \$8.99)). If Figure V.11 does



record MSRPs, the JLI data in Dr. Murphy's Figure V.11 do not actually capture any discounting or responses to competition by JUUL and thus are unreliable.

Moreover, Dr. Murphy admitted at trial that he did not run any regressions to address the question of why pod-based device prices fell from September of 2018 to September 2020. (CCFF ¶ 2107). Dr. Murphy also admitted that he did not perform econometric analysis of the effects of other factors, including the negative press surrounding vaping, and the impact of state bans on non-tobacco and non-menthol flavored e-cigarettes, on the price for pod-based devices. (CCFF ¶¶ 2108-09).

Finally, the proposed finding is also vague and misleading as to timing "about two months later." { [REDACTED]

[REDACTED] }

1291. [REDACTED] } Six months into the promotion, in June 2019, JLI's analysis showed that NJOY Ace was capturing 66 percent of device share at Circle K, almost three-quarters of which came "at JUUL's expense." (PX2602 (JLI) at 019).

### **Response to Finding No. 1291**

The proposed finding is incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286 regarding post-transaction competition and harm after Altria's exit. (See Responses to RPF ¶¶ 1284, 1286).

The proposed finding is also unreliable, incomplete, and misleading to the extent that it relies on device shares because "[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products." (CCFF ¶ 1763 (quoting Dr. Rothman, who used share of consumables (i.e., cartridges, pods, and disposables) to calculate market shares); *see also* Huckabee (Reynolds) Tr. 398-99, 401 (testifying that while device share "is a good indicator for the amount of consumers

that are trying our products,” pod share gives Reynolds “an indication for the amount of consumer purchases and uses of our product”).

Finally, the proposed finding is unreliable and unsupported because it cites to no evidence from NJOY about NJOY’s sales. Instead, the proposed finding relies on evidence from a customer and a competitor of NJOY.

1292. By September of 2019, roughly ten months after its entry, NJOY had captured 22.7 percent of total volume share. (RX1061 (PMI) at 010). According to detailed market analysis performed by Professor Murphy, using the same projected IRI sales data relied on by manufacturers, NJOY’s Ace device sales were approximately 80 times higher at the peak of its promotion (September 2019) than when it launched in 2018, increasing from roughly 2,500 devices per week to more than 200,000 devices per week. (RX1217 Murphy Report ¶ 70; *see also* RX1217 Murphy Report ¶ 12 n.17 (“Projected IRI data is an aggregated view of more than 80,000 sample stores out of a universe of more than 350,000 stores that sell tobacco products. IRI projects total retail sales based on this representative sample of stores.”); O’Hara (JLI) Tr. 538-39, 629 (discussing use of IRI data); Begley (Altria) Tr. 1108 (same); Gifford (Altria) Tr. 2732-33, 2854-55 (same); Robbins (JLI) Tr. 3243-44 (same)).

### **Response to Finding No. 1292**

The first sentence of the proposed finding is incomplete and misleading because it references only NJOY’s *volume* share in the finding, but the document cited as support for the finding also reports NJOY’s *dollar share* that was lower at 13.7 percent. (RX1061 (PMI) at 010).

The proposed finding is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the

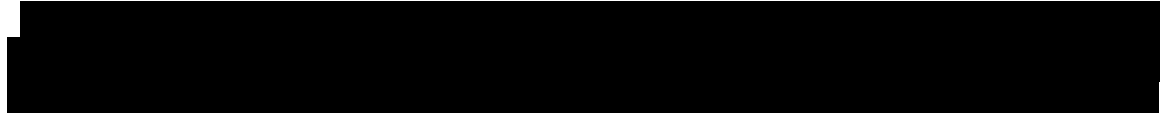
“actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also unreliable, incomplete, and misleading to the extent that it relies on device shares because “[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products.” (CCFF ¶ 1763 (quoting Dr. Rothman, who used share of consumables (i.e., cartridges, pods, and disposables) to calculate market shares); *see also* Huckabee (Reynolds) Tr. 398-99, 401 (testifying that while device share “is a good indicator for the amount of consumers that are trying our products,” pod share gives Reynolds “an indication for the amount of consumer purchases and uses of our product”)).

Finally, the proposed finding is unsupported, vague, incomplete, and misleading to the extent that it relies on paragraph 70 (including Figures V.5 and V.6) of the Murphy report, which is cited as support for this proposed finding. Paragraph 70 and Figures V.5 and V.6 cite to no sources of data or include any definitions of the data used. (RX1217 at 053-56 (¶ 70, Fig. V.5, V.6) (Murphy Report)). Thus, it is unclear what the sales numbers referenced in paragraph 70 include; it is unclear if the sales numbers refer to retail outlets, and if so, to what (or what percentage of) retail outlets. Respondents try to cure this failing of Dr. Murphy to cite to his data source in paragraph 70 by referring back to paragraph 12 and footnote 17 of the Murphy report.

But there is nothing in paragraph 12 and footnote 17 of the Murphy report that connects it to the data analysis in paragraph 70 or vice versa. (RX1217 at 08-09 (¶ 12 n.17) (Murphy Report)).

1293.

}; *see also* PX7033 O’Hara (JLI) Dep. at 199 (explaining that NJOY has “seen their pod sales . . . increase as a result of their increased device sales”).

### **Response to Finding No. 1293**

The proposed finding is incomplete and misleading for the reasons stated in response to RPF 1284 and 1286 regarding post-transaction competition and harm after Altria’s exit. (*See* Responses to RPF 1284, 1286).

The proposed finding is also unreliable, incomplete, and misleading to the extent that it relies on device shares because “[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products.” (CCFF ¶ 1763 (quoting Dr. Rothman, who used share of consumables (i.e., cartridges, pods, and disposables) to calculate market shares); *see also* Huckabee (Reynolds) Tr. 398-99, 401 (testifying that while device share “is a good indicator for the amount of consumers that are trying our products,” pod share gives Reynolds “an indication for the amount of consumer purchases and uses of our product”).

The proposed finding is also incomplete and misleading to the extent that the finding is positing that device share is a predictor of future performance because it ignores testimony that Huckabee dismissed that notion. (Huckabee (Reynolds) Tr. 398-99 (“Q. In your experience, does the device share predict -- is device share a predictor of future performance? A. I wouldn't characterize it as a predictor of future performance. It is a -- it is a good indicator for the amount of consumers that are trying our products, and when they -- when they purchase a device, they are very likely, as you might expect, to also purchase pods to use that device with. That is a very higher

end transactional dynamic. When we talk about future performance, then now we're getting into repeat trial and ongoing repertoire usage, which I consider to be different – different things.”)).

1294. Market data shows that cartridge sales for Ace increased “from about 1,600 units in weekly cartridge volume” in 2018 “to about 1.16 million units in weekly cartridge volume starting in August 2019.” (RX1217 Murphy Report ¶ 70). Neither Dr. Rothman nor Complaint Counsel dispute this evidence. (PX5001 Rothman Rebuttal at ¶ 62; CC Pretrial Br. 68).

#### **Response to Finding No. 1294**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (See Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also unsupported, vague, incomplete, and misleading to the extent that it relies on paragraph 70 (including Figures V.5 and V.6) of the Murphy report, which is cited as support for this proposed finding. Paragraph 70 and Figures V.5 and V.6 cite to no sources of data or include any definitions of the data used. (RX1217 at 053-56 (¶ 70, Fig. V.5, V.6) (Murphy

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Report)). Thus, it is unclear what the sales numbers referenced in paragraph 70 include; it is unclear if the sales numbers refer to retail outlets, and if so, to what (or what percentage of) retail outlets.

Finally, the last sentence of the proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal argument regarding the relevance of evidence under Section 7 of the Clayton Act. Respondents inappropriately state their own arguments as a “fact.”

1295. In addition, NJOY’s launches at new retailers were “very positive and were in line with [NJOY’s] strategy at the time.” (PX7029 Farrell (NJOY) Dep. at 69-70; *see also* {

### **Response to Finding No. 1295**

The first sentence of the proposed finding is vague because it relies on the phrases “very positive” and “in line with [NJOY’s] strategy at the time” but does not define what it means by these phrases. The second sentence of the proposed finding is vague because it relies on the phrase

The proposed finding is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding

also ignores the substantial evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

1296. Ace's performance during this early launch phase also far outstripped that of MarkTen Elite. Comparing the two products' performance at the 33-week mark, right before Elite was discontinued, Elite's sales were "only 21 percent of NJOY's sales." (RX1217 Murphy Report ¶ 165).

### **Response to Finding No. 1296**

The first sentence of the proposed finding is unsupported and should be disregarded because it contains no citations to the record. The first sentence of the proposed finding is also vague because it does not define what it means by the phrase "during this early launch phase" or the phrase "far outstripped."

The proposed finding is also incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286 regarding post-transaction competition and harm after Altria's exit. (See Responses to RPF ¶¶ 1284, 1286). The proposed finding is further incomplete and misleading because it ignores evidence that Elite sales were also growing in 2018 before the transaction and before Altria removed Elite from the market. (CCFF ¶¶ 1112-31).

Finally, the proposed finding is incomplete and misleading because in the cited section of the Murphy report, Dr. Murphy ignores evidence that, before the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Dr. Murphy's report, however, makes no mention of Altria's work to produce an updated Elite 2.0 pod-based product. (See generally RX1217 (Murphy Report); see also CCFF ¶ 2117). Dr. Murphy

also ignores the fact that Altria was collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Dr. Murphy conceded that his report does not mention Altria’s Joint Research, Development, and Technology Sharing Agreement (“JRDTA”) with PMI, nor the e-cigarette products that were in development under the JRDTA or that PMI had already commercialized and was selling in other parts of the world, e.g., VEEV. (CCFF ¶¶ 2115-16, 2118, 2121).

1297. By the summer of 2019, NJOY’s deep discounts on Ace had put JUUL back on its heels. In an August 2019 email, Jared Fix, JLI’s Chief Strategy Officer, observed that, due to NJOY’s discounting, JLI was “facing an aggressive competitive threat for the first time.” (RX1547 (JLI) at 002).

#### **Response to Finding No. 1297**

The first sentence of the proposed finding is unsupported and should be disregarded because it contains no citations to the record and the phrase “put JUUL back on its heels” is vague and undefined.

The proposed finding is also incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286 regarding post-transaction competition and harm after Altria’s exit. (See Responses to RPF ¶¶ 1284, 1286). In addition, the proposed finding is incomplete and misleading because it ignores evidence that JLI did focus on competition from Altria products, including MarkTen and MarkTen Elite, prior to Altria exiting. (CCFF ¶¶ 1432-40). Specifically, JLI viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”)).

The proposed finding is further incomplete and misleading because the proposed finding omits discussion in RX1547 (JLI) at 002 about other issues impacting JLI’s sales, specifically,



negative “headwinds” from PR, legislation of T21 (legislation to raise the age to buy tobacco to 21) and taxes. (RX1547 (JLI) at 002).

Finally, the proposed finding is incomplete and misleading because it ignores evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

1298. Kevin Cooke, JLI’s Senior Vice President of U.S. Commercial, responded with his analysis: NJOY’s promotion, he said, was the “biggest disruptor of the growth of [JLI’s] business.” In “[a]ccounts that have NJOY, our business on avg is up about 1% in the last 3 months. . . . Accounts that don’t have NJOY my biz is up 21% on average.” “We need to recco [sic] aggressive but thoughtful [device kit] pricing/promotions and will be doing this.” (RX1547 (JLI) at 002).

### **Response to Finding No. 1298**

The proposed finding is incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286 regarding post-transaction competition and harm after Altria’s exit. (*See* Responses to RPF ¶¶ 1284, 1286). In addition, the proposed finding is incomplete and misleading

because it ignores evidence that JLI did focus on competition from Altria products, including MarkTen and MarkTen Elite, prior to Altria exiting. (CCFF ¶¶ 1432-40). Specifically, JLI viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”). The proposed finding is incomplete and misleading because it ignores evidence demonstrating that Elite sales were also growing in 2018 before the transaction and before Altria removed Elite from the market. (CCFF ¶¶ 1112-31).

The proposed finding is also incomplete and misleading because it omits discussion in RX1547 (JLI) at 002, the document that is cited as support for this finding, about other issues impacting JLI’s sales, specifically, negative “headwinds” from PR, legislation of T21 (legislation to raise the age to buy tobacco to 21) and taxes. (RX1547 (JLI) at 002).

Finally, the proposed finding is incomplete and misleading because it ignores evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with

significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

## **2. Vuse Matched NJOY's Promotion**

1299. By the summer of 2019, Reynolds's Vuse Alto was "replicating [NJOY's] tactics." (RX1547 (JLI) at 003).

### **Response to Finding No. 1299**

The proposed finding is vague because it does not define what it means by "replicating [NJOY's] tactics." The proposed finding is also incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286 regarding post-transaction competition and harm after Altria's exit. (See Responses to RPF ¶¶ 1284, 1286). The proposed finding is further incomplete and misleading because it ignores evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52, 1588-716). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

1300. Vuse's Alto pod product, which was launched in August 2018, contained "high-quality nicotine salts." (O'Hara (JLI) Tr. 643-44). According to statements made by Reynolds in a July 2018 earnings call, consumer research showed that "Alto rate[d] significantly higher than any other nicotine salt Pod . . . product on a number of key consumer attributes and purchase intent." (RX1456 (JLI) at 001).

### **Response to Finding No. 1300**

The second sentence of the proposed finding is vague, unreliable, incomplete, and misleading because the document cited as the source for this finding does not provide sufficient details about the consumer research such as which pod products were included in the study.

The proposed finding is also incomplete and misleading because it ignores evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

1301. In its first six months on the market, Vuse Alto “achieved monthly sales of roughly 4.7 times MarkTen Elite.” Comparing the two products at the 33-week mark, Elite’s sales were “only 12 percent of Alto’s sales.” (RX1217 Murphy Report ¶ 165). By December 2018, JLI’s internal analysis concluded “Alto is the best performing launch by a major competitor in the past few years.” (RX1618 (JLI) at 030).

### **Response to Finding No. 1301**

The first sentence of the proposed finding is unsupported and should be disregarded because it contains no citations to the record. The proposed finding is also incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286 regarding post-transaction competition and harm after Altria’s exit. (*See Responses to RPF ¶¶ 1284, 1286*).

The proposed finding is also incomplete and misleading because in the cited section of the Murphy report, Dr. Murphy ignores evidence that, before the transaction, Altria was working to

improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Dr. Murphy's report, however, makes no mention of Altria's work to produce an updated Elite 2.0 pod-based product. (*See generally* RX1217 (Murphy Report); *see also* CCFF ¶ 2117; PX5001 at 045-46 (¶ 83) (Rothman Rebuttal Report) (explaining how Dr. Murphy's claims that Elite's launch was not successful are wrong)).

In addition, the proposed finding is incomplete and misleading because it ignores evidence that JLI did focus on competition from Altria products, including MarkTen and MarkTen Elite, prior to Altria exiting. (CCFF ¶¶ 1432-40). Specifically, JLI viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled "What Keeps Us Up at Night")). Respondents ignore that Elite sales were also growing in 2018 before Altria removed Elite from the market. (CCFF ¶¶ 1112-31).

Finally, the proposed finding is unsupported with its citation to RX1618 (JLI) at 030, because the document does not contain any data at that page to support the quoted statement or the claim of the proposed finding.

1302. During this period, Alto's cartridge sales "rose rapidly and nearly continuously." (RX1217 Murphy Report ¶ 71).

### **Response to Finding No. 1302**

The proposed finding is vague because it does not define the time period meant by "this period" and it does not define what it means by "rapidly." The proposed finding is also incomplete and misleading for the reasons stated in response to RPFF ¶¶ 1284 and 1286, regarding post-transaction competition and harm after Altria's exit. (*See Responses to RPFF ¶¶ 1284, 1286*).

The proposed finding is further incomplete and misleading to the extent that it suggests Elite did not have a successful launch because in the cited section of the Murphy report, Dr. Murphy ignores evidence that, before the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Dr. Murphy's report, however, makes no mention of Altria's work to produce an updated Elite 2.0 pod-based product. (*See generally* RX1217 (Murphy Report); *see also* CCFF ¶ 2117; PX5001 at 045-46 (¶ 83) (Rothman Rebuttal Report) (explaining how Dr. Murphy's claims that Elite's launch was not successful are wrong)).

1303. JLI quickly recognized that Alto posed a formidable threat. Bob Robbins, JLI's Chief Growth Officer, wrote in March 2019: “[W]e are keeping an eye on Alto. It is the most competent competitive product we’ve seen yet.” (PX2575 (JLI) at 002).

### **Response to Finding No. 1303**

The first sentence of the proposed finding is unsupported and should be disregarded because it contains no citations to the record. The proposed finding is incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286, regarding post-transaction competition and harm after Altria's exit. (*See Responses to RPF ¶¶ 1284, 1286*). In addition, the proposed finding is incomplete and misleading because it ignores that JLI did focus on competition from other products, including MarkTen and MarkTen Elite, prior to Altria exiting. (CCFF ¶¶ 1432-40). Specifically, JLI viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (CCFF ¶¶ 503-06, 1129; PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”)).

The proposed finding is also incomplete and misleading to the extent that it suggests Altria was not a competitive threat because it ignores evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including

through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

1304. §



#### **Response to Finding No. 1304**

The proposed finding is incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286, regarding post-transaction competition and harm after Altria's exit. (*See* Responses to RPF ¶¶ 1284, 1286). The proposed finding also ignores evidence that Reynolds viewed Altria as a competitive threat before Altria's exit from the closed-system e-cigarette market. Prior to December 2018, Reynolds considered both MarkTen Elite and MarkTen cigalikes when pricing its Vuse line of closed-system e-cigarettes. (CCFF ¶ 344). Reynolds likewise viewed both MarkTen Elite and MarkTen cigalikes to be primary competitors to Vuse. (CCFF ¶ 345; *see also* CCFF ¶ 347).

The proposed finding is also incomplete and misleading because it ignores evidence that JLI viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”); CCF ¶¶ 504-06 (discussing PX2005 (JLI) at 003, 004, 016 (“Altria Threat Competitive Response – May 2018”)); CCF ¶¶ 1516-22 (discussing PX2289 (JLI) at 021 (“US Landscape: Competitive Analysis Framework”)) (reflecting JLI’s conclusion in May 2018 that Elite was one of only four products besides JUUL with “long-term viability”))).

1305. [REDACTED]

**Response to Finding No. 1305**

The proposed finding is vague because it does not define what it means by [REDACTED] [REDACTED] } The proposed finding is also incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286, regarding post-transaction competition and harm after Altria’s exit. (See Responses to RPF ¶¶ 1284, 1286).

1306. According to Professor Murphy’s analysis, sales of Vuse Alto, which had averaged “fewer than 50,000 devices per week over the period January to July 2019,” “jump[ed] to more than 200,000 devices per week in December 2019,” a fourfold increase. (RX1217 Murphy Report ¶ 71). And, again, neither Dr. Rothman nor Complaint Counsel dispute this analysis. (PX5001 Rothman Rebuttal ¶ 62; CC Pretrial Br. 68).

**Response to Finding No. 1306**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In



the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also incomplete and misleading to the extent that it suggests that, but for the transaction and Altria's exit, Elite would not have been a formidable competitor in the closed-system e-cigarette market. In the cited section of the Murphy report, Dr. Murphy ignores evidence that, before the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (RX1217 at 054 (¶ 71) (Murphy Report); CCFF ¶¶ 1538-52). Dr. Murphy's report, however, makes no mention of Altria's work to produce an updated Elite 2.0 pod-based product. (*See generally* RX1217 (Murphy Report); *see also* CCFF ¶ 2117; PX5001 at 045-46 (¶ 83) (Rothman Rebuttal Report) (explaining how Dr. Murphy's claims that Elite's launch was not successful are wrong)).

Finally, the last sentence of the proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal argument regarding the relevance of evidence under Section 7 of the Clayton Act. Respondents inappropriately state their own arguments as a “fact.”

1307.

 ; *see also* PX7033 O'Hara (JLI) Dep. at

199 (explaining that Vuse “is a very strong competitor. It’s gotten stronger over time. [Vuse is] selling more than twice the number of devices per week than [JLI is]. And as a result, [it is] seeing increased pod demand, as you would expect”); { [REDACTED] }  
 [REDACTED] ).

### **Response to Finding No. 1307**

The proposed finding is unsupported and misleading because it mischaracterizes

{ [REDACTED] }  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]

{ [REDACTED] } The proposed finding is also vague because it does not identify what time period is being discussed (e.g., whether it is today, at the time of the launch of the 99-cent promotion, or somewhere in between).

The proposed finding is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s

exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

### 3. JLI Was Forced To Drop Price

1308. [REDACTED]

#### Response to Finding No. 1308

The first sentence of the proposed finding is unsupported and should be disregarded because it contains no citations to the record. The first sentence of the proposed finding is also vague because it does not define what it means by { [REDACTED] } and { [REDACTED] }

The proposed finding is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the

e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is further incomplete and misleading because it ignores other factors specifically mentioned in the cited JLI document, including: {

[REDACTED]

[REDACTED]

[REDACTED] }

1309. At one large retail chain, Circle K, NJOY Ace captured 66 percent of device share and, according to JLI estimates, almost three-quarters of that came “at JUUL’s expense.” (PX2602 (JLI) at 019).

#### **Response to Finding No. 1309**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as

well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also incorrect and unsupported because the document cited as support for the finding does not state that “three quarters” of NJOY’s share came “at JUUL’s expense.” Rather, the document states: “In six months, NJOY Ace devices have captured 66% unit share. Approximately 49% share was at JUUL’s expense, but the remaining share can be attributed to MarkTen exiting the market.” (PX2602 (JLI) at 019).

The proposed finding is also unreliable, incomplete, and misleading to the extent that it relies on device shares because “[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products.” (CCFF ¶ 1763 (quoting Dr. Rothman, who used share of consumables (i.e., cartridges, pods, and disposables) to calculate market shares); *see also* Huckabee (Reynolds) Tr. 398-99, 401 (testifying that while device share “is a good indicator for the amount of consumers that are trying our products,” pod share gives Reynolds “an indication for the amount of consumer purchases and uses of our product”)).

1310. As JLI’s internal analysis explained, Ace’s users did not see JUUL as offering “meaningful advantages to justify its cost,” so “it [was] common and easy for users to try something else.” (RX1550 (JLI) at 006).

### **Response to Finding No. 1310**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In

the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the "actual world" with the "but-for world," calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

1311. [REDACTED]; *see also* PX7019 Crozier (Sheetz) Dep. at 76-77 (noting JLI did not offer new promotions in response to Elite); RX1061 (PMI) at 010 (observing that after NJOY "triggered [a] price war" in the e-vapor category, "JUUL's dollar share slipped for the first time").

### **Response to Finding No. 1311**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the "actual world" with the "but-for world," calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria's exit from the

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e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also unsupported, incomplete, and misleading to the extent that it is suggesting that JLI did not view Elite as a competitive threat or discount against Elite because it omits that the document cited by Respondents is specifically addressing { [REDACTED] } [REDACTED] } The proposed finding is also unsupported, incomplete, and misleading because it mischaracterizes Crozier's testimony in the citation noting that "JLI did not offer new promotions in response to Elite." Crozier did not testify that JLI's promotions were unrelated to the launch of Elite; in fact, Crozier implied the opposite, testifying that JLI ran its normal promotion "to address" the introduction of Elite. (PX7019 (Crozier (Sheetz), Dep. at 76-77) ("Q. And did JUUL respond at all with new kinds of promotions of its own after Elite was introduced? A. No, I mean, they just ran their normal -- they would do -- their offer was generally \$20 off of a pod pack with the -- or battery and pod pack together. But I don't recall them doing things above and beyond to address that."))).

1312. In September 2019, JLI dropped its device price to \$9.99, down from an MSRP of \$34.99. (RX1061 (PMI) at 010; *see also* { [REDACTED] }; RX1217 Murphy Report ¶ 91, Fig. V.11 (showing line graph of JUUL's price, including a significant price drop in October 2019); Robbins (JLI) Tr. 3257 ("Since December 2018, we have lowered the price on the device permanently, and then we've run deeper promotions as well."); O'Hara (JLI) Tr. 571 ("[JUUL's] device price is even down to about \$10 now."); PX7033 O'Hara (JLI) Dep. at 122 (explaining that JLI "had to . . . bring down the price of [its] own device" in response to aggressive promotions)). In addition to running "deeper promotions," JLI later "permanently" lowered the price of its device. (Robbins (JLI) Tr. 3257; [REDACTED] ).

### **Response to Finding No. 1312**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that competition and promotions from other companies were the sole reasons that JLI dropped its device price in September 2019. The document cited as support for the proposed finding, RX1061 (PMI) at 010, notes that “US president Donald Trump has announced that his administration is preparing new market restrictions on flavored e-cigarettes banning all flavors incl. menthol. . . . Sep’19: JUUL reacts - JUUL device for \$9.99 with 3-month Auto-Ship subscription.” (RX1061 (PMI) at 010).

The proposed finding is also incomplete and misleading to the extent that it suggests that JLI did not view Altria as a competitive threat in closed-system e-cigarettes before Altria’s exit



because the proposed finding ignores evidence that JLI also closely tracked pricing and promotions by Altria, (CCFF ¶ 1438), and that JLI considered Altria's MarkTen Bold as one of JUUL's competitors (PX2079 (JLI) at 014 ("Product Roadmap" dated January 2018) (slide entitled "Competition from big companies" and listing MarkTen Bold and MarkTen Elite as JUUL's competitors)).

The proposed finding is unsupported, vague, incomplete, and misleading to the extent that it relies on paragraph 91 and Figure V.11 of the Murphy report, which is cited as support for this proposed finding. Paragraph 91 and Figure V.11 of Dr. Murphy's report cite to no sources of data or include any definitions of the data used. (RX1217 at 070-71 (¶ 91, Fig. V.11) (Murphy Report)). Thus, it is unclear if the analysis or underlying data are reliable.

The proposed finding is further incomplete and misleading to the extent that it is suggesting that Respondents, through their economic expert, submitted econometric analysis to demonstrate that competition and discounting rather than other factors led to the alleged price decreases in e-cigarette products. Dr. Murphy's report contains no such evidence: As to pod-based cartridges, Dr. Murphy admitted at trial that he did not perform any econometric analysis or attribution analysis of why prices for pod-based cartridges were declining after Altria's exit from the e-cigarette business. (CCFF ¶¶ 2099, 2104). Dr. Murphy also admitted that he did not analyze the effects of other factors, including the negative press surrounding vaping, the impact of changes in the minimum age to purchase nicotine products, and the FDA's flavor ban on the price of pod-based cartridges. (CCFF ¶¶ 2100-02). Dr. Murphy also conceded at trial that the pricing data he presents in Figure V.2 of his report does not rule out the possibility that pod-based cartridge prices would have fallen further if Altria had not discontinued its e-cigarette products. (CCFF ¶ 2103). As to pod-based devices, Dr. Murphy admitted at trial that he did not run any regressions to address the

question of why pod-based device prices fell from September of 2018 to September 2020. (CCFF ¶ 2107). Dr. Murphy also admitted that he did not perform econometric analysis of the effects of other factors, including the negative press surrounding vaping, and the impact of state bans on non-tobacco and non-menthol flavored e-cigarettes, on the price for pod-based devices. (CCFF ¶¶ 2108-09; *see also* CCFF ¶¶ 2094-98).

1313. The “competitive pressures” JLI is facing have “significantly reduced JUUL’s revenues and margins,” forcing the company to “retrench” and lay off roughly “70 or 75 percent of the company[’s workforce].” (Pritzker (JLI) Tr. 881-82).

### **Response to Finding No. 1313**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also incomplete, misleading, and unreliable because it relies only on the self-serving testimony a JLI executive, Pritzker. The proposed finding is incorrect,

incomplete, and misleading because it ignores evidence that there were other factors at the time of and after the transaction influencing the prices and sales of JLI's e-cigarettes, including the FDA ban on flavored pods in February 2020, (CCFF ¶ 294), and the FDA's increase in the minimum age required to purchase tobacco products to 21 years. (PX8001 at 002 (¶ 12) (Stout (7-Eleven), Decl.)).

The proposed finding is further incomplete and misleading to the extent that it is suggesting that Respondents, through their economic expert, submitted econometric analysis to demonstrate that competition and discounting rather than other factors led to the alleged price decreases in e-cigarette products. Dr. Murphy's report contains no such evidence: As to pod-based cartridges, Dr. Murphy admitted at trial that he did not perform any econometric analysis or attribution analysis of why prices for pod-based cartridges were declining after Altria's exit from the e-cigarette business. (CCFF ¶¶ 2099, 2104). Dr. Murphy also admitted that he did not analyze the effects of other factors, including the negative press surrounding vaping, the impact of changes in the minimum age to purchase nicotine products, and the FDA's flavor ban on the price of pod-based cartridges. (CCFF ¶¶ 2100-02). Dr. Murphy also conceded at trial that the pricing data he presents in Figure V.2 of his report does not rule out the possibility that pod-based cartridge prices would have *fallen further* if Altria had not discontinued its e-cigarette products. (CCFF ¶ 2103). As to pod-based devices, Dr. Murphy admitted at trial that he did not run any regressions to address the question of why pod-based device prices fell from September of 2018 to September 2020. (CCFF ¶ 2107). Dr. Murphy also admitted that he did not perform econometric analysis of the effects of other factors, including the negative press surrounding vaping, and the impact of state bans on non-tobacco and non-menthol flavored e-cigarettes, on the price for pod-based devices. (CCFF ¶¶ 2108-09; *see also* CCFF ¶¶ 2094-98).

1314. JLI's price drops combined with aggressive promotions by competitors have "generally resulted in the overall market for devices being priced down significantly." (PX7033 O'Hara (JLI) Dep. at 122).

#### **Response to Finding No. 1314**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the "actual world" with the "but-for world," calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also incomplete, misleading, and unreliable because it relies only on the self-serving testimony a JLI executive, O'Hara. The proposed finding is incorrect, incomplete, and misleading because it ignores evidence that there were other factors at the time of and after the transaction influencing the prices and sales of JLI's e-cigarettes, including the FDA ban on flavored pods in February 2020, (CCFF ¶ 294), and the FDA's increase in the minimum age required to purchase tobacco products to 21 years. (PX8001 at 002 (¶ 12) (Stout (7-Eleven), Decl.)).

The proposed finding is further incomplete and misleading to the extent that it is suggesting that Respondents, through their economic expert, submitted econometric analysis to demonstrate that competition and discounting rather than other factors led to the alleged price decreases in e-cigarette products. Dr. Murphy's report contains no such evidence: As to pod-based cartridges, Dr. Murphy admitted at trial that he did not perform any econometric analysis or attribution analysis of why prices for pod-based cartridges were declining after Altria's exit from the e-cigarette business. (CCFF ¶¶ 2099, 2104). Dr. Murphy also admitted that he did not analyze the effects of other factors, including the negative press surrounding vaping, the impact of changes in the minimum age to purchase nicotine products, and the FDA's flavor ban on the price of pod-based cartridges. (CCFF ¶¶ 2100-02). Dr. Murphy also conceded at trial that the pricing data he presents in Figure V.2 of his report does not rule out the possibility that pod-based cartridge prices would have *fallen further* if Altria had not discontinued its e-cigarette products. (CCFF ¶ 2103). As to pod-based devices, Dr. Murphy admitted at trial that he did not run any regressions to address the question of why pod-based device prices fell from September of 2018 to September 2020. (CCFF ¶ 2107). Dr. Murphy also admitted that he did not perform econometric analysis of the effects of other factors, including the negative press surrounding vaping, and the impact of state bans on non-tobacco and non-menthol flavored e-cigarettes, on the price for pod-based devices. (CCFF ¶¶ 2108-09; *see also* CCFF ¶¶ 2094-98).

#### 4. Aggressive Promotions Have Continued

1315. E-vapor manufacturers have continued to compete aggressively. Despite JLI's September 2019 price drop, by December 2019, Reynolds had overtaken JLI as the leading seller of devices. (PX7037 Huckabee (Reynolds) Dep. at 70-72; *see also* [REDACTED] [REDACTED] }).

#### Response to Finding No. 1315

The first sentence of the proposed finding is unsupported and should be disregarded because it contains no citations to the record.

The proposed finding is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also unreliable, incomplete, and misleading to the extent that it relies on device shares because “[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products.” (CCFF ¶ 1763 (quoting Dr. Rothman, who used share of consumables (i.e., cartridges, pods, and disposables) to calculate market shares); *see also* Huckabee (Reynolds) Tr. 398-99, 401 (testifying that while device share “is a good indicator for the amount of consumers

that are trying our products,” pod share gives Reynolds “an indication for the amount of consumer purchases and uses of our product”).

Finally, the proposed finding is incomplete and misleading because it ignores Huckabee’s testimony that JUUL (JLI) has the highest “pod” share (meaning pod-based cartridge sales) today. (Huckabee (Reynolds) Tr. 401-02). (Complaint Counsel is not conceding in this reply that pod-based devices alone are a relevant market).

1316. Vuse has held onto that position in 2021, “selling more than twice the number of devices per week” as JLI. (PX7033 O’Hara (JLI) Dep. at 199; *see also* [REDACTED]).

### **Response to Finding No. 1316**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also incomplete and misleading to the extent that it relies on the testimony of Huckabee, because it ignores what Huckabee said when asked if [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } The proposed finding is also incomplete and misleading for the reasons set forth in response to RPF 1315, regarding JLI's share of cartridges. (*See* Response to RPF 1315).

The proposed finding is also unreliable, incomplete, and misleading to the extent that it relies on device shares because “[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products.” (CCFF ¶ 1763 (quoting Dr. Rothman, who used share of consumables (i.e., cartridges, pods, and disposables) to calculate market shares); *see also* Huckabee (Reynolds) Tr. 398-99, 401 (testifying that while device share “is a good indicator for the amount of consumers that are trying our products,” pod share gives Reynolds “an indication for the amount of consumer purchases and uses of our product”)).

1317. In addition, Vuse Alto's device sales were followed by “increased pod demand.” (PX7033 O'Hara (JLI) Dep. at 199). By September 2020, it held a 21 percent share of the cartridge market. (RX1217 Murphy Report ¶ 73).

### **Response to Finding No. 1317**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In



the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also unsupported and unreliable because it relies on the self-serving testimony of O'Hara, a JLI executive. O'Hara's deposition testimony that is cited here as support for this proposed finding contains no reference to the source of data or basis for his conclusions about Alto's sales and is thus unreliable. (PX7033 O'Hara (JLI) Dep. at 199).

The proposed finding is also unsupported, vague, incomplete, and misleading to the extent that it relies on paragraph 73, and its included Figure V.8, of the Murphy report, which is cited as support for this proposed finding. Paragraph 73 and Figure V.8 cite to no sources of data and do not include any definitions of the data used. (RX1217 at 057-58 (¶ 73, Fig. V.8) (Murphy Report)). Thus, it is unclear what the sales numbers referenced in paragraph 73 include; it is unclear if the sales numbers refer to retail outlets, and if so, to what (or what percentage of) retail outlets.

1318. Meanwhile, NJOY is “selling roughly the same number of devices per week” as JLI. (PX7033 O'Hara (JLI) Dep. at 199).

### **Response to Finding No. 1318**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-

system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also unreliable, incomplete, and misleading to the extent that it relies on device shares because “[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products.” (CCFF ¶ 1763 (quoting Dr. Rothman, who used share of consumables (i.e., cartridges, pods, and disposables) to calculate market shares); *see also* Huckabee (Reynolds) Tr. 398-99, 401 (testifying that while device share “is a good indicator for the amount of consumers that are trying our products,” pod share gives Reynolds “an indication for the amount of consumer purchases and uses of our product”)).

The proposed finding is also unreliable because it relies on self-serving testimony from one JLI employee, and in the deposition testimony cited as support for this finding, there are no references to any data to provide the basis for O’Hara’s testimony. (PX7033 O’Hara (JLI) Dep. at 199).

1319. JLI has correspondingly seen a sharp drop in market share in cartridge sales. (RX1217 Murphy Report ¶ 71, Fig. V.6).

**Response to Finding No. 1319**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also unsupported, vague, incomplete, and misleading to the extent that it relies on paragraph 71 and Figure V.6 of the Murphy report, which is cited as support for this proposed finding. Paragraph 71 and Figure V.6 cite to no sources of data or include any definitions of the data used. (RX1217 at 054-55 (¶ 71, Fig. V.6) (Murphy Report)). Thus, it is unclear what the sales numbers referenced in paragraph 71 include; it is unclear if the sales numbers refer to retail outlets, and if so, to what (or what percentage of) retail outlets.

The proposed finding is also incomplete and misleading because it ignores the testimony that JLI remains the leader in pod/cartridge sales. (*See* Response to RPF ¶ 1315).

1320. NJOY also saw cartridge sales “increase as a result of their increased device sales,” (PX7033 O’Hara (JLI) Dep. at 199), growing to 7.4 percent of the market at its peak, (RX1217 Murphy Report ¶ 73).

### **Response to Finding No. 1320**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also unsupported, vague, incomplete, and misleading to the extent that it relies on paragraph 73, and its included Figure V.8, of the Murphy report, which is cited as support for this proposed finding. Paragraph 73 and Figure V.8 cite to no sources of data or include any definitions of the data used. (RX1217 at 057-58 (¶ 73, Fig. V.8) (Murphy Report)). Thus, it is

unclear what the sales numbers referenced in paragraph 73 include; it is unclear if the sales numbers refer to retail outlets, and if so, to what (or what percentage of) retail outlets.

1321. This aggressive competition has “significantly reduced JUUL’s revenues and margins,” as well as its market share. (Pritzker (JLI) Tr. 880-81).

### **Response to Finding No. 1321**

The proposed finding is vague because it does not identify what it means by “This aggressive competition.” The proposed finding is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (See Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is further incomplete, misleading, and unreliable because it relies only on the self-serving testimony a JLI executive, Pritzker. The proposed finding ignores the evidence demonstrating that other issues since the transaction have impacted JLI’s sales and prices, including the FDA ban on flavored e-cigarettes in February 2020, (CCFF ¶ 294), and the FDA’s

increase in the minimum age required to purchase tobacco products to 21 years. (PX8001 at 002 (¶ 12) (Stout (7-Eleven), Decl.); *see also* Responses to RPF ¶¶ 1308, 1313-14).

Finally, the proposed finding is incomplete and misleading to the extent that it is suggesting that Respondents, through their economic expert, submitted econometric analysis to demonstrate that competition and discounting rather than other factors led to the alleged price decreases in e-cigarette products. Dr. Murphy's report contains no such evidence: As to pod-based cartridges, Dr. Murphy admitted at trial that he did not perform any econometric analysis or attribution analysis of why prices for pod-based cartridges were declining after Altria's exit from the e-cigarette business. (CCFF ¶¶ 2099, 2104). Dr. Murphy also admitted that he did not analyze the effects of other factors, including the negative press surrounding vaping, the impact of changes in the minimum age to purchase nicotine products, and the FDA's flavor ban on the price of pod-based cartridges. (CCFF ¶¶ 2100-02). Dr. Murphy also conceded at trial that the pricing data he presents in Figure V.2 of his report does not rule out the possibility that pod-based cartridge prices would have *fallen further* if Altria had not discontinued its e-cigarette products. (CCFF ¶ 2103). As to pod-based devices, Dr. Murphy admitted at trial that he did not run any regressions to address the question of why pod-based device prices fell from September of 2018 to September 2020. (CCFF ¶ 2107). Dr. Murphy also admitted that he did not perform econometric analysis of the effects of other factors, including the negative press surrounding vaping, and the impact of state bans on non-tobacco and non-menthol flavored e-cigarettes, on the price for pod-based devices. (CCFF ¶¶ 2108-09; *see also* CCFF ¶¶ 2094-98).

1322. The new entrants sustained this competition in the face of a changing regulatory landscape. After FDA banned flavors other than tobacco and menthol effective February 2020, ITG, Reynolds, and NJOY each "significantly expanded their shipments of menthol and tobacco flavor pods." (RX1217 Murphy Report ¶¶ 54-55, Figs. IV.5 through IV.7; *see also* PX9016 (FDA) at 001-02 (announcing ban); Crozier (Sheetz) Tr. 1495-96 (discussing ban)). "As a result, JUUL continued in 2020 to face significant head-to-head competition

from e-cigarettes with very similar product look and feel and nicotine experience in the form of ITG’s *myblu*, NJOY’s *Ace* and Reynolds’s *Vuse Alto*, among others.” (Murphy Report ¶¶ 54-55, Figs. IV.5 through IV.7).

### **Response to Finding No. 1322**

The first sentence of the proposed finding is unsupported and should be disregarded because it contains no citations to the record. The proposed finding is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

1323.

### **Response to Finding No. 1323**

The first sentence of the proposed finding is vague because it does not define what it means by “aggressive promotions.” The proposed finding is also incomplete and misleading because it

fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

**B. Meanwhile, The Cig-A-Like Market Continued To Decline**

1324. The cig-a-like segment has continued to exhibit dramatically different market dynamics. As K.C. Crosthwaite, the current CEO of JLI, summarized, cig-a-likes “are essentially irrelevant in the market today.” (PX7024 Crosthwaite (Altria/JLI) Dep. at 214; *see also* [REDACTED]).

**Response to Finding No. 1324**

The first sentence of the proposed finding is unsupported and should be disregarded because it contains no citations to the record. The first sentence of the proposed finding is also vague in that it does not define what it means by “dramatically” or by “different market dynamics.”

The proposed finding is also incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286 regarding post-transaction competition. (*See* Responses to RPF ¶¶ 1284, 1286). Altria’s cigalikes, had they stayed on the market, could have had advantages in the



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FDA's PMTA process. (*See* Responses to RPF 1284, 1286). Specifically, Altria's e-cigarettes did not raise youth initiation concerns, (CCFF 1323-52); because cigalikes do not raise the same youth vaping concerns as pod-based products, and this can be an advantage in the PMTA process. (CCFF 1328-31). In addition, the { [REDACTED] }, and thus subject to the FDA ban on flavors. (CCFF 294).

The proposed finding is also incomplete, misleading, and unreliable. Contrary to the self-serving and unreliable testimony of the CEO of JLI, the company that exclusively sells pod-based products. (CCFF 155), cigalikes are not "irrelevant" in the market today. First, Altria's testimony contradicts JLI's CEO. Baculis (Altria) testified that her "assumption was that the cigalike category would remain viable for a niche group of consumers." (CCFF 1318). Because "MarkTen cigalikes was [sic] meeting the needs of a small niche of consumers," Baculis "didn't see any reason why [Altria] should stop selling them." (CCFF 1319; *see also* CCFF 1036). Before Altria's MarkTen cigalikes were removed from the market, sales were increasing in 2018. (CCFF 1036, 1097, 1104, 1105, 1107, 1109).

Moreover, competitors continue to sell cigalikes, further contradicting JLI's CEO. Reynolds sells three cigalikes today: Vuse Ciro, Vuse Solo, and Vuse Vibe. (CCFF 1174).

{ [REDACTED] } NJOY sells a cigalike, the NJOY Daily. (CCFF 1173). ITG sells cigalikes. (CCFF 1175). ITG submitted PMTAs for its cigalike products (blu PLUS) in various nicotine strengths and flavors, and none of them contain nicotine salts, with ITG explaining in its PMTA

that, “[t]he variety of available nicotine concentrations, including zero nicotine, and flavors provides optionality to current adult smokers, aiding their transition from combustible cigarettes to blu PLUS+ ENDS.” (CCFF ¶ 1176).

The proposed finding is also misleading as to Crozier’s testimony. { [REDACTED]

{ [REDACTED] } While it is unclear what { [REDACTED] } means in this context, that testimony does not indicate that { [REDACTED] } as Respondents suggest. Crozier testified that even after Altria discontinued Elite, Sheetz planned to continue to sell Altria’s cigalike products, and “had no plans of cutting [those] product[s].” (CCFF ¶ 1515). Furthermore, at his deposition Crozier testified that about the appeal of cigalikes for some consumers: “It was also a round product, cigalike, so that might have appealed to somebody looking to switch from cigarettes and wanting still a round-type device.” (PX7019 (Crozier (Sheetz), Dep. at 33-34)).

Finally, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. The evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1325. Although sales for pod-based products have continued to grow, cig-a-like sales have maintained their precipitous decline. In early 2016, “cig-a-likes represented more than 90 percent of total e-cigarette cartridge volume.” By January 2018, “this fraction had fallen to about 59 percent,” and shortly before Altria discontinued MarkTen in December 2018, cig-a-like cartridge volume had fallen “to less than 19 percent.” (RX1217 Murphy Report ¶ 80). Thereafter, it declined further still, to just five percent of all cartridge sales as of September 2020 (the end date of available data), with pods capturing the other 95 percent. (RX1217 Murphy Report ¶¶ 41, 62 n.143, Fig. IV.3; *see also* [REDACTED] [REDACTED] }).

### **Response to Finding No. 1325**

The first sentence of the proposed finding is unsupported and should be disregarded because it contains no citations to the record. The first sentence of the proposed finding is also vague because it does not define “precipitous” or include a time period. The proposed finding is also incomplete and misleading for the reasons stated in response to RPF 1284 and 1286, regarding post-transaction competition and harm after Altria’s exit.

The proposed finding is incomplete and misleading in how it describes the purported decline in cigalikes in terms of percentage of “total e-cigarette cartridge volume” rather than in raw sales volume. The proposed finding uses *percentage* of “total e-cigarette cartridge volume” in reporting cigalikes decline. However, a decline in volume percentage does not necessarily correspond with a decline in volume if the total market is growing, or in this case, if the volume of pod-based devices grew. (CCFF 64-65; *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)).

The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (*See* PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018)).

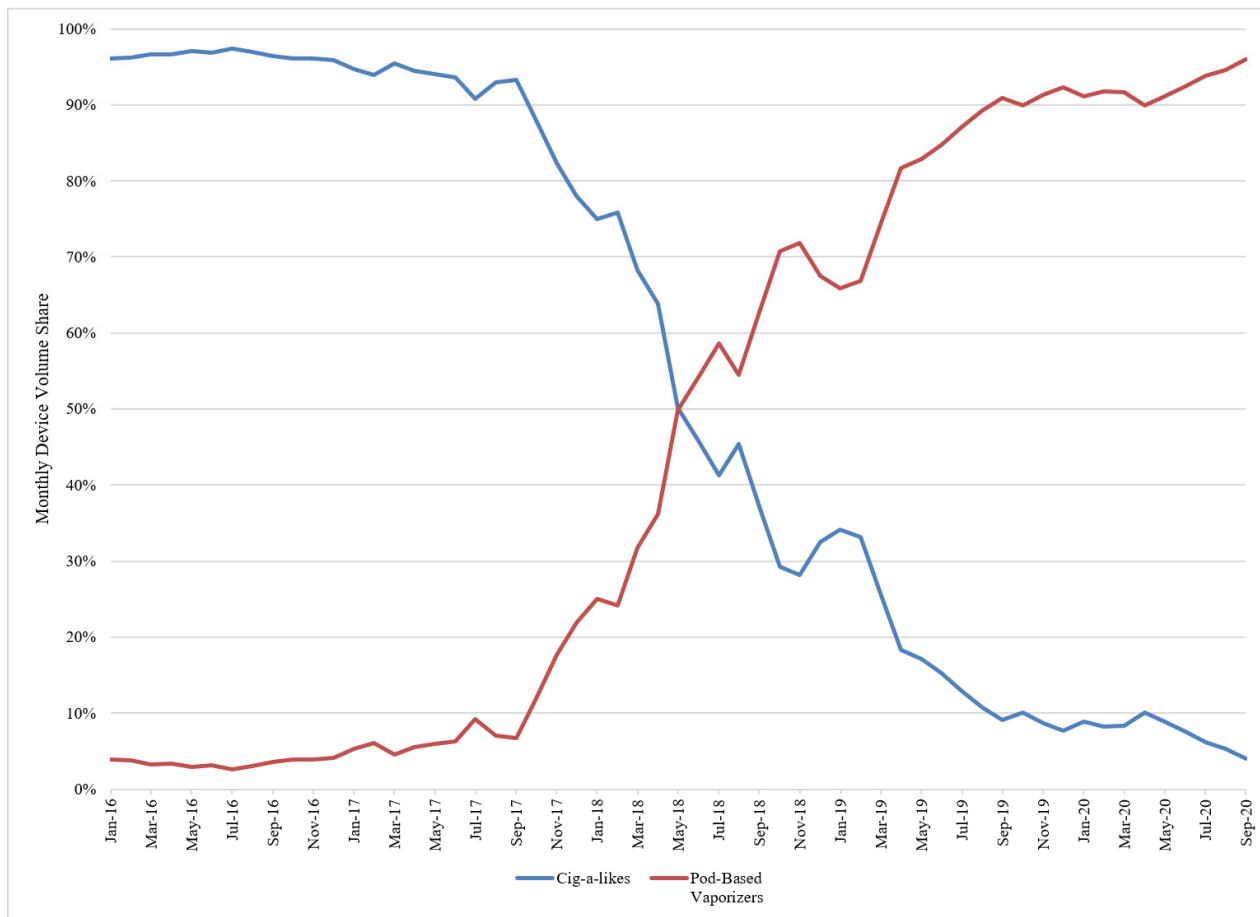
ITG and NJOY also continue to market and sell cigalike products today. (CCFF 1173, 1175-76; *see also* Response to RPF 1324).

Finally, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant

product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

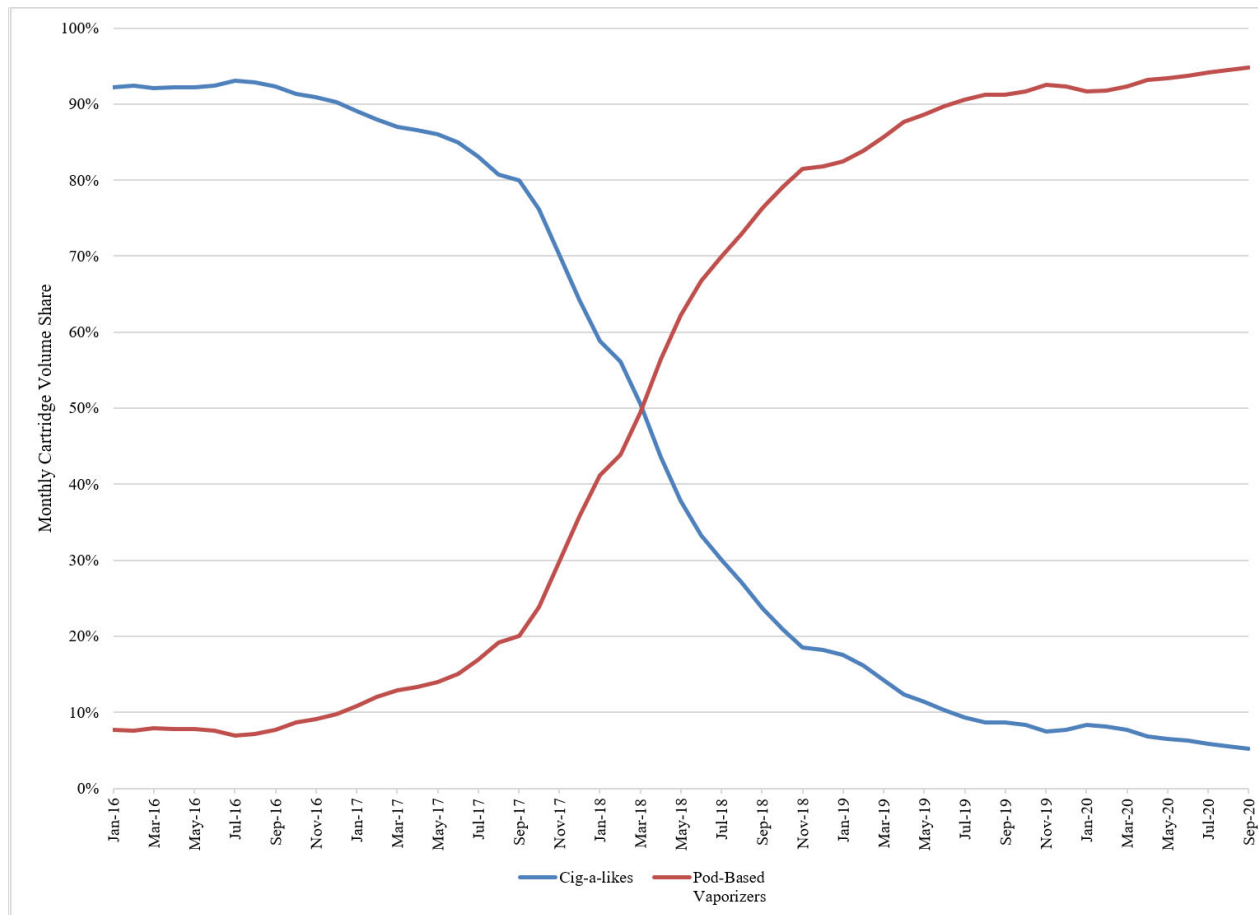
1326. This shift from cig-a-likes to pod-based products is summarized in the following charts depicting their relative volume shares for devices and cartridges, which were not disputed by Complaint Counsel or Dr. Rothman:

**Fig. IV.2: Cig-a-like versus Pod-based Vaporizer Device Volume Share, Altria IRI Projected Data**



(RX1217 Murphy Report ¶ 41, Fig. IV.2 (devices)).

**Fig. IV.3: Cig-a-like versus Pod-based Vaporizer Cartridge Volume Share, Altria IRI Projected Data**



(RX1217 Murphy Report ¶ 41, Fig. IV.3 (cartridges)).

**Response to Finding No. 1326**

The proposed finding is incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (See PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018)). [REDACTED]

[REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

The proposed finding is also incomplete and misleading in how it describes the purported decline of cigalikes. The proposed finding uses closed-system volume *share* in reporting cigalikes decline. However, a decline in volume share does not necessarily correspond with a decline in volume if the total market is growing, or in this case, if the volume of pod-based devices grew. (CCFF ¶¶ 64-65; *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)).

The proposed finding is also incorrect, incomplete, and misleading in its suggestion that Complaint Counsel and Dr. Rothman did not dispute the continued role of cigalikes in the closed-system e-cigarette market. (*See* CCFF ¶¶ 1173-76; PX5001 at 017 (¶ 27) (Rothman Rebuttal Report) (noting Dr. Rothman’s opinion that without the transaction “Altria was and likely would have been a significant e-cigarette competitor . . . and its ongoing product development initiatives were in closed-system e-cigarettes, including both cig-a-like and pod-based products”)).

Finally, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

1327. Sales data measured by units tell a similar story. The weekly sales volume of all cig-a-likes fell from approximately 3.6 million units at their peak in the summer of 2018 to

approximately 770,000 weekly units in September 2020. (RX1217 Murphy Report ¶ 115, Fig. VI.3; *see also* RX1217 Murphy Report ¶ 111 (“Sales of cig-a-like devices and cartridges peaked in 2018 2Q and have declined since that time; by early 2019 cig-a-like sales had fallen below levels from three years prior.”)).

### **Response to Finding No. 1327**

While Complaint Counsel does not disagree that cigalike sales declined between 2018 and 2020, the proposed finding is incomplete and misleading because it fails to recognize that, on December 7, 2018, Altria announced the withdrawal of its cigalikes from the market. (CCFF ¶ 989; *see also* CCFF ¶¶ 129-30, 134-37).

The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (*See* PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018, prior to Altria’s exit)). [REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

The proposed finding is further incomplete and misleading to the extent that it suggests that few consumers preferred cigalikes. Altria’s Quigley testified that “[Altria] had the cigalikes, which here were declining and were a smaller piece of the overall vapor business, but the point I was making is although they were declining, they were not going to zero. (Quigley (Altria) Tr. 2034 (testifying about PX1644 (Altria) at 010, which shows only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing

the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)).

Finally, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

1328. [REDACTED]

### **Response to Finding No. 1328**

The proposed finding is incomplete and misleading for the reasons set forth in response to RPF ¶ 1324. (*See* Response to RPF ¶ 1324). The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product: NJOY continues to sell a cigalike, the NJOY Daily. (CCFF ¶ 1173). [REDACTED]

[REDACTED] } ITG also continues to sell cigalikes. (CCFF ¶ 1175). ITG submitted PMTAs for its cigalike products (blu PLUS) in various nicotine strengths and flavors, and none of them contain nicotine salts, with ITG explaining in its PMTA that, “[t]he variety of available nicotine concentrations, including



zero nicotine, and flavors provides optionality to current adult smokers, aiding their transition from combustible cigarettes to blu PLUS+ ENDS.” (CCFF ¶ 1176).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

1329. [REDACTED] ; *see also* PX7037 Huckabee (Reynolds) Dep. at 26 (explaining that over the last two years the cig-a-like form factor products in Reynolds’s portfolio have declined because pods are now substantially more popular); [REDACTED]; Crozier (Sheetz) Tr. 1560 (agreeing that the e-vapor category “is now overwhelmingly pods”).

### **Response to Finding No. 1329**

The proposed finding is incomplete and misleading for the reasons set forth the response to RPF ¶ 1324. (*See* Response to RPF ¶ 1324). The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (*See* PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). [REDACTED]

[REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPFF ¶¶ 1388-414).

### **C. The Current Market Leaders All Contain Salts In Their E-Liquid Formulas**

1330. The distribution of market share among existing market players also reflects a competitive insight that JLI saw early and Altria recognized too late: the importance of nicotine salts.

#### **Response to Finding No. 1330**

The proposed finding is unsupported and should be disregarded because it contains no citations to the record and is conclusory, incomplete, and misleading. Cigalike and pod-based closed-system e-cigarettes may or may not contain nicotine salts. (CCFF ¶ 81). The proposed finding is incomplete and misleading to the extent that it suggests that Altria's products did not contain nicotine salts because it ignores evidence that prior to removing its products from the market, Altria sold a product with nicotine salts: MarkTen Bold. (CCFF ¶¶ 464-65). Also, prior to shutting down its e-cigarette business, Altria was doing R&D on nicotine salts, (CCFF ¶¶ 1542-51, 1582), including for MarkTen Elite 2.0. (CCFF ¶¶ 568, 1568). Altria was working to develop and commercialize new products, including Elite 2.0 with nicotine salts, and PMI's VEEV product

with MESH technology. (CCFF ¶ 1555). The proposed finding also ignores evidence that JLI included competitors with and without nicotine salts in its market analyses. (CCFF ¶ 321).

The proposed finding is incomplete and misleading to the extent that it suggests that nicotine salts were required for an e-cigarette product to be successful. The proposed finding ignores evidence that MarkTen Elite did not have nicotine salts, (CCFF ¶ 1164), and its sales were growing before Altria removed it from the market. (CCFF ¶¶ 1112-31). Other competitors continue to sell products closed-system e-cigarettes that do not have nicotine salts. (CCFF ¶¶ 1166-72). ITG has submitted a PMTA for a e-cigarette without nicotine salts. (CCFF ¶ 1166). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, Altria's products, had they continued to stay on the market, could have had advantages in the PMTA process because they did not contain nicotine salts, which did not raise the same youth vaping concerns as e-liquids with nicotine salts. (CCFF ¶¶ 1336-39). In fact, prior to exiting the closed-system e-cigarette market, Altria had a low-nicotine strength Elite product in development. (PX7014 (Baculis (Altria) Dep. at 175 (discussing PX1853 (Altria) at 12)).

1331. As Joseph O'Hara, who was responsible for monitoring competitive products at JLI, testified in response to a question from the Court, none of the market leaders today are sold without nicotine salts. (O'Hara (JLI) Tr. 636; *see also* RX0962 (Altria) at 003 (listing the acid ratios of the leading products)).

### **Response to Finding No. 1331**

The proposed finding is incomplete, misleading, contrary to the weight of the evidence, and unreliable. First, the Court's question was with regard to the current day—nearly three years after the transaction and the elimination of Altria's products from the market. The self-serving testimony from O'Hara is unreliable and the proposed finding ignores the evidence demonstrating,

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and Dr. Rothman’s opinion, that Altria would have continued to stay on the market absent the transaction, and that having Altria in the market would have resulted in a more competitive market. (See Response to RPF ¶ 1284). Altria had active R&D and plans to add salts to its next generation products and likely would have brought such a product to market. (See Response to RPF ¶ 1330). Furthermore, the proposed finding is incomplete and misleading to the extent that it suggests Altria did not have a product containing nicotine salts. In 2018, at the time of the transaction and Altria’s exit from the e-cigarette business, Altria sold a product with nicotine salts: MarkTen Bold. (CCFF ¶¶ 464-65).

The proposed finding is also incomplete and misleading because it ignores evidence demonstrating that there are or have been e-cigarettes sold by major suppliers without nicotine salts. MarkTen Elite did not have nicotine salts, (CCFF ¶ 1164), and its sales were growing before Altria removed it from the market. (CCFF ¶¶ 1112-31). Other competitors continue to sell products that do not have nicotine salts. (CCFF ¶¶ 1166-72). ITG has submitted a PMTA for a e-cigarette without nicotine salts. (CCFF ¶ 1166). { [REDACTED]

[REDACTED]

[REDACTED] }

1332. JUUL, Vuse Alto, NJOY Ace, and the ITG Brands *myblu* Intense cartridges all contain salts. (RX0962 (Altria) at 003 (listing nicotine-to-acid ratios of JUUL, Alto, and *myblu* Intense); Farrell (NJOY) Tr. 362 (confirming all NJOY products currently on the market, including Ace, contain nicotine salts)). JTI’s Logic Pro does not. (RX1739 (ITG Brands) at 019).

### **Response to Finding No. 1332**

The proposed finding is incomplete and misleading for the same reasons stated in response to RPF ¶ 1331. (See Response to RPF ¶ 1331). The last sentence of the proposed finding should be disregarded because it is vague and does not explain what JTI’s Logic Pro “does not” have.

1333. According to the IRI data analyzed by Professor Murphy, in September 2020, the device share for Vuse Alto was approximately 60 percent, JUUL had fallen to under 30 percent, NJOY Ace was at approximately ten percent, ITG's myBlu was near three percent, and JTI's Logic Pro—the only one of these devices without salts—was less than one percent. (See RX1217 Murphy Report ¶ 72, Fig. V.7; see also Murphy Tr. 3152-53 (specifying that Logic Pro was at 0.3 percent)).

### **Response to Finding No. 1333**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (See Order on Post-Trial Filings at 3, dated June 28, 2021). The proposed finding is also incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286, regarding post-transaction competition and harm after Altria exited, and in response to RPF ¶ 1331, regarding Altria's active R&D and plans without the transaction to add salts to Elite 2.0 and competitors who currently sell products without nicotine salts. (See Responses to RPF ¶¶ 1284, 1286, 1331).

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests the presence of nicotine salts in an e-cigarettes causes it to have higher sales or higher market share. In paragraph 72 of his report, cited in support for this proposed finding, Dr. Murphy did not conduct a regression analysis or any type of econometric analysis to demonstrate that nicotine salts impact sales. (See RX1217 at 056-57 (¶ 72, Fig. V.7) (Murphy Report) (Figure V.7 is simply a plot of pod-based vaporizer device sales shares by brand)).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that all e-vapor customers desire a product with nicotine salts or that nicotine salts are the only means to provide a satisfying e-vapor experience. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Indeed, closed-system e-cigarette products without nicotine salts are still marketed today. (See CCFF ¶¶ 1166, 1176).

1334. Other witnesses confirmed the competitive significance of salts. { [REDACTED] ; see also RX1217 Murphy Report ¶ 133 (“Vuse Alto and NJOY Ace, which saw the highest pick-up among consumers also used salts, similar to JLI.”)).

**Response to Finding No. 1334**

The proposed finding is incomplete and misleading for the reasons stated in response to RPFF ¶¶ 1284 and 1286, regarding post-transaction competition and harm after Altria exited, and in response to RPFF ¶ 1331, regarding Altria’s active R&D and plans without the transaction to add salts to Elite 2.0 and competitors who currently sell products without nicotine salts. (See Responses to RPFF ¶¶ 1284, 1286, 1331).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that all e-vapor customers desire a product with nicotine salts or that nicotine salts are the only means to provide a satisfying e-vapor experience. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Indeed,

closed-system e-cigarette products without nicotine salts are still marketed today. (See CCFF ¶¶ 1166, 1176).

Finally, the proposed finding should be disregarded to the extent that it relies on RX1217 to establish a purported “fact.” (See Order on Post-Trial Filings at 3, dated June 28, 2021). Paragraph 133 of Dr. Murphy’s report, which is cited as support, contains no citations to the record to support his claims in the paragraph about the success of products with salts. (RX1217 at 094 (¶ 133) (Murphy Report)).

1335. [REDACTED]

**Response to Finding No. 1335**

The proposed finding is incomplete, misleading, and mischaracterizes Huckabee’s and Farrell’s testimony. The proposed finding is also incomplete, and misleading to the extent that it suggests that all e-vapor customers desire a product with nicotine salts or that nicotine salts are the only means to provide a satisfying e-vapor experience. [REDACTED]

[REDACTED]

[REDACTED] } Indeed, closed-system e-cigarette products without nicotine salts are still marketed today. (See CCFF ¶¶ 1166, 1176).

1336. [REDACTED]

[REDACTED]; *see also* PX3216 (NJOY) at 003 (similar)).

### **Response to Finding No. 1336**

The proposed finding is incomplete and misleading to the extent that it suggests that all e-vapor customers desire a product with nicotine salts or that nicotine salts are the only means to provide a satisfying e-vapor experience. (*See* Response to RPF ¶ 1335 (regarding [REDACTED] [REDACTED] [REDACTED])). The proposed finding is also incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286, regarding post-transaction competition and harm after Altria exited, and in response to RPF ¶ 1331, regarding Altria’s active R&D and plans without the transaction to add salts to Elite 2.0 and competitors who currently sell products without nicotine salts. (*See* Responses to RPF ¶¶ 1284, 1286).

1337. And, as JLI’s O’Hara testified, “these days customers in this market understand what nicotine salts are and understand them to be a more satisfying nicotine formulation.” (O’Hara (JLI) Tr. 635-36; *see also* Farrell (NJOY) Tr. 362 (observing that *myblu* packaging and its website advertise that the product contains nicotine salts)).

### **Response to Finding No. 1337**

The proposed finding should be disregarded because it relies on the self-serving testimony of a JLI executive and ignores testimony regarding the many factors other than nicotine salts that contribute to a satisfying e-vapor experience. (*See* Response to RPF ¶ 1335) [REDACTED] [REDACTED] [REDACTED] } The proposed finding is also incomplete and misleading for the reasons stated in response to RPF ¶¶ 1284 and 1286, regarding post-transaction competition and harm after Altria exited, and in response to RPF ¶ 1331, regarding Altria’s active R&D and plans without the transaction to add salts to Elite 2.0 and competitors who currently sell products without nicotine salts. (*See* Responses to RPF ¶¶ 1284, 1286, 1331).



### **XIII. ACTUAL EVIDENCE SHOWS THAT THE E-CIGARETTE MARKETPLACE IS INTENSELY COMPETITIVE**

1338. As Respondents' expert, Professor Murphy, details, there is no evidence that the e-cigarette marketplace has become less competitive since Altria discontinued its e-vapor products. (RX1217 Murphy Report ¶ 61 ("My review of the direct evidence in this case finds no indication that the market has become less competitive since Altria discontinued its e-cigarette product lines."); Murphy Tr. 3189 (similar)).

#### **Response to Finding No. 1338**

The proposed finding should be disregarded because it relies solely on expert testimony ("My review of the direct evidence in this case finds no indication . . .") to establish a purported "fact." (*See* Order on Post-Trial Filings at 3, dated June 28, 2021).

The proposed finding is incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria's exit from the closed-system e-cigarette market has harmed competition. (CCFF ¶¶ 1408-730).

The proposed finding is also incomplete and misleading to the extent that it suggests that post-transaction market conditions show that the closed-system e-cigarette market was not harmed by Altria's exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the "actual world" with the "but-for world," estimating the loss of consumer surplus from Altria's exit. (CCFF ¶¶ 1416, 1525; PX5001 at 047 (¶ 86, n.207) (Rothman Rebuttal Report)). Assuming that Altria would have maintained a 10 percent share of the closed-system e-cigarette market, Dr. Rothman calculated that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (CCFF ¶ 1525).

The proposed finding is further incomplete and misleading because Dr. Murphy’s “before-and-after” analyses of market conditions ignore confounding factors that may have influenced the prices and sales of e-cigarettes, including negative press surrounding vaping, changes in the minimum age to purchase nicotine, and the FDA’s flavor ban. (CCFF ¶¶ 2099-111). Moreover, Dr. Murphy did not attempt to calculate what the average price of pod-based cartridges would have been had Altria stayed in the market. (CCFF ¶ 2106).

1339. Instead, all of the evidence—from the assessment of industry participants, (*see infra* ¶ 1340), to the post-transaction market data, (RX1217 Murphy Report ¶¶ 61-76; Murphy Tr. 3102; *see also infra* Part XIII.A-C)—indicates that the e-vapor marketplace is intensely competitive.

### **Response to Finding No. 1339**

The proposed finding is conclusory, unsupported, incomplete, and misleading. The proposed finding is unsupported, incomplete, and misleading to the extent that it relies on the testimony of industry participants, for the reasons cited below in response to RPF ¶ 1340. (*See* Response to RPF ¶ 1340). The proposed finding is also incomplete and misleading to the extent that it refers to post-transaction market data, for the reasons cited below in response to RPF ¶¶ 1345-76. (*See* Responses to RPF ¶¶ 1345-76). Finally, the proposed finding is incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria’s exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730).

1340. Each of the current leading e-vapor manufacturers that were deposed or testified in this case acknowledged that the industry bears the hallmarks of a competitive market:

(a). **Altria:** Following the investment, there was “significant competitive activity in the U.S.,” which prompted JLI to “look at running promotions and things of that nature in the marketplace to lower the price.” (Gifford (Altria) Tr. 2848).

(b). **JLI:** “Competition has steadily increased” since December 2018. (Robbins (JLI) Tr. 3256). The e-vapor business has “become exceedingly competitive” and “there has been a lot [of] price competition.” (Pritzker (JLI) Tr. 880; *see also* PX7025

Burns (JLI) Dep. at 232 (“The market actually accelerated in terms of level of competition throughout 2019 . . .”).

- (c). **NJOY:** [REDACTED] } That is evident from the “deals” the leading brands are “offering to customers,” their competition for the amount and visibility of shelf space, and “a whole number of other dynamics that [Farrell] consider[s] to characterize intense competition.” (PX7029 Farrell (NJOY) Dep. at 142-43).
- (d). **Reynolds:** There has been [REDACTED], as well as “a great deal of movement across -- across brands and . . . price points.” (PX7037 Huckabee (JLI) Dep. at 85).
- (e). **ITG Brands:** There are a “lot[] of brands” engaging in “pricing action,” resulting in a loss of share from JUUL and market gains by other competitors. (PX7012 Eldridge (ITG Brands) Dep. at 109-11).

#### **Response to Finding No. 1340**

The proposed finding is vague because it relies on the phrase “hallmarks of a competitive market” without defining what that phrase means. The proposed finding is also vague because it does not identify the time frame to which the introductory statement of the finding applies. The proposed finding is further vague in that it is unclear from the cited testimony whether the manufacturers were comparing competition before and after Altria’s exit or for some other time period. The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria’s exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730).

Part (a): The proposed finding is vague, unsupported, incomplete, and misleading to the extent that it suggests that the closed-system e-cigarette market became more competitive after Altria’s investment in JLI. The cited testimony makes an observation about competitive activity, but does not compare the competition to the time Altria was selling e-vapor products. (Gifford (Altria) Tr. 2848).

Part (b): Complaint Counsel has no specific response to this subpart beyond the overall response to this proposed finding presented above.

Part (c): The proposed finding is unsupported, incomplete, and misleading to the extent that it suggests that the closed-system e-cigarette market became more competitive after Altria's investment in JLI. In fact, the cited Farrell testimony specifically mentions the competition that Altria brought to the marketplace before it exited. (PX7029 Farrell (NJOY) Dep. at 142-43).

Part (d): The proposed finding is vague, unsupported, incomplete, and misleading to the extent that it suggests that the closed-system e-cigarette market became more competitive after Altria's investment in JLI. The cited testimony makes an observation about competitive activity, but does not compare the competition to the time Altria was selling e-vapor products.

Part (e): The proposed finding is vague, unsupported, incomplete, and misleading to the extent that it suggests that the closed-system e-cigarette market became more competitive after Altria's investment in JLI. The cited testimony makes an observation about competitive activity, but does not compare the competition to the time Altria was selling e-vapor products.

1341. The retailers also view the marketplace as highly competitive:

- (a). **Sheetz:** The e-vapor marketplace is “increasingly competitive since Altria removed its vaping products.” (Crozier (Sheetz) Tr. 1548).
- (b). **7-Eleven:** The market today is “competitive” and there is no “reason to think that the category has become less competitive than it was in 2018.” (PX7044 Stout (7-Eleven) Dep. at 15, 33).
- (c). **Wawa:** Category leadership has been dynamic, manufacturers have increased promotional activity, the market for shelf space remains competitive, and NJOY is now a leading supplier in Wawa, alongside JUUL. (PX8006 Kloss (Wawa) Decl. at 003-05 ¶¶ 13-15, 22; *see also* {REDACTED}).

### **Response to Finding No. 1341**

The proposed finding is incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the

transaction and Altria's exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730). The initial clause of the proposed finding is also vague in that it uses the term "marketplace" without defining what products are included in the marketplace.

Part (a): Complaint counsel has no specific response to this subpart other than the response to the proposed finding as a whole.

Part (b) The proposed finding is incomplete and misleading to the extent that it suggests that the closed-system e-cigarette market became more competitive after the transaction and Altria's exit. The cited testimony does not refer to Altria's exit. (PX7044 (Stout (7-Eleven) Dep. at 15, 33)).

Part (c): The proposed finding is incomplete and misleading to the extent that it suggests that the closed-system e-cigarette market became more competitive after Altria's investment in JLI. The cited exhibit explicitly refers to the competition that Altria brought to the market before the transaction and Altria's exit. (CCFF ¶ 1461 (Altria competed for shelf space); PX8006 at 004 (¶ 15) (Kloss (Wawa), Decl.) (mentioning Altria's promotional activity, including the discounting of its e-cigarette products)).

1342. Empirical data confirms these observations. According to nearly two years of post-2018 market data analyzed by Professor Murphy, "(i) overall prices are lower; (ii) overall output is higher; [and] (iii) market concentration is lower," with JLI having "lost share to multiple competitors." (RX1217 Murphy Report ¶ 61; *see also* Murphy Tr. 3142-43, 3146).

### **Response to Finding No. 1342**

The first sentence of the proposed finding is vague because it does not define the "observations" to which the sentence refers. Moreover, the first sentence of the proposed finding is unsupported by any evidence. The second sentence of the proposed finding is also unsupported because Paragraph 61 of Dr. Murphy's report contains only opinions and no citations to any data

or other evidence to support Dr. Murphy's opinions in the paragraph. (RX1217 at 046 (¶ 61) (Murphy Report)).

The proposed finding is incomplete and misleading to the extent that it suggests that Dr. Murphy conducted econometric analysis to demonstrate the effects of the transaction. Dr. Murphy's "before-and-after" analyses of market conditions ignore confounding factors that may have influenced the prices and sales of e-cigarettes, including negative press surrounding vaping, changes in the minimum age to purchase nicotine, and the FDA's flavor ban. (CCFF ¶¶ 2099-111). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (See CCFF ¶¶ 2094-124).

The proposed finding is also incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria's exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730). The proposed finding is also incomplete and misleading to the extent that it suggests that post-transaction marketplace conditions demonstrate that the closed-system e-cigarette market was not harmed by Altria's exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the "actual world" with the "but-for world," estimating the loss of consumer surplus from Altria's exit. (CCFF ¶¶ 1416, 1525; PX5001 at 047 (¶ 86, n.207) (Rothman Rebuttal Report)). Assuming that Altria would have maintained a 10 percent share of the closed-system e-cigarette market, Dr. Rothman calculated that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (CCFF ¶ 1525).

1343. Complaint Counsel does not dispute these observations. To the contrary, its expert, Dr. Rothman, agrees that “overall prices are lower, overall output is higher, [and] market concentration is lower.” (PX7046 Rothman Dep. at 28; *see also* PX7048 Rothman Trial Dep. at 96-97 (similar)).

#### **Response to Finding No. 1343**

The first sentence of the proposed finding is vague in that it does not identify what observations Complaint Counsel allegedly does not dispute. The first sentence of the proposed finding is also unsupported. Complaint Counsel does not disagree with the second sentence of the proposed finding, but adds that the proposed finding is incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria’s exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730).

The proposed finding is incomplete and misleading to the extent that it suggests that current marketplace conditions demonstrate that the closed-system e-cigarette market was not harmed by Altria’s exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPPF ¶ 1338).

1344. This evidence, which is discussed in detail below, provides “strong and consistent evidence that competition was *not* diminished and consumers have *not* been adversely affected.” (RX1217 Murphy Report ¶ 21 (emphasis in original)).

#### **Response to Finding No. 1344**

The proposed finding is vague in that it does not identify to what evidence it is referring. The proposed finding references “evidence, which is discussed in detail below,” but does not specifically identify the paragraphs of Respondents’ proposed findings to which it is referring. The proposed finding is also unsupported to the extent that it is relying solely on Dr. Murphy’s report. Paragraph 21 of Dr. Murphy’s report does not contain a single citation to data or other evidence that Dr. Murphy relied upon for his opinions expressed in that paragraph. (RX1217 at 013 (¶ 21) (Murphy Report)).

The proposed finding is incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria’s exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730). The proposed finding is incomplete and misleading to the extent that it suggests that post-transaction market conditions demonstrate that the transaction did not harm competition. Dr. Murphy’s “before-and-after” analyses of market conditions ignore confounding factors that may have influenced the prices and sales of e-cigarettes, including negative press surrounding vaping, changes in the minimum age to purchase nicotine, and the FDA’s flavor ban. (CCFF ¶¶ 2099-111). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (*See* CCFF ¶¶ 2094-124).

The proposed finding is also incomplete and misleading to the extent that it suggests that current marketplace conditions demonstrate that the closed-system e-cigarette market was not harmed by Altria’s exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman



used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338).

**A. Prices Decreased, Driven By Aggressive Third-Party Discounting**

1345. “[S]ince 2018, the market has gotten significantly more competitive on price,” with many companies “offering significantly discounted prices on devices as well as pods.” (PX7033 O’Hara (JLI) Dep. at 122; *see also* Pritzker (JLI) Tr. 880 (similar)).

**Response to Finding No. 1345**

The proposed finding is vague, incomplete, and misleading. The proposed finding is incomplete because in testimony immediately before the cited testimony, JLI’s O’Hara testified about a JLI document that discussed competition from Altria’s MarkTen Elite and discounting by Elite on its pod products. (PX7033 O’Hara (JLI) Dep. at 121 (discussing PX2269 (JLI) at 002)). The proposed finding is incomplete and misleading to the extent that it suggests that Altria was not a significant competitor in e-cigarettes before it exited the market, which is contrary to the weight of evidence. (CCFF ¶¶ 119-52, 409-531, 1754).

The proposed finding is vague and incomplete to the extent that it relies on the testimony of JLI’s Pritzker. Pritzker’s cited testimony does not reference which companies compete with JLI. (Pritzker (JLI) Tr. 880). The proposed finding is also incomplete and misleading to the extent that it suggests that there was no competitive harm from this transaction. There is ample evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including loss of price and non-price competition and the elimination of products that appealed to consumers and future development by Altria. (CCFF ¶¶ 1408-730).

1346. “[A]ggressive competition among the various producers of pod-based products, in particular, pricing by NJOY as well as Vuse Alto over this period of time” has led to significant price decreases. (PX7047 Murphy Dep. at 203).

**Response to Finding No. 1346**

The proposed finding is vague, unsupported, incomplete, and misleading. The proposed finding is vague and unsupported to the extent that it uses the terms “aggressive competition,” “over this period of time,” and “significant price decreases.” The cited testimony does not describe in enough specificity what “aggressive competition” Dr. Murphy is referring to such that his claims about competition can be appropriately vetted. The cited testimony also does not specify what period of time Dr. Murphy is testifying about. Furthermore, the cited testimony does not define what Dr. Murphy means by “significant” price decreases or provide the data to support his claim.

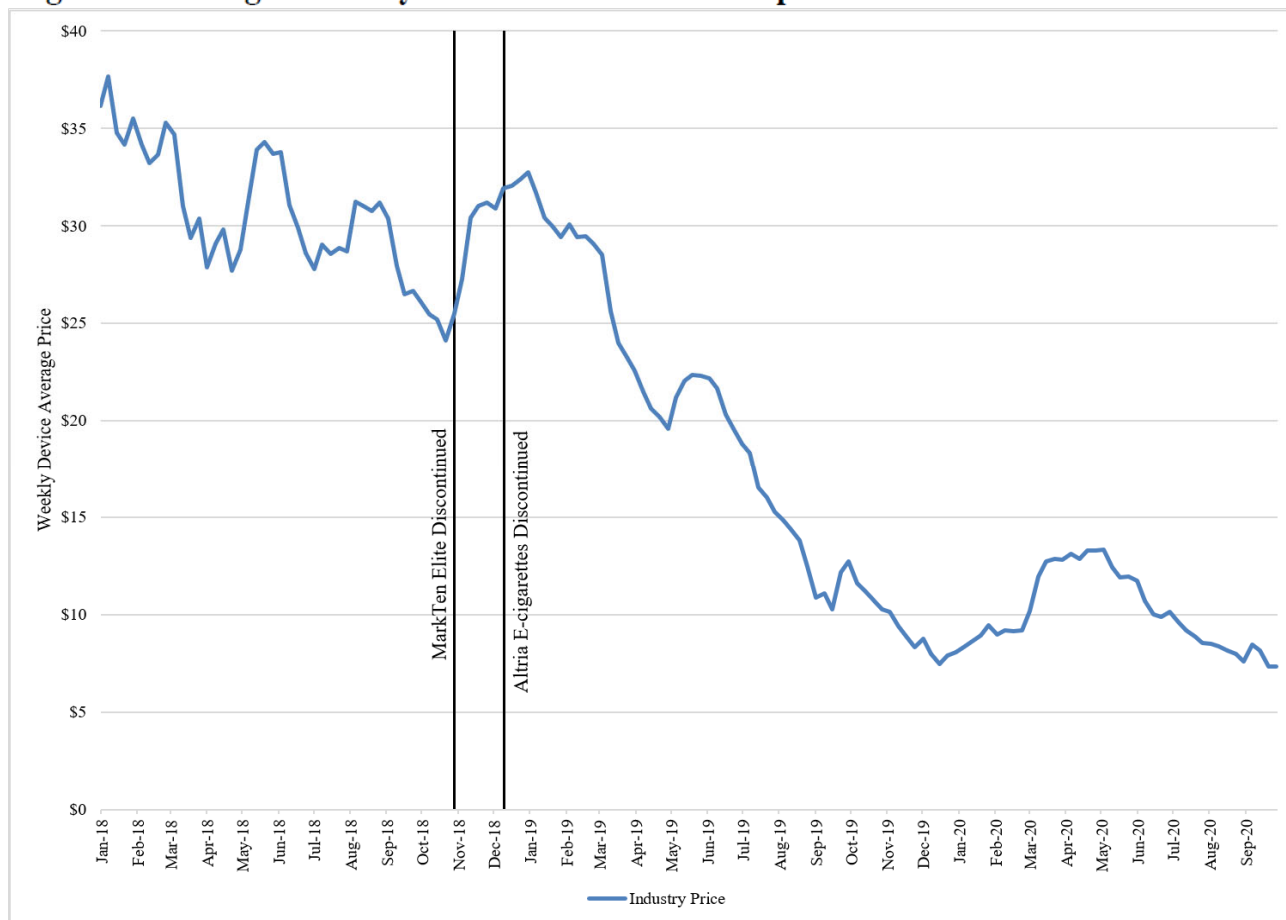
The proposed finding is incomplete and misleading to the extent that it is suggesting that Dr. Murphy performed econometric analysis to demonstrate that competition and discounting rather than other factors led to the alleged price decreases in e-cigarette products. As to pod-based cartridges, Dr. Murphy admitted at trial that he did not perform any econometric analysis or attribution analysis of why prices for pod-based cartridges were declining after Altria’s exit from the e-cigarette business. (CCFF ¶¶ 2099, 2104). Dr. Murphy also admitted that he did not analyze the effects of other factors, including the negative press surrounding vaping, the impact of changes in the minimum age to purchase nicotine products, and the FDA’s flavor ban on the price of pod-based cartridges. (CCFF ¶¶ 2100-02). Dr. Murphy also conceded at trial that the pricing data he presents in Figure V.2 of his report does not rule out the possibility that pod-based cartridge prices would have *fallen further* if Altria had not discontinued its e-cigarette products. (CCFF ¶ 2103). As to pod-based devices, Dr. Murphy admitted at trial that he did not run any regressions to address the question of why pod-based device prices fell from September of 2018 to September 2020. (CCFF ¶ 2107). Dr. Murphy also admitted that he did not perform econometric analysis of the effects of other factors, including the negative press surrounding vaping, and the impact of state

bans on non-tobacco and non-menthol flavored e-cigarettes, on the price for pod-based devices. (CCFF ¶¶ 2108-09; *see also* CCFF ¶¶ 2094-98).

The proposed finding is also incomplete and misleading to the extent that it suggests that post-transaction marketplace conditions demonstrate that the closed-system e-cigarette market was not harmed by Altria's exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the "actual world" with the "but-for world," calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338).

1347. All told, the average price of a pod-based *device* "fell from about \$27 in September 2018 to around \$8 in September 2020, representing a roughly 72 percent price reduction," (RX1217 Murphy Report ¶ 62; *see also* Murphy Tr. 3146-47 (similar)), as shown in the chart below:

**Fig. V.1: Average Industry Price for Pod-Based Vaporizer Devices**



(RX1217 Murphy Report ¶ 62, Fig. V.1).

**Response to Finding No. 1347**

The proposed finding is vague, unsupported, incomplete, and misleading to the extent that it suggests that pod-based device prices fell due to an increase in competition or because of Altria’s exit. Substantial evidence demonstrates that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also incomplete and misleading to the extent that it suggests that Dr. Murphy performed econometric analysis to demonstrate that competition and discounting

rather than other factors led to the alleged price decreases in e-cigarette products. Dr. Murphy admitted at trial that he did not run any regressions to address the question of why pod-based device prices fell from September of 2018 to September 2020. (CCFF ¶ 2107). Dr. Murphy also admitted that he did not perform econometric analysis of the effects of other factors, including the negative press surrounding vaping, and the impact of state bans on non-tobacco and non-menthol flavored e-cigarettes, on the price for pod-based devices. (CCFF ¶¶ 2108-09).

Moreover, the proposed finding is incomplete and misleading because Dr. Murphy does not analyze the average industry price for cigalike devices in his report. (CCFF ¶ 2096). Dr. Murphy admitted that Figure V.1 from his report does not include cigalike device prices. (CCFF ¶ 2096). Figure V.1 of Dr. Murphy's report simply plots the average price over time for pod-based devices. (CCFF ¶ 2096). Until late-2018, Altria sold MarkTen cigalikes and Green Smoke cigalikes. (CCFF ¶ 21). Altria's MarkTen cigalikes were a market leader in the closed-system e-cigarette market with their volume growth in 2017 far outpacing other cigalike brands. (CCFF ¶ 1096). When Dr. Murphy estimated harm in a hypothetical "pod-only" product market, he ignored the harm caused by Altria's withdrawal of its cigalike products. (CCFF ¶ 1526). Dr. Rothman estimated that the harm associated with Altria's withdrawal of its cigalike products is about \$25.5 million. (CCFF ¶ 1526). Thus, the proposed finding is incomplete to the extent that it suggests that prices for e-cigarettes, as a whole, were decreasing because Dr. Murphy's analysis does not include cigalike products.

Finally, the proposed finding is incomplete and misleading because Figure V.1 of Dr. Murphy's report shows that the average industry price for pod-based devices was decreasing before Elite exited the market in October 2018. (CCFF ¶ 2097).

1348. In addition, the average price of a *JUUL device* has decreased approximately 45 percent, from approximately \$35 in December 2018 to approximately \$19 in September 2020.

(Murphy Tr. 3147-48). And the promotions that JLI has run in the wake of Altria's exit have been deeper than the seasonal promotion it ran while MarkTen products were on the market. (RX1217 Murphy Report ¶ 84).

### **Response to Finding No. 1348**

The first sentence of the proposed finding is vague, unsupported, incomplete, and misleading to the extent that it suggests that JUUL device prices fell due to an increase in competition from December 2018 to September 2020. The proposed finding is incomplete and misleading to the extent that it suggests that Dr. Murphy performed econometric analysis to demonstrate that competition and discounting rather than other factors led to the alleged price decreases in devices. Dr. Murphy admitted at trial that he did not run any regressions to address the question of why pod-based device prices fell from September of 2018 to September 2020. (CCFF ¶ 2107). Dr. Murphy also admitted that he did not perform econometric analysis of the effects of other factors, including the negative press surrounding vaping, and the impact of state bans on non-tobacco and non-menthol flavored e-cigarettes, on the price for pod-based devices. (CCFF ¶¶ 2108-09).

The proposed finding is also incomplete and misleading in that Dr. Murphy does not analyze the average industry price for cigalike devices in his report. (CCFF ¶ 2096). Until late-2018, Altria sold MarkTen cigalikes and Green Smoke cigalikes. (CCFF ¶ 21). Altria's MarkTen cigalikes were a market leader in the closed-system e-cigarette market with their volume growth in 2017 far outpacing other cigalike brands. (CCFF ¶ 1096). When Dr. Murphy estimated harm in a hypothetical "pod-only" product market, he ignored the harm from Altria's withdrawal of its cigalike products. (CCFF ¶ 1526). Dr. Rothman estimated that the harm associated with Altria's withdrawal of its cigalike products is about \$25.5 million. (CCFF ¶ 1526). Thus, the proposed finding is incomplete to the extent that it suggests that prices for e-cigarettes, as whole, were decreasing because Dr. Murphy's analysis does not include cigalike products.

The second sentence of the proposed finding is vague, unsupported, incomplete, and misleading to the extent that it suggests that Altria's exit caused JLI to run deeper promotions or provide larger discounts. Dr. Murphy admitted at trial that he did not run any regressions to address the question of why pod-based device prices fell from September of 2018 to September 2020. (CCFF ¶ 2107). Dr. Murphy also admitted that he did not perform econometric analysis of the effects of other factors, including the negative press surrounding vaping, and the impact of state bans on non-tobacco and non-menthol flavored e-cigarettes, on the price for pod-based devices. (CCFF ¶¶ 2108-09).

Finally, the proposed finding as a whole is incomplete and misleading to the extent that it suggests that there was no competitive harm from this transaction. The weight of the evidence demonstrates that the transaction and Altria's exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730).

1349. In addition, the average price of pod *cartridges* fell by over 15 percent during the same period. (Murphy Tr. 3146; RX1217 Murphy Report ¶ 63).

#### **Response to Finding No. 1349**

The proposed finding is vague in that it does not identify the time period during which Dr. Murphy claims that the average price of pod cartridges fell by over 15 percent. The proposed finding is also vague, unsupported, incomplete, and misleading to the extent that it suggests that pod cartridge prices fell due to an increase in competition or because of Altria's exit, and to the extent that it is suggesting that Dr. Murphy performed econometric analysis to demonstrate that competition rather than other factors led to the alleged price decreases in pod cartridges. Dr. Murphy admitted at trial that he did not perform any econometric analysis or attribution analysis of why prices for pod-based cartridges were declining after Altria's exit from the e-cigarette business. (CCFF ¶¶ 2099, 2104). Dr. Murphy also admitted that he did not analyze the effects of

other factors, including the negative press surrounding vaping, the impact of changes in the minimum age to purchase nicotine products, and the FDA's flavor ban, on the price of pod-based cartridges. (CCFF ¶¶ 2100-02). Dr. Murphy also conceded at trial that the cartridge pricing data he presents in Figure V.2 of his report does not rule out the possibility that pod-based cartridge prices would have *fallen further* if Altria had not discontinued its e-cigarette products. (CCFF ¶ 2103). Finally, the proposed finding is incomplete and misleading to the extent that it suggests that there was no competitive harm from this transaction. The weight of the evidence demonstrates that the transaction and Altria's exit from e-cigarettes has harmed competition. (CCFF ¶¶ 1408-730).

1350. These sharp declines in price were not simply the continuation of a trend that existed prior to Altria's exit. Rather, as explained above, (*see supra* Part XII.A.1), NJOY introduced its 99-cent price promotion for NJOY Ace—which led to cascading discounts across the pod segment—*after* Altria withdrew its products. (*See* PX7037 Huckabee (Reynolds) Dep. at 67 (discussing internal Reynolds document concluding that a “[q]uick, strong response to NJOY ACE 99 cent traction was necessary to secure [Vuse] Alto's market potential”); RX1217 Murphy Report ¶ 91 (“NJOY and Vuse's aggressive pricing . . . leads to JLI lowering its device prices.”); Murphy Tr. 3193 (similar)).

### **Response to Finding No. 1350**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The first sentence of the proposed finding is also vague because it does not identify the specific products or time period to which it refers in the phrase “These sharp declines in price.”

The second sentence of the proposed finding is unsupported, incomplete, and misleading to the extent that it relies on the cited Huckabee deposition testimony. Huckabee simply agreed that the document he was shown contains the statement “[q]uick, strong response to NJOY ACE 99 cent traction was necessary to secure [Vuse] Alto's market potential.” (PX7037 (Huckabee (Reynolds), Dep. at 67)). Indeed, Huckabee testified that he did not know how NJOY's 99-cent promotion would impact the sales of Vuse Alto. (PX7037 (Huckabee (Reynolds), Dep. at 69))



(Huckabee was asked if a “Quick strong response to NJOY Ace 99 cent traction was necessary to secure Alto’s market potential,” to which he answered “that is the opinion of the vapor team as to . . . [what] the right recommendation should be for the brand. I don’t know how . . . the various share impacts would have played out in any scenario.”).

Furthermore, the second sentence of the proposed finding is unsupported, incomplete, and misleading to the extent that it relies on paragraph 91 of the Murphy report and Dr. Murphy’s cited trial testimony. Paragraph 91 of the Murphy report—and Figure V.11 contained therein—fail to cite any data sources or include definitions of the data used. (RX1217 at 070-71 (¶ 91) (Murphy Report)). It is therefore unclear what measure of device price is being reported in paragraph 91 of Dr. Murphy’s report; it is unclear, for example, if the JLI data relied on for this proposed finding actually capture any discounting or responses to competition by JUUL, or if the data simply reflects list prices. Moreover, Dr. Murphy admitted at trial that he did not run any regressions to address the question of why pod-based device prices fell from September of 2018 to September 2020. (CCFF ¶ 2107). Dr. Murphy also admitted that he did not perform econometric analysis of the effects of other factors, including the negative press surrounding vaping, and the impact of state bans on non-tobacco and non-menthol flavored e-cigarettes, on the price for pod-based devices. (CCFF ¶¶ 2108-09).

The proposed finding is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence showing that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In

the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730; *see also* Responses to RPF ¶¶ 1287-98).

1351. The causal effects of NJOY's aggressive promotion are also apparent from the market data, which shows that device prices have fallen faster *post*-transaction than they did before Altria's discontinuation of its e-vapor products, and cartridge prices only began their downward trend after Altria had exited the market. (Murphy Tr. 3147; RX1217 Murphy Report ¶¶ 62-63, Figs. V.1, V.2).

### **Response to Finding No. 1351**

The proposed finding is vague, unsupported, incomplete, and misleading because Dr. Murphy did not engage in econometric work to demonstrate a causal effect of the promotion on prices. (CCFF ¶¶ 2099-111). Other factors may have been the cause of the lower prices in the marketplace, including demand factors such as negative press and the FDA flavor ban. Dr. Murphy's “before-and-after” analyses of market conditions ignore confounding factors that may have influenced the prices and sales of e-cigarettes, including negative press surrounding vaping, changes in the minimum age to purchase nicotine, and the FDA's flavor ban. (CCFF ¶¶ 2099-111). The proposed finding is also vague in that it is not specific as to the NJOY promotion to which it refers.

The proposed finding is also incomplete and misleading because Dr. Murphy does not analyze the average industry price for cigalike devices in his report. (CCFF ¶¶ 2096, 2098). Dr. Murphy admitted that Figures V.1 and V.2 of his report, which are cited as support for this finding,

do not include cigalike device prices. (CCFF ¶¶ 2096, 2098). Until late-2018, Altria sold MarkTen cigalikes and Green Smoke cigalikes. (CCFF ¶ 21). Altria’s MarkTen cigalikes were a market leader in the closed-system e-cigarette market with their volume growth in 2017 far outpacing other cigalike brands. (CCFF ¶ 1096). When Dr. Murphy estimated harm in a hypothetical “pod-only” product market, he ignored the harm from Altria’s withdrawal of its cigalike products. (CCFF ¶ 1526). Dr. Rothman estimated that the harm associated with Altria’s withdrawal of its cigalike products is about \$25.5 million. (CCFF ¶ 1526). Thus, the proposed finding is incomplete to the extent that it suggests that prices for e-cigarettes, as whole, were decreasing because Dr. Murphy’s analysis does not include cigalike products.

Finally, the proposed finding is further incomplete and misleading because Dr. Murphy concedes that the pricing data presented in Figure V.2 of his report, which is cited as support for this proposed finding, does not rule out the possibility that pod-based cartridge prices would have *fallen further* if Altria had not discontinued its e-cigarette products. (CCFF ¶ 2103).

1352. Although Dr. Rothman admits that average prices are lower in the e-vapor category since December 2018, (PX7048 Rothman Trial Dep. at 96), he contends that this decrease is irrelevant because “JLI likely would have offered lower prices and would have had a stronger incentive to offer lower prices” if Altria had remained in the market. (PX7046 Rothman Dep. at 96-97).

### **Response to Finding No. 1352**

Complaint Counsel has no specific response.

1353. This contention, which Dr. Rothman cannot tie to any analysis in his report, (PX7046 Rothman Dep. at 97-98), is baseless. Indeed, Dr. Rothman admits that he never analyzed whether JLI changed its price in response to Elite’s entry or exit. (PX7048 Rothman Trial Dep. at 171-72).

### **Response to Finding No. 1353**

The first sentence of the proposed finding is vague because it does not specifically identify the “contention” to which it refers. To the extent that it refers to Dr. Rothman’s deposition

testimony that JLI likely would have offered lower prices and would have had a stronger incentive to offer lower prices if Altria had remained in the market, the proposed finding is incorrect. Dr. Rothman's Expert Report and Rebuttal Report provide the basis for his opinion that Altria's exit from the closed-system e-cigarette market eliminated a competitive constraint on all other competitors, including JLI, which reduced their incentives to offer lower prices and invest in developing better products, thereby harming consumers. (PX5000 at 006, 043, 075, 077-81 (¶¶ 11, 91, 130, 134-37, 139-40) (Rothman Expert Report); PX5001 at 030 (¶ 45) (Rothman Rebuttal Report); CCF ¶¶ 1408, 1524, 1532).

The first sentence of the proposed finding is also argumentative, conclusory, and unsupported because it claims Dr. Rothman's opinion is "baseless." The weight of the evidence demonstrates that the transaction and the elimination of Altria as a competitor in e-cigarettes has harmed competition. (CCFF ¶¶ 1408-730).

The second sentence of the proposed finding is incorrect to the extent that it suggests that Dr. Rothman did not analyze evidence demonstrating that JLI dropped its price in response to Altria's Elite. In the cited testimony, Dr. Rothman testified that he reviewed a document discussing how JLI "dropped their price \$20 in response to Elite's launch." (PX7048 (Rothman, Trial Dep. at 171-72) (discussing the document referenced in CCF ¶ 1434)). Furthermore, the second sentence of the proposed finding is incomplete and misleading to the extent that suggests that there is no evidence in this matter that JLI changed its price in response to Altria Elite's entry or exit. The weight of the evidence demonstrates that JLI engaged in head-to-head price competition with Altria. (CCFF ¶¶ 1432-40).

1354. And the evidence put forward at trial—including the unrebutted statements by JLI witnesses and the economic analysis conducted by Professor Murphy—shows that JLI never changed its prices in response to the entry or exit of any Altria e-vapor product. (*See infra* Part XVII.A).

**Response to Finding No. 1354**

The proposed finding is unsupported, incomplete, and misleading. (*See Responses to RPF* ¶¶ 1639-46).

1355. On this record, there is “no reason to believe” that the dramatic reduction in prices that occurred after the transaction would have been even more dramatic had Altria remained on the market. (Murphy Tr. 3195; PX7047 Murphy Dep. at 196, 199, 211). Complaint Counsel has not made any effort to meet its burden in this regard.

**Response to Finding No. 1355**

The proposed finding is argumentative, conclusory, and unsupported in that it suggests that there is no evidence in the record to support a finding that no competitive harm resulted or is likely to result from the transaction and Altria’s exit from the e-cigarette business. On the contrary, the weight of the evidence demonstrates that the transaction and Altria’s exit from e-cigarettes has harmed competition. (CCFF ¶¶ 1408-730). Furthermore, the proposed finding is inappropriate, argumentative, and conclusory to the extent that it relies on the testimony of an expert for what should be a legal finding—whether there is a “reason to believe” that the transaction and Altria’s exit from the e-cigarette business harmed or is likely to harm competition. The proposed finding is also incomplete and misleading to the extent that it relies on the work of Dr. Murphy because he admits that he did not attempt to calculate what the average price of pod-based cartridges would have been had Altria stayed in the market. (CCFF ¶ 2106). Lastly, the second sentence of the proposed finding is unsupported because it contains no citation.

**B. Output Increased, Thanks To Entry And Expansion**

1356. As for output, it too is indicative of a competitive market after the transaction. A year after Altria discontinued Elite, sales of pod-based *devices* had increased by more than 20 percent. (RX1217 Murphy Report ¶ 65). Over the same time period, sales of pod *cartridges* increased by more than 30 percent. (RX1217 Murphy Report ¶ 65).

**Response to Finding No. 1356**

The first sentence of the proposed finding is unsupported, argumentative, and inappropriate for a factual finding. The second and third sentences of the proposed finding are unsupported, incomplete, and misleading because Dr. Murphy did not include in his report any regression analysis to explain why sales volumes of pod-based devices or cartridges were higher in 2019 than they were prior to Altria's exit. (CCFF ¶¶ 2105, 2111). Furthermore, Dr. Murphy did not include in his report nor did he conduct any switching analysis that identifies precisely where or what products new pod users were coming from or what percentage of pod users were coming from cigarette smokers versus new users. (CCFF ¶ 2112). Thus, Dr. Murphy has no basis to testify that competition has not been harmed by the transaction without conducting such analysis.

In addition, the second and third sentences of the proposed finding are incomplete and misleading because, in the cited parts of Dr. Murphy's report, he does not include an analysis of the sales of cigalike devices or cartridges. Figure V.3 of Dr. Murphy's report, which is cited in support for the second and third sentences of this proposed finding, only includes the sales of pod-based vaporizer devices and cartridges. (Murphy Tr. 3196-97; RX1217 at 049-50 (¶ 65, Fig. V.3) (Murphy Report)). Until late-2018, Altria sold MarkTen cigalikes and Green Smoke cigalikes. (CCFF ¶ 21). Altria's MarkTen cigalikes were a market leader in the closed-system e-cigarette market with their volume growth in 2017 far outpacing other cigalike brands. (CCFF ¶ 1096). When Dr. Murphy estimated harm in a hypothetical "pod-only" product market, he ignored the harm from Altria's withdrawal of its cigalike products. (CCFF ¶ 1526). Dr. Rothman estimated that the harm associated with Altria's withdrawal of its cigalike products is about \$25.5 million. (CCFF ¶ 1526).

Finally, the proposed finding is incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates

that the transaction and Altria's exit from e-cigarettes has harmed competition. (CCFF ¶¶ 1408-730).

1357. While this growth in output was driven, at least in part, by growing demand, it was made possible by competitor *expansion* and new *entries*. (RX1217 Murphy Report ¶ 64). As Professor Murphy put it, "expansion of output is consistent with a competitive and dynamic market in which rivals were investing in launching and aggressively promoting products, and in which retailers were expanding product variety by introducing brands from a growing set of manufacturers to take advantage of growing market opportunities." (RX1217 Murphy Report ¶ 64).

### **Response to Finding No. 1357**

The first sentence of the proposed finding is unsupported because Paragraph 64 of Dr. Murphy's report contains no citations. Indeed, Dr. Murphy provides no support for the statement that "growth in output was driven, at least in part, by growing demand, it was made possible by competitor expansion and new entries." (RX1217 at 049 (¶ 64) (Murphy Report)). The second sentence of the proposed finding is also unsupported. Again, Paragraph 64 of Dr. Murphy's report contains no citations to any evidence in the record to support a finding that expansion of output was due to rivals "investing in launching and aggressively promoting products" or that retailers were "expanding product variety by introducing brands from a growing set of manufacturers." (RX1217 at 049 (¶ 64) (Murphy Report)). The proposed finding is also incomplete and misleading to the extent that it suggests that entry and expansion in e-cigarettes will offset the competitive harm caused by the transaction and Altria's exit. The weight of the evidence demonstrates that entry and expansion will not be timely, likely, or sufficient to offset the competitive harm. (CCFF ¶¶ 1765-870).

1358. After Altria's exit, companies were "able to expand" and "easily make up for any loss of competition." (Murphy Tr. 3154).

### **Response to Finding No. 1358**

The proposed finding is vague and unsupported in that it does not identify which companies were able to expand nor quantify how much they were able to “make up” for the loss of Altria’s competition. The proposed finding is also unsupported in that Dr. Murphy admitted that he failed to do several analyses relevant to this purported fact. First, Dr. Murphy did not quantify in his report the extent to which Reynolds’ sales expansion was in response to Altria’s exit. (CCFF ¶ 2123). Nor did Dr. Murphy offer an opinion in his report that NJOY’s expansion in sales was in response to Altria’s exit from e-cigarettes. (CCFF ¶ 2124). Dr. Murphy did not include in his report any regression analysis to explain why sales volumes of pod-based devices or cartridges were higher in 2019 than they were prior to Altria’s exit. (CCFF ¶¶ 2105, 2111). Also, Dr. Murphy did not include in his report nor did he conduct any switching analysis that identifies precisely where or what products new pod users were coming from or what percentage of pod users were coming from cigarette smokers versus new users. (CCFF ¶ 2112). In addition, Dr. Murphy conceded that demand for pod-based product was rising before Altria discontinued its e-cigarette products. (Murphy Tr. 3197). These admissions by Dr. Murphy establish that the proposed finding is unsupported, incomplete, and misleading.

Finally, the proposed finding is incomplete and misleading to the extent that it suggests that entry and expansion in e-cigarettes will offset the competitive harm caused by the transaction and Altria’s exit. The weight of the evidence demonstrates that entry and expansion will not be timely, likely, or sufficient to offset the competitive harm. (CCFF ¶¶ 1765-870).

1359. “[P]roducts from rivals more than replaced MarkTen’s sales, with both NJOY and Vuse significantly outpacing MarkTen Elite in terms of sales performance.” (RX1217 Murphy Report ¶ 74).

### **Response to Finding No. 1359**

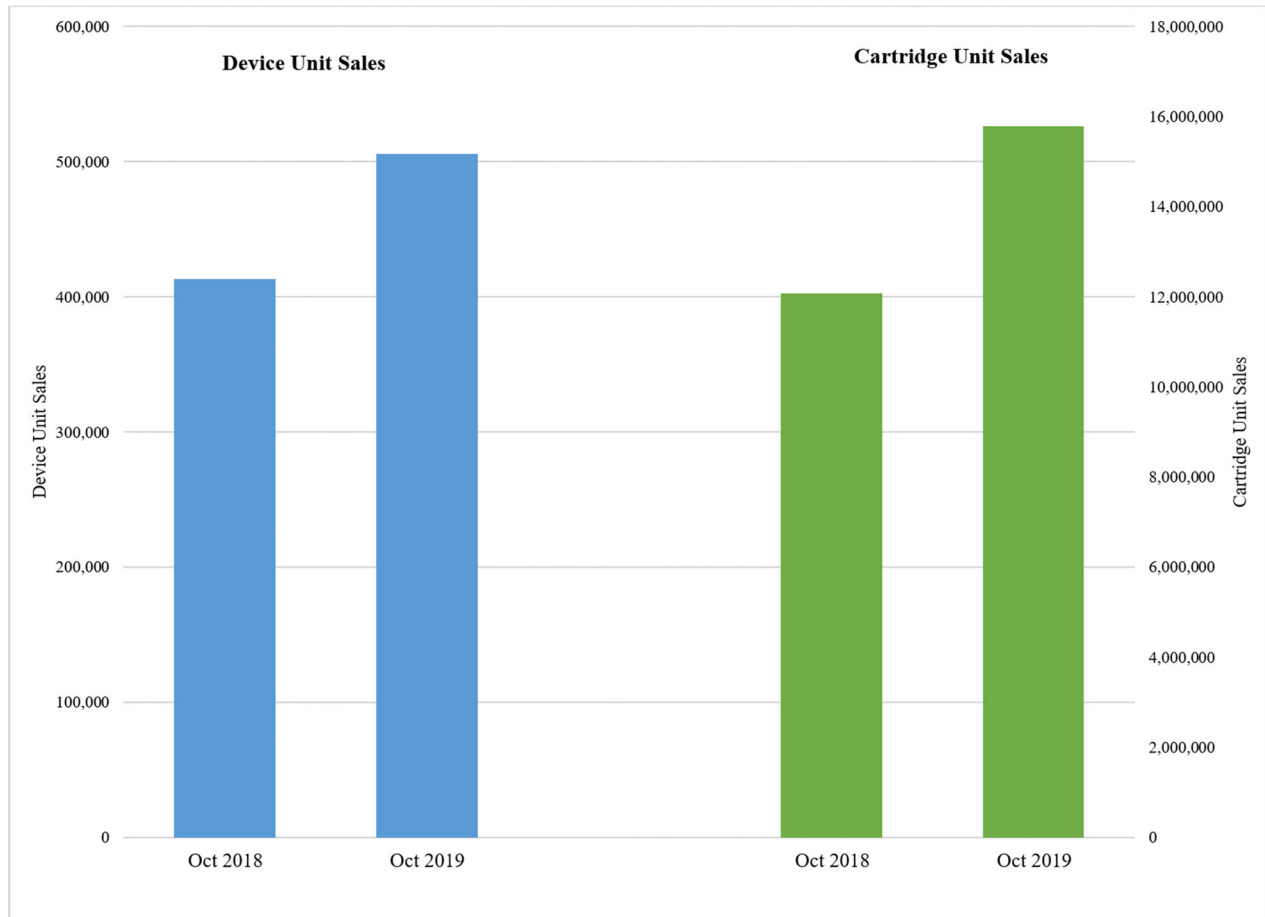
The proposed finding is incomplete and misleading in that it omits the fact that the data it cites pertains to only one convenience store: Sheetz. (RX1217 at 058-59 (¶ 74) (Murphy Report)).



The proposed finding is unsupported, incomplete, and misleading because Dr. Murphy did not quantify in his report the extent to which Reynolds' sales expansion was in response to Altria's exit. (CCFF ¶ 2123). Nor did Dr. Murphy offer an opinion in his report that NJOY's expansion in sales was in response to Altria's exit from e-cigarettes. (CCFF ¶ 2124). Dr. Murphy did not include in his report any regression analysis to explain why sales volumes of pod-based devices or cartridges were higher in 2019 than they were prior to Altria's exit. (CCFF ¶¶ 2105, 2111). Finally, the proposed finding is incomplete and misleading to the extent that it suggests that entry and expansion in e-cigarettes will offset the competitive harm caused by the transaction and Altria's exit. The weight of the evidence demonstrates that entry and expansion will not be timely, likely, or sufficient to offset the competitive harm. (CCFF ¶¶ 1765-870).

1360. For example, at the time of its exit, Elite only sold 100,000 cartridges a week; less than two years later, sales by non-JUUL competitors had increased by *3.1 million* cartridges a week (from 1 million to 4.1 million). (RX1217 Murphy Report ¶ 85, Fig. V.10; Murphy Tr. 3126-28; *see also* Murphy Tr. 3127-28 (“[W]e have actual market evidence that these other sellers were able to expand the sales of their products on the market dramatically, 31 times what would be required to offset the loss of Elite in this case.”)). And, as the below chart shows, the overall sales for cartridges, including all competitors, increased by approximately 3.7 million cartridges per week:

**Fig. V.3: Average Weekly Sales of Pod-Based Vaporizer Devices and Cartridges**



(RX1217 Murphy Report ¶ 65, Fig. V.3).

**Response to Finding No. 1360**

The proposed finding is incomplete and misleading to the extent that it suggests that Elite’s sales would have remained at the levels it reached at the time of its exit. The weight of the evidence demonstrates that prior to the transaction, Altria committed significant time, resources and money to its e-cigarette business and intended to compete in the market long term. (CCFF ¶¶ 409-544). The weight of the evidence also demonstrates that Altria’s sales of Elite were growing and Altria was prepared to and did in fact fix problems with the Elite product to grow sales. (CCFF ¶¶ 1034-407).

The third sentence of the proposed finding is incomplete and misleading because the cited figure from Dr. Murphy's report does not include an analysis of the sales of cigalike devices or cartridges. (RX1217 at 049-50 (¶ 65, Fig. V.3) (Murphy Report)). Figure V.3 of Dr. Murphy's report includes only the sales of pod-based vaporizer devices and cartridges. (Murphy Tr. 3196-97; RX1217 at 049-50 (¶ 65, Fig. V.3) (Murphy Report)). Until late-2018, Altria sold MarkTen cigalikes and Green Smoke cigalikes. (CCFF ¶ 21). Altria's MarkTen cigalikes were a market leader in the closed-system e-cigarette market with their volume growth in 2017 far outpacing other cigalike brands. (CCFF ¶ 1096). When Dr. Murphy estimated harm in a hypothetical "pod-only" product market, he ignored the harm from Altria's withdrawal of its cigalike products. (CCFF ¶ 1526). Dr. Rothman estimated that the harm associated with Altria's withdrawal of its cigalike products is about \$25.5 million. (CCFF ¶ 1526). Thus, the proposed finding is incomplete to the extent that it suggests that Altria's sales in e-cigarettes as a whole were minimal because Dr. Murphy's figure does not include the Altria's sales of MarkTen cigalike products.

1361. This expansion by existing competitors is essentially equivalent to new entry. (CoL ¶ 46).

#### **Response to Finding No. 1361**

The proposed finding should also be disregarded because it is not a "finding of fact," but rather a legal conclusion about the equivalence of entry and expansion under Section 1 of the Sherman Act and Section 7 of the Clayton Act. (*See* Response to Respondents' Proposed COL ¶ 46). Respondents inappropriately state their own arguments as a "fact."

The proposed finding is also incomplete and misleading to the extent that it suggests that competition was not harmed by the transaction and Altria's exit or that new entry or expansion will offset competitive harm due to the transaction. The weight of the evidence demonstrates that the transaction and Altria's exit from e-cigarettes has caused and will cause harm to competition.

(CCFF ¶¶ 1408-730). The weight of the evidence demonstrates that entry and expansion will not be timely, likely, or sufficient to offset the competitive harm. (CCFF ¶¶ 1765-870).

1362. And the data shows that “the marketplace, through the normal competitive process, would be able to adapt to and compensate for the loss of specific products that were not very attractive at the time.” (PX7047 Murphy Dep. at 254-55).

### **Response to Finding No. 1362**

The proposed finding is unsupported, incomplete, and misleading to the extent that it suggests that Dr. Murphy engaged in quantitative analysis to show that the marketplace compensated for the loss of Altria’s e-cigarette products. The proposed finding cites select pages of Dr. Murphy’s deposition testimony for support, but a close examination of his testimony makes it clear that he was not, in fact, testifying about specific data or analysis that he performed. Rather, Dr. Murphy testified that he did not quantify what part of other firms’ expansion was due to Altria’s exit, but rather he “expects” other companies’ expansion as a result of Altria’s exit. (*See* PX7047 (Murphy, Dep. at 254-55 (“Q. Are you offering an opinion in this case that any of Reynolds’ expansion was in response to Altria’s exit? A. *I don’t think we can quantify the extent to which it is. I would expect* that their expansion, as well as the expansion of others, would be at least partially in response to that, because they would be making up for and compensating for the loss that them and others would gain from distribution made available. *I don’t think we can quantify the extent of which part of that was due to Altria’s exit.* But you don’t need to do that to reach the conclusion that, you know, the marketplace, through the normal competitive process, would be able to adapt to and compensate for the loss of specific products that were not very attractive at the time and, indeed, that replacement process is part of the ways that marketplace, in this market and others, you know, generate benefits for consumers. That’s really the message. I think it’s pretty simple.”) (emphasis added)). Moreover, Dr. Murphy did not quantify in his report the extent to which Reynolds’ sales expansion was in response to Altria’s exit. (CCFF ¶ 2123). Nor did Dr. Murphy

offer an opinion in his report that NJOY's expansion in sales was in response to Altria's exit from e-cigarettes. (CCFF ¶ 2124).

The proposed finding is incomplete and misleading to the extent that it suggests that entry and expansion in e-cigarettes will offset the competitive harm caused by the transaction and Altria's exit. The weight of the evidence demonstrates that entry and expansion will not be timely, likely, or sufficient to offset the competitive harm. (CCFF ¶¶ 1765-870). The proposed finding is also incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria's exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730).

The proposed finding is also incomplete and misleading to the extent that it suggests that current marketplace conditions demonstrate that the closed-system e-cigarette market was not harmed by Altria's exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the "actual world" with the "but-for world," calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338).

Finally, the proposed finding is misleading to the extent that it suggests that Altria's e-cigarette products were unattractive to consumers or could not have been improved. The evidence shows that Altria's claim that it exited the e-cigarette business because of financial challenges is unsupported and pretextual. (CCFF ¶¶ 1034-162). The evidence shows that Altria's claim that its e-cigarettes had characteristics that made them commercially unviable is unsupported and

pretextual. (CCFF ¶¶ 1163-91). And, finally, the evidence also shows that Altria's claim that it could not improve its products or introduce new ones after the deeming date is unsupported and pretextual. (CCFF ¶¶ 1192-236).

1363. Likewise, "given the robust competition and the way in which [competitors] were able to market their products and expand their sales and cut their prices, there's no reason, in economics, to believe that output would have been higher in some but-for world" in which Altria continued selling e-vapor products. (PX7047 Murphy Dep. at 216).

### **Response to Finding No. 1363**

The proposed finding is vague in that it does not define what is meant by "robust competition." The proposed finding is also unsupported because in the cited deposition testimony of Dr. Murphy, he does not identify with specificity which analysis in his report he is relying on to support his claim that competitors were able to expand their sales and cut their prices. In fact, Dr. Murphy admitted that, as to pod-based cartridges, he did not perform any econometric analysis or attribution analysis of why prices for pod-based cartridges were declining after Altria's exit from the e-cigarette business. (CCFF ¶¶ 2099, 2104). Dr. Murphy also admitted that he did not analyze the effects of other factors, including the negative press surrounding vaping, the impact of changes in the minimum age to purchase nicotine products, and the FDA's flavor ban, on the price of pod-based cartridges. (CCFF ¶¶ 2100-02). Dr. Murphy also conceded at trial that the pricing data presented in Figure V.2 of his report does not rule out the possibility that pod-based cartridge prices would have *fallen further* if Altria had not discontinued its e-cigarette products. (CCFF ¶ 2103). As to pod-based devices, Dr. Murphy admitted at trial that he did not run any regressions to address the question of why pod-based device prices fell from September of 2018 to September 2020. (CCFF ¶ 2107). Dr. Murphy also admitted that he did not perform econometric analysis of the effects of other factors, including the negative press surrounding vaping, and the impact of state bans on non-tobacco and non-menthol flavored e-cigarettes, on the price for pod-based

devices. (CCFF ¶¶ 2108-09). The proposed finding is also incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria's exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730).

The proposed finding is further incomplete and misleading to the extent that it suggests that current marketplace conditions demonstrate that the closed-system e-cigarette market was not harmed by Altria's exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the "actual world" with the "but-for world," calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338).

1364. Indeed, as evidence of the expansion that occurred after the transaction, the market data demonstrates that convenience stores carried more e-vapor brands after Altria exited the market than before, with the average number of products in the top 20 retailers increasing from 3.0 to 3.8. (Murphy Tr. 3140; RX1217 Murphy Report ¶ 75).

#### **Response to Finding No. 1364**

The proposed finding is unsupported because Paragraph 75 of Dr. Murphy's report contains no citations to his analysis other than to state that he used IRI data. (RX1217 at 059 (¶ 75) (Murphy Report)). The paragraph does not refer to any table or appendix where Dr. Murphy shows his data analysis. (RX1217 at 059 (¶ 75) (Murphy Report)). The proposed finding is also incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria's exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730). The proposed finding is incomplete and

misleading to the extent that it suggests that entry and expansion in e-cigarettes will offset the competitive harm caused by the transaction and Altria's exit. The weight of the evidence demonstrates that entry and expansion will not be timely, likely, or sufficient to offset the competitive harm. (CCFF ¶¶ 1765-870).

1365. Sheetz, in particular, "added products from three manufacturers that it did not previously sell when MarkTen was on the market—NJOY's Ace, ITG's *myblu*, and EAS' Leap," (RX1217 Murphy Report ¶ 74; *see also* Crozier (Sheetz) Tr. 1490 (similar)), as well as a product called Glas, (Crozier (Sheetz) Tr. 1482).

### **Response to Finding No. 1365**

The proposed finding is incorrect, incomplete, and misleading to the extent that it suggests that Sheetz started carrying these products directly as a result of Altria's exit from the market. The cited testimony does not support that finding. Rather, Crozier testified merely about the dates that Sheetz started carrying certain products, testifying that it "would have been around 2018, the same general period or just after MarkTen Elite." (Crozier (Sheetz) Tr. 1490). The proposed finding is also incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria's exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730). The proposed finding is incomplete and misleading to the extent that it suggests that entry and expansion in e-cigarettes will offset the competitive harm caused by the transaction and Altria's exit. The weight of the evidence demonstrates that entry and expansion will not be timely, likely, or sufficient to offset the competitive harm. (CCFF ¶¶ 1765-870).

1366. The enhanced product diversity on retailer shelves was made possible, at least in part, by Altria's departure. As Professor Murphy explained, in an environment where resources (such as shelf space) are scarce, "when a product leaves the market, that creates the ability and incentive for other products to expand, to come in and fill the void," and to "create[] an opportunity for more attractive products." (Murphy Tr. 3140).

### **Response to Finding No. 1366**



The first sentence of this proposed finding is unsupported.

The second sentence of the proposed finding is incomplete and misleading to the extent that it is implying that Altria's products were unattractive to consumers. The evidence shows that Altria's claims that it exited the e-cigarette business because of financial challenges, (CCFF ¶¶ 1034-162); that its e-cigarettes had characteristics that made them commercially unviable, (CCFF ¶¶ 1163-91); and that it could not improve its products or introduce new ones, (CCFF ¶¶ 1192-236), are unsupported and pretextual. The second sentence of the proposed finding is also misleading, unsupported, argumentative, and inappropriate for a factual finding because it makes a theoretical claim about general economic predictions. The cited expert testimony does not provide the necessary quantitative analysis to establish an appropriate proposition of fact.

The proposed finding is incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria's exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730). The proposed finding is also incomplete and misleading to the extent that it suggests that entry and expansion in e-cigarettes will offset the competitive harm caused by the transaction and Altria's exit. The weight of the evidence demonstrates that entry and expansion will not be timely, likely, or sufficient to offset the competitive harm. (CCFF ¶¶ 1765-870).

1367. In this respect, "products leaving the marketplace is a normal part of the competitive process, and, indeed, it's part of the process by which products that are relatively unsuccessful are replaced by more successful products." (Murphy Tr. 3129-30).

#### **Response to Finding No. 1367**

The proposed finding is conclusory, argumentative, vague, and unsupported. It is inappropriate as a factual finding and does not cite to specific facts in this matter for support. The proposed finding is incomplete and misleading to the extent that it suggests that Dr. Murphy expresses an opinion in his report as to why Altria exited the closed-system e-cigarette market. Dr.

Murphy admitted he did not offer an opinion in this case as to whether Altria would have exited the e-vapor business but for the transaction. (CCFF ¶ 2122). Dr. Murphy also admitted that in his report he did not compare the profitability of Altria's e-vapor business to other e-vapor competitors at the time of Altria's exit. (CCFF ¶ 2119).

The proposed finding is also incomplete and misleading to the extent that it suggests that Altria's products were unattractive to consumers. The evidence shows that Altria's claim that it exited the e-cigarette business because of financial challenges is unsupported and pretextual. (CCFF ¶¶ 1034-162). The evidence shows that Altria's claim that its e-cigarettes had characteristics that made them commercially unviable is unsupported and pretextual. (CCFF ¶¶ 1163-91). And the evidence also shows that Altria's claim that it could not improve its products or introduce new ones after the deeming date is unsupported and pretextual. (CCFF ¶¶ 1192-236).

The proposed finding is also incomplete and misleading to the extent that it suggests that Altria's exit from the market was not the result of an anticompetitive agreement. The weight of the evidence demonstrates that Respondents agreed that Altria would exit the closed-system e-cigarette market in exchange for an ownership stake in JLI. (CCFF ¶¶ 578-1033).

The proposed finding is further incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria's exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730).

Finally, the proposed finding is incomplete and misleading to the extent that it suggests Dr. Rothman's reliance on the Antitrust Logit Model ("ALM") was improper. Dr. Rothman analyzed two sources of harm from the transaction and Altria's exit from the e-cigarette business—higher prices and loss of consumer choice—by applying the ALM and Compensating Marginal Cost

Reduction. (CCFF ¶ 1416). One harm is not more important than the other, and the ALM takes into account both sources of harm. (CCFF ¶ 1416). Dr. Rothman used an ALM to estimate the loss of consumer surplus from Altria's exit. (CCFF ¶ 1525). Assuming that Altria would have maintained a 10 percent share of the closed-system e-cigarette market, Dr. Rothman calculated that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (CCFF ¶ 1525). The ALM and the Compensating Marginal Cost Reduction are methodologies that antitrust economists often use. (PX7048 (Rothman, Trial Dep. at 70); PX5000 at 082 (¶ 142) (Rothman Expert Report)).

### **C. Market Concentration Decreased As JUUL Lost Share To Rivals**

1368. Market concentration has also decreased significantly in the two years following the transaction. (Murphy Tr. 3143; PX7047 Murphy Dep. at 243-44; RX1217 Murphy Report ¶ 66).

#### **Response to Finding No. 1368**

The proposed finding is vague, unsupported, incomplete, and misleading. Paragraph 66 of Dr. Murphy's report does not include any citations to any data that he used to calculate market concentration and the Herfindahl–Hirschman Index (“HHI”) levels, nor does it report those HHI results or specify the specific time frame over which he calculated them. The trial and deposition testimony of Dr. Murphy cited as support for this proposed finding do not specify HHI levels either. Indeed, the weight of the evidence in this matter shows that the closed-system e-cigarette market is highly concentrated and that Altria's exit increased concentration. (CCFF ¶¶ 1749-61).

The proposed finding and the evidence cited in support are vague in that they do not describe in detail and with precision how Dr. Murphy calculated market shares and what time frame he was using. Complaint Counsel's expert, Dr. Rothman, measured concentration in the market for closed-system e-cigarettes sold in the United States using the HHI as described in the Horizontal Merger Guidelines. (CCFF ¶ 1750). To calculate the HHI and measure concentration

before the transaction between Altria and JLI, Dr. Rothman used shares of Altria, JLI, ITG, JTI, NJOY, and Reynolds in the 12-month period from October 2017 to September 2018, before Altria began to remove its e-cigarette products from the market. (CCFF ¶ 1751). To calculate the HHI and measure concentration after the transaction, Dr. Rothman assumed Altria's share is reallocated to the remaining competitors in proportion to their shares. (CCFF ¶ 1752). He then calculated the change in HHI as the difference between the HHI after the transaction and the HHI before the transaction. (CCFF ¶ 1752). Dr. Rothman calculated that the transaction resulted in an HHI of 3,929 and an increase in HHI of 652. (CCFF ¶ 1754). Dr. Rothman concluded that Dr. Murphy's "before-and-after" comparisons of market concentration violate basic principles of economic analysis by not controlling for confounding factors. (CCFF ¶ 1758). Dr. Murphy's "before-and-after" analyses of market concentration do not identify the effect of the transaction on concentration because Dr. Murphy's analysis confuses correlation with causation. (CCFF ¶ 1758). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (CCFF ¶¶ 2094-124).

The proposed finding is also incomplete and misleading to the extent that Dr. Murphy relied only on device sales to calculate market shares because share of device sales is not a reliable metric upon which to assess competition in the relevant market. Dr. Rothman calculated market shares by using unit data on closed-system consumables—that is, pods, cartridges, and disposables—and he did not use device shares in his models or his conclusions. (CCFF ¶ 1762). Dr. Rothman used shares of consumables rather than devices because "[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products." (CCFF ¶ 1763; *see also* Huckabee (Reynolds) Tr. 398-99 ("Q. In your experience, does the device share predict -- is device share a

predictor of future performance? A. I wouldn't characterize it as a predictor of future performance. It is a -- it is a good indicator for the amount of consumers that are trying our products, and when they -- when they purchase a device, they are very likely, as you might expect, to also purchase pods to use that device with. That is a very higher end transactional dynamic. When we talk about future performance, then now we're getting into repeat trial and ongoing repertoire usage, which I consider to be different -- different things.”)).

1369. As discussed above, (*see supra* Part XII.A), the “competitive repositioning” by NJOY and Reynolds that took place in the wake of Altria’s discontinuation of its products has enabled both competitors to capture substantial portions of device sales. (RX1217 Murphy Report ¶ 68 n.149).

#### **Response to Finding No. 1369**

The proposed finding is incomplete and misleading because it fails to account for the evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition and the elimination of products that appealed to consumers and future development by Altria. (CCFF ¶¶ 1408-730; *see also* Responses to RPF ¶¶ 1285-323).

1370. Less than a year after its introduction, NJOY had used steep discounts on a highly satisfying pod product to achieve, for a time, a 30 percent share of device sales for pod-based products, approximately the same share as JUUL. (RX1217 Murphy Report ¶ 72).

#### **Response to Finding No. 1370**

The proposed finding is vague, unsupported, incomplete, and misleading. The proposed finding is unsupported to the extent that it refers to NJOY using “steep discounts.” The citation does not discuss NJOY discounts, and to the extent that the citation to Dr. Murphy’s report is meant to support discounting activity, it is improper to cite to an expert for a proposition of fact. In addition, the term “steep” is undefined.

The proposed finding is also unsupported as to NJOY's "highly satisfying" product. The citation makes no reference to market acceptance of the NJOY product, and to the extent that the citation to Dr. Murphy's report is meant to support NJOY's product being "highly satisfying," it is improper to cite to an expert for a proposition of fact. The proposed finding is misleading in that Dr. Murphy's own data show that after reaching a peak of around 30 percent, NJOY's share fell back below 10 percent in October 2019 and has remained at or below 10 percent since that time. (RX1217 at 057 (Fig. V.7) (Murphy Report)).

Finally, to the extent that the proposed fact is suggesting that there was no competitive harm from this transaction, it is contrary to the weight of evidence in this matter demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm. (CCFF ¶¶ 1408-730). Dr. Murphy's "before-and-after" comparisons of market concentration, which are cited as support for this finding, violate basic principles of economic analysis by not controlling for confounding factors, thus confusing correlation with causation. (CCFF 1758). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (*See* CCFF ¶¶ 2094-124).

1371. Reynolds's Vuse Alto later surged past both NJOY Ace and JUUL, capturing about 60 percent of all pod-based device sales as of September 2020. (RX1217 Murphy Report ¶ 72).

### **Response to Finding No. 1371**

The proposed finding is vague, incomplete, misleading, and contrary to the weight of evidence to the extent that it suggests that there was no competitive harm from the transaction. There is ample evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm. (CCFF ¶¶ 1408-730).

The proposed finding is also incomplete and misleading because share of device sales is not a reliable metric upon which to assess competition in the relevant market. Dr. Rothman

calculated market shares by using unit data on closed-system consumables—that is, pods, cartridges, and disposables—and he did not use device shares in his models or his conclusions. (CCFF ¶ 1762). Dr. Rothman used shares of consumables rather than of devices because “[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products.” (CCFF ¶ 1763; *see also* Huckabee (Reynolds) Tr. 398-99 (“Q. In your experience, does the device share predict -- is device share a predictor of future performance? A. I wouldn’t characterize it as a predictor of future performance. It is a -- it is a good indicator for the amount of consumers that are trying our products, and when they -- when they purchase a device, they are very likely, as you might expect, to also purchase pods to use that device with. That is a very higher end transactional dynamic. When we talk about future performance, then now we’re getting into repeat trial and ongoing repertoire usage, which I consider to be different – different things.”)).

Finally, the proposed finding is unsupported, incomplete, and misleading because Dr. Murphy’s “before-and-after” comparisons of market concentration, which are cited as support for this finding, violate basic principles of economic analysis by not controlling for confounding factors, thus confusing correlation with causation. (CCFF ¶ 1758). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (*See* CCFF ¶¶ 2094-124).

1372. As a result, JLI’s share of *device* sales has plummeted from approximately 69 percent in October 2018 to approximately 30 percent in September 2020. (RX1217 Murphy Report ¶ 72). And JLI continued to lose device share even after it dropped its price in late 2019. (*See supra* ¶ 1315). By that point, JLI’s share had fallen to about 43 percent. But in the next year it fell by an additional 13 percent. (RX1217 Murphy Report ¶ 72).

### **Response to Finding No. 1372**

The proposed finding is vague, unsupported, incomplete, and misleading. The first sentence of the proposed finding is vague in that it does not identify the cause of JLI’s purported decline in share of device sales. To the extent that the proposed finding is claiming that JLI’s

decline in share of device sales is a result of actions by NJOY and Reynolds, the finding is unsupported by the citation to Dr. Murphy's report. Dr. Murphy's "before-and-after" comparisons of market concentration violate basic principles of economic analysis by not controlling for confounding factors, thus confusing correlation with causation. (CCFF ¶ 1758). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (*See* CCFF ¶¶ 2094-124).

The second sentence of the proposed finding is incomplete and misleading. (*See* Response to RPF ¶ 1315). The third sentence of the proposed finding is unsupported. The final sentence of the proposed finding is vague, incomplete, unsupported, and misleading to the extent that it is suggesting that JLI's share has fallen due to the actions of NJOY and Reynolds. Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction, (*see* CCFF ¶¶ 2094-124), including not quantifying in his report the extent to which Reynolds' and NJOY's sales expansions were in response to Altria's exit. (CCFF ¶¶ 2123-34). Overall, the proposed finding is incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. There is ample evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm. (CCFF ¶¶ 1408-730).

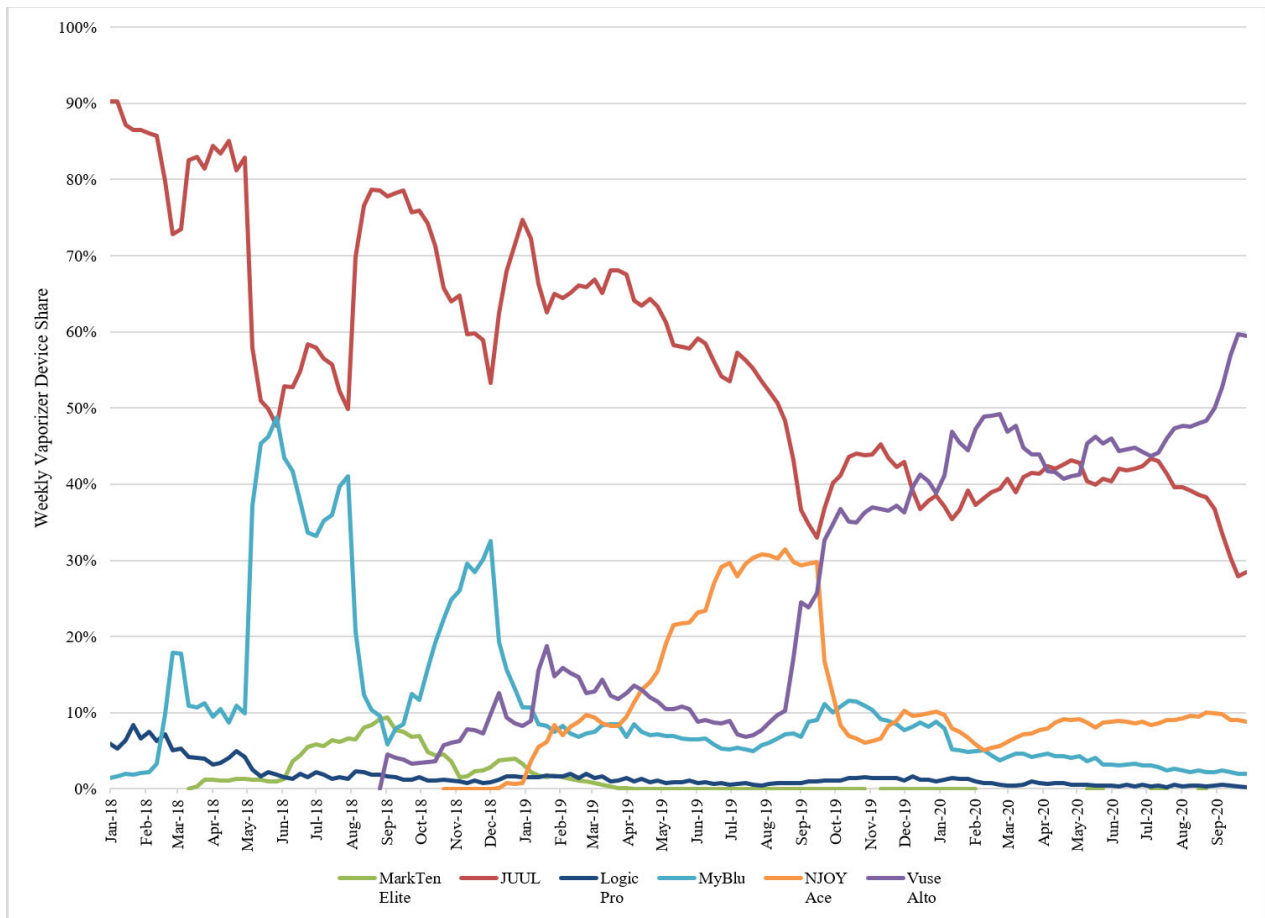
The proposed finding is incomplete and misleading to the extent that Dr. Murphy relies on device sales to calculate market shares because share of device sales is not a reliable metric upon which to assess competition in the relevant market. Dr. Rothman calculated market shares by using unit data on closed-system consumables—that is, pods, cartridges, and disposables—and he did not use device shares in his models or his conclusions. (CCFF ¶ 1762). Dr. Rothman used shares of consumables rather than of devices because "[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to



encourage consumers to try products.” (CCFF ¶ 1763; *see also* Huckabee (Reynolds) Tr. 398-99 (“Q. In your experience, does the device share predict -- is device share a predictor of future performance? A. I wouldn’t characterize it as a predictor of future performance. It is a -- it is a good indicator for the amount of consumers that are trying our products, and when they -- when they purchase a device, they are very likely, as you might expect, to also purchase pods to use that device with. That is a very higher end transactional dynamic. When we talk about future performance, then now we’re getting into repeat trial and ongoing repertoire usage, which I consider to be different – different things.”)).

1373. JLI’s loss of device share is depicted in the following chart:

**Fig. V.7: Pod-Based Vaporizer Device Sales Shares by Brand (by Units)**



(RX1217 Murphy Report ¶ 72, Fig. V.7).

**Response to Finding No. 1373**

The proposed finding is incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. There is ample evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm. (CCFF ¶¶ 1408-730).

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that any decline in JLI's share was due to competition from other e-cigarette manufacturers. Dr. Murphy's "before-and-after" comparisons of market concentration violate basic principles of economic analysis by not controlling for confounding factors, thus confusing correlation with causation. (CCFF ¶ 1758). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (*See* CCFF ¶¶ 2094-124).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it relies on device sales to calculate market shares. Share of device sales is not a reliable metric to assess competition in the relevant market. (CCFF ¶¶ 1762-63). Dr. Rothman calculated market shares by using unit data on closed-system consumables—that is, pods, cartridges, and disposables—and he did not use device shares in his models or his conclusions. (CCFF ¶ 1762). Dr. Rothman used shares of consumables rather than of devices because "[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to encourage consumers to try products." (CCFF ¶ 1763; *see also* Huckabee (Reynolds) Tr. 398-99 ("Q. In your experience, does the device share predict -- is device share a predictor of future performance? A. I wouldn't characterize it as a predictor of future performance. It is a -- it is a good indicator for the amount of consumers that are trying our products, and when they -- when they purchase a device, they are very likely, as you might expect, to also purchase pods to use that device with. That is a very higher end transactional dynamic.

When we talk about future performance, then now we're getting into repeat trial and ongoing repertoire usage, which I consider to be different – different things.”)).

1374. In addition, JLI lost approximately 20 percentage points in *cartridge* unit share from December 2018 to September 2020. (RX1217 Murphy Report ¶ 73). This too was a sustained and steady loss. “[I]n the first full year after Altria withdrew its e-cigarette products from the market, JUUL lost 15.6 percentage points in cartridge unit market share, before losing another 4.9 percentage points of share through the end of September 2020. During that same period, NJOY Ace grew its cartridge share to 7.4 percent in September 2019 and Vuse Alto gained share almost continuously and held a 21.0 percent share at the end of September 2020.” (RX1217 Murphy Report ¶ 73).

#### **Response to Finding No. 1374**

The proposed finding is vague, incomplete, and misleading to the extent that it suggests that because JLI’s share has declined there was no competitive harm from this transaction. There is ample evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm. (CCFF ¶¶ 1408-730).

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that any decline in JLI’s share was due to competition from other e-cigarette manufacturers. Dr. Murphy’s “before-and-after” comparisons of market concentration violate basic principles of economic analysis by not controlling for confounding factors, thus confusing correlation with causation. (CCFF ¶ 1758). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (*See* CCFF ¶¶ 2094-124).

The proposed finding is also incomplete and misleading to the extent that it suggests that post-transaction marketplace conditions demonstrate that the closed-system e-cigarette market was not harmed by Altria’s exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman

used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338).

Finally, the second sentence of the proposed finding is unsupported.

1375. At trial, Robbins, the Chief Growth Officer of JLI, confirmed that, JLI’s market share has decreased since December 2018. (Robbins (JLI) Tr. 3256).

#### **Response to Finding No. 1375**

The proposed finding is vague, incomplete, unsupported, and misleading. The proposed finding is vague, incomplete, and unsupported in that it relies on an impression of a JLI executive who provides no data to support his claim. The cited testimony at trial is as follows: “Q. And what has happened to JLI’s market share in pod-based e-vapor products since late -- since December 2018? A. We’ve lost share.” (Robbins (JLI) Tr. 3256). Robbins does not reference any data or statistics in his testimony. The proposed finding is misleading to the extent that it suggests because JLI’s share may have declined there was no competitive harm from the transaction. There is ample evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm. (CCFF ¶¶ 1408-730).

1376. And Complaint Counsel’s own expert, Dr. Rothman, admits that JLI has, in fact, lost market share. (PX7048 Rothman Trial Dep. at 96; PX7046 Rothman Dep. at 14).

#### **Response to Finding No. 1376**

The proposed finding is incomplete and misleading to the extent that it suggests that because JLI’s share has declined there was no competitive harm from the transaction. There is ample evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm. (CCFF ¶¶ 1408-730).

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that any decline in JLI’s share was due to competition from other e-cigarette

manufacturers. Dr. Murphy’s “before-and-after” comparisons of market concentration violate basic principles of economic analysis by not controlling for confounding factors, thus confusing correlation with causation. (CCFF ¶ 1758). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (*See* CCFF ¶¶ 2094-124).

Finally, the proposed finding is incomplete and misleading to the extent that it suggests that post-transaction marketplace conditions demonstrate that the closed-system e-cigarette market was not harmed by Altria’s exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338).

**D. This Post-Transaction Evidence Is Highly Relevant To Assessing Market Competition**

1377. Despite agreeing “that the market has continued to evolve over time, that new products have been introduced, that sales . . . have gone up, [and] that prices have fallen,” (PX7048 Rothman Trial Dep. at 39), Dr. Rothman failed to account for any of this post-transaction evidence in his analysis, (PX7048 Rothman Trial Dep. at 93-96; *see also* PX7048 Rothman Trial Dep. at 95 (conceding that “whether output is higher after December 2018 [was] not an input into [his] analysis of the competitive effect of the transaction”)). Instead he inappropriately dismisses the evidence that prices have decreased, output has increased, and market concentration has decreased as attributable to “confounding factors.” (PX7048 Rothman Trial Dep. at 40; *see also* PX5001 Rothman Rebuttal ¶ 50 (“Dr. Murphy’s before-and-after comparisons cannot be interpreted to reflect the effect of the discontinuation of Altria’s products in 2018.”)).

**Response to Finding No. 1377**

The first sentence of the proposed finding is incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence

demonstrates that the transaction and Altria's exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730). The second sentence of the proposed finding is misleading, argumentative, and inappropriate for a factual finding because instead of suggesting a factual finding, the sentence states an argument about the relevancy of Complaint Counsel's expert's testimony on a particular matter.

The proposed finding is incomplete and misleading to the extent that it suggests that post-transaction marketplace conditions demonstrate that the closed-system e-cigarette market was not harmed by Altria's exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the "actual world" with the "but-for world," calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338).

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that Dr. Murphy conducted econometric analysis to demonstrate that there was no competitive harm from the transaction. Dr. Murphy's "before-and-after" analyses of market conditions ignore confounding factors that may have influenced the prices and sales of e-cigarettes, including negative press surrounding vaping, changes in the minimum age to purchase nicotine, and the FDA's flavor ban. (CCFF ¶¶ 2099-111). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (*See* CCFF ¶¶ 2094-124).

1378. Dr. Rothman offers no analysis other than his mere say-so that these indicia of a more competitive market are attributable to confounding factors. (PX5001 Rothman Rebuttal ¶¶ 19, 50 (repeatedly listing the same set of potential "confounding factors" without attempting to link them to the market data); PX7048 Rothman Trial Dep. at 169 (explaining

that he simply “list[s] the factors that were changing over time as examples of confounding factors”); Murphy Tr. 3155 (explaining that Dr. Rothman did not attempt to measure effects after controlling for confounding factors)).

### **Response to Finding No. 1378**

The proposed finding is misleading, argumentative, and inappropriate for a factual finding because instead of suggesting a factual finding, the sentence states an argument about the relevancy of Complaint Counsel’s expert’s testimony on a topic. The proposed finding is also incomplete and misleading to the extent that it suggests that Dr. Murphy’s analyses of post-transaction prices, sales, and market concentration demonstrate that the market was not competitively harmed by the transaction. Dr. Murphy’s “before-and-after” analyses of market conditions ignore confounding factors that may have influenced the prices and sales of e-cigarettes, including negative press surrounding vaping, changes in the minimum age to purchase nicotine, and the FDA’s flavor ban. (CCFF ¶¶ 2099-111). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (*See* CCFF ¶¶ 2094-124).

1379. In a market in which pod-based products account for 95 percent of the market and the competitors with pod-based products that used nicotine salts were already discounting devices to 99 cents and stealing substantial market share from JUUL, (*see supra* Part XII.A-B, XIV.C), there is no basis for Dr. Rothman to assume that the presence of Altria—which did not have any pod-based product with nicotine salts—would have resulted in lower prices, higher output, or a meaningful reduction in market concentration. (*See supra* Part XIII; Murphy Tr. 3155 (“The types of products that left the market here would easily be replaced by competition from those that remained.”)).

### **Response to Finding No. 1379**

With respect to the proposed finding’s statements about competitors’ discounting practices, the proposed finding is incomplete and misleading for the reasons explained above. (*See* Responses to RPF ¶¶ 1285-329). The proposed finding is also unsupported to the extent that it relies on “Part XIV.C” because such a section does not exist in Respondents’ Proposed Findings. The proposed finding is vague to the extent that it is making a claim about the appropriate relevant

market or market shares in this matter in so far as the finding does not define what products it includes in the term “market.”

The statement that “there is no basis for Dr. Rothman to assume” is argumentative, incomplete, and misleading. This section of the proposed finding is also incorrect, unsupported, incomplete, and misleading to the extent that it suggests that Dr. Rothman had no basis for his opinion that competition was harmed by the transaction. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338).

The proposed finding is also incomplete and misleading to the extent that it suggests that if Altria had stayed in the e-cigarette business it would not have been able to or sought to add nicotine salts to its e-cigarette products. The weight of the evidence demonstrates that Altria’s claim that it could not improve its products or introduce new ones after the deeming date is unsupported and pretextual. (CCFF ¶¶ 1192-236).

The proposed finding is further incomplete and misleading to the extent that it suggests that Dr. Murphy’s analyses of post-transaction market conditions demonstrate that the transaction did not harm competition. Dr. Murphy’s “before-and-after” analyses of market conditions ignore confounding factors that may have influenced the prices and sales of e-cigarettes, including negative press surrounding vaping, changes in the minimum age to purchase nicotine, and the



FDA's flavor ban. (CCFF ¶¶ 2099-111). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (See CCFF ¶¶ 2094-124).

Finally, the proposed finding is incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the transaction and Altria's exit from the e-cigarette business has harmed competition. (CCFF ¶¶ 1408-730). The proposed finding is also incomplete and misleading to the extent that it suggests that entry and expansion in e-cigarettes will offset the competitive harm caused by the transaction and Altria's exit. The weight of the evidence demonstrates that entry and expansion will not be timely, likely, or sufficient to offset the competitive harm. (CCFF ¶¶ 1765-870).

1380. Professor Murphy explains the significance of the post-transaction market evidence: “[W]hat happened in the marketplace during this period reflects the transaction and the lack, really, of impact of the transaction.” (Murphy Tr. 3154).

#### **Response to Finding No. 1380**

The proposed finding is misleading, argumentative, and inappropriate for a factual finding because the proposed finding is making a claim about the evidentiary value of certain expert testimony in this matter. The proposed finding is also vague in that it does not identify to which “post-transaction market evidence” it is referring. To the extent that the proposed finding is referring to Dr. Murphy's analysis of post-transaction market conditions, the proposed finding is unsupported, incomplete, and misleading. Dr. Murphy's “before-and-after” analyses of market conditions are not proper econometric analyses in that they ignore confounding factors that may have influenced the prices and sales of e-cigarettes, including negative press surrounding vaping, changes in the minimum age to purchase nicotine, and the FDA's flavor ban. (CCFF ¶¶ 2099-111). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (See CCFF ¶¶ 2094-124).

1381. Well-established principles of antitrust law confirm the relevance of post-transaction evidence. (CoL ¶¶ 33-38). And the key indicia of anticompetitive effects that courts look to are exactly those discussed by Professor Murphy and not disputed by Dr. Rothman—output, price, and market concentration. (CoL ¶ 39).

### **Response to Finding No. 1381**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion about the relevancy of evidence. (*See Responses to Respondents’ Proposed COL ¶¶ 33-39*). Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is unsupported, incomplete, and misleading to the extent that it suggests that the transaction and Altria’s exit did not harm competition. The weight of the evidence demonstrates that the transaction and Altria’s exit from the e-cigarette business has caused and will harm to competition. (CCFF ¶¶ 1408-730).

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that Dr. Murphy’s analyses of post-transaction market conditions demonstrate no competitive harm from the transaction. Dr. Murphy’s “before-and-after” analyses of market conditions ignore confounding factors that may have influenced the prices and sales of e-cigarettes, including negative press surrounding vaping, changes in the minimum age to purchase nicotine, and the FDA’s flavor ban. (CCFF ¶¶ 2099-111). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (*See CCFF ¶¶ 2094-124*).

Finally, the proposed finding is incorrect, incomplete, and misleading to the extent that it suggests that the post transaction conditions demonstrate that the closed-system e-cigarette market was not harmed by Altria’s exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759). Dr.

Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338).

1382. Such evidence is particularly relevant where, as here, it pertains to increased competition by actors outside the parties’ control and thus cannot be manipulated. (CoL ¶ 36).

### **Response to Finding No. 1382**

The proposed finding should also be disregarded because it is not a “finding of fact,” but rather a legal conclusion about the relevancy of evidence. (*See* Response to Respondents’ Proposed COL ¶ 36). Respondents inappropriately state their own arguments as a “fact.” The proposed finding is also vague because it refers to “Such evidence” without identifying the evidence at issue. To the extent that the proposed finding is referring to post-transaction market conditions, the proposed finding is conclusory and unsupported by the record.

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that the transaction and Altria’s exit did not harm competition. The weight of the evidence demonstrates that the transaction and Altria’s exit from the e-cigarette business has caused and will harm to competition. (CCFF ¶¶ 1408-730).

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that Dr. Murphy’s analyses of post-transaction market conditions demonstrate no competitive harm from the transaction. Dr. Murphy’s “before-and-after” analyses of market conditions ignore confounding factors that may have influenced the prices and sales of e-cigarettes, including negative press surrounding vaping, changes in the minimum age to purchase nicotine, and the FDA’s flavor ban. (CCFF ¶¶ 2099-111). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (*See* CCFF ¶¶ 2094-124).

Finally, the proposed finding is incomplete and misleading to the extent that it suggests that post-transaction marketplace conditions demonstrate that the closed-system e-cigarette market was not harmed by Altria's exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." (CCFF ¶ 1759). Dr. Rothman used an Antitrust Logit Model to compare the "actual world" with the "but-for world," calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1338).

#### **XIV. COMPLAINT COUNSEL FAILS TO CARRY ITS BURDEN OF DEMONSTRATING THE MARKET IS ALL CLOSED-SYSTEM PRODUCTS**

1383. Complaint Counsel cannot meet its burden to demonstrate anticompetitive effects under Section 1 of the Sherman Act or Section 7 of the Clayton Act because, as explained below, its proposed market—closed-system devices—is unsupported by evidence.

##### **Response to Finding No. 1383**

The proposed finding should be disregarded because it contains no citations to the record, stating only "as explained below" without identifying with specificity the other proposed findings to which it is referring. The proposed finding should also be disregarded because it is not a "finding of fact," but rather a legal conclusion as to the applicable standards under Section 1 of the Sherman Act and Section 7 of the Clayton Act. Respondents inappropriately state their own arguments as a "fact." The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. The evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1384. “[M]arket definition is, at its heart, a tool to identify and evaluate the competitive alternatives available to consumers,” alternatives that “constrain the pricing and other dimensions of competitive behavior by rival suppliers.” (RX1217 Murphy Report ¶ 107).

**Response to Finding No. 1384**

The proposed finding is vague, conclusory, argumentative, and improper because it is not a “finding of fact,” but a legal conclusion about market definition and the relevance of economic tools and theories. The proposed finding is also incomplete and misleading to the extent that it suggests that Dr. Murphy offered an opinion in his report about the appropriate relevant product market. Dr. Murphy conceded that he did not express an opinion in his report on what the appropriate relevant product market is in this case. (CCFF ¶ 2086). Likewise, Dr. Murphy did not reach an opinion on whether the relevant market includes open-system and closed-system e-cigarette products, (CCFF ¶ 2086), or whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087).

1385. Contrary to Complaint Counsel’s argument, neither practical indicia relevant to market definition, (*see infra* Part XIV.A), nor the hypothetical monopolist test supports a closed-system e-vapor market, (*see infra* Part XIV.B).

**Response to Finding No. 1385**

The proposed finding is vague, conclusory, argumentative, and improper because it is not a “finding of fact,” but a legal conclusion about the sufficiency of the evidence offered by Complaint Counsel. The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. The evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPFF ¶¶ 1387-426).

1386. To the contrary, “there is considerable evidence from the marketplace that substitution between cig-a-likes and pod-based vaporizers is limited and that cig-a-likes and pod-based vaporizers are in separate relevant markets.” (RX1217 Murphy Report ¶ 113).

**Response to Finding No. 1386**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (*See* Order on Post-Trial Filings at 3, dated June 28, 2021). The proposed finding is also vague because it does not identify what it means when it states “[t]o the contrary,” nor does it identify the “considerable evidence” to which it refers. Moreover, the proposed finding is unsupported because the cited paragraph of Dr. Murphy’s report itself contains no support for Dr. Murphy’s claims. Paragraph 113 of Dr. Murphy’s report contains no citations to specific data or references to figures or charts.

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that the sale of closed-system e-cigarettes is not an appropriate relevant product market. The evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

The proposed finding is also incomplete and misleading because it ignores evidence demonstrating that there is no clear-cut way of classifying a closed-system e-cigarette product as either a cigalike or a pod-based product. The distinction between cigalikes and pod-based products is minimal at best and centers on the shape of the products. (CCFF ¶¶ 83-88). Indeed, Altria’s internal classifications for some products are contradicted by third-party witnesses and Respondents’ own economic expert. (RX0865 (Altria) at 032 (classifying the Vuse Vibe under “Closed Tanks” as opposed to “Cig-a-like”); RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” and classifying the Vuse Vibe as a “Closed Tank” instead of a “Cig-a-like” or “Hybrid”); *but see* Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike); (RX1217 at 026 (¶ 38), 091-92 (¶ 129), 112 (¶ 171) (Murphy Report) (Dr. Murphy classifies Vuse Vibe as a cigalike)). Furthermore, there is a “hybrid” category between cigalikes

and pod-based products, and the lines of distinction between these categories are unclear. (Crozier (Sheetz) Tr. 1489-90 (identifying Logic Pro as a hybrid and identifying the hybrid category) (“Q. Is that product you mentioned right now, is it Logic Pro? A. Yes. Q. And do you consider that product a cigalike or a pod system? A. I kind of consider that a hybrid, if you will, because it’s kind of a -- it doesn’t exactly -- it’s too big, I think, to consider it a true cigalike, a longer, wider, heavier type product. Q. So you used the term hybrid, so hybrid between cigalike and pod system products, that’s what you mean? A. Yes.”); *but see* RX1217 at 026 (¶ 37), (Murphy Report) (Dr. Murphy classifies Logic Pro as a “pod-based vaporizer”); RX0865 (Altria) at 032 (classifying Logic Pro under “Closed Tanks” as opposed to “Cig-a-like”); *see also* RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” and classifying Logic Pro as a “Closed Tank” instead of a “Cig-a-like” or “Hybrid”).

Finally, the proposed finding is incomplete and misleading to the extent that it suggests that Dr. Murphy defined a relevant product market. Dr. Murphy conceded that he did not express an opinion in his report on what the appropriate relevant product market is in this case. (CCFF ¶ 2086). Likewise, Dr. Murphy did not reach an opinion on whether the relevant market includes open-system and closed-system e-cigarette products, (CCFF ¶ 2086), or whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087).

**A. Practical Indicia Show That Pod-Based Products And Cig-A-Likes Are Distinct Markets**

1387. The practical indicia looked to by courts, (CoL ¶ 57), show that pod-based products and cig-a-likes are not close substitutes. Rather, as discussed below, pod-based products and cig-a-likes have different product features, appeal to different consumers, are priced separately, and are recognized as distinct product segments within the industry. (*See infra* Part XIV.A.1-4).

**Response to Finding No. 1387**

The first sentence of the proposed finding is unsupported and should be disregarded. The second sentence of the proposed finding is incorrect, incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that the sale of closed-system e-cigarettes is not an appropriate relevant product market. As shown in Complaint Counsel's Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

Finally, the proposed finding is incomplete and misleading because it ignores evidence demonstrating that there is no clear-cut way of classifying a closed-system e-cigarette product as either a cigalike or a pod-based product. The distinction between cigalikes and pod-based products is minimal at best and centers on the shape of the products. (CCFF ¶¶ 83-88). Indeed, Altria's internal classifications for some products are contradicted by third-party witnesses and Respondents' own economic expert. (RX0865 (Altria) at 032 (classifying the Vuse Vibe under "Closed Tanks" as opposed to "Cig-a-like"); RX1290 (Altria) at 007 (depicting the "Evolving E-Vapor Category" and classifying the Vuse Vibe as a "Closed Tank" instead of a "Cig-a-like" or "Hybrid"); *but see* Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike); (RX1217 at 026 (¶ 38), 091-92 (¶ 129), 112 (¶ 171) (Murphy Report) (Dr. Murphy classifies Vuse Vibe as a cigalike)). Furthermore, there is a "hybrid" category between cigalikes and pod-based products, and the lines of distinction between these categories are unclear. (Crozier (Sheetz) Tr. 1489-90 (identifying Logic Pro as a hybrid and identifying the hybrid category) ("Q. Is that product you mentioned right now, is it Logic Pro? A. Yes. Q. And do you consider that product a cigalike or a pod system? A. I kind of consider that a hybrid, if you will, because it's kind of a -- it doesn't exactly -- it's too big, I think, to consider it a true cigalike, a longer, wider,



heavier type product. Q. So you used the term hybrid, so hybrid between cigalike and pod system products, that's what you mean? A. Yes.”); *but see* RX1217 at 026 (¶ 37), (Murphy Report) (Dr. Murphy classifies Logic Pro as a “pod-based vaporizer”); RX0865 (Altria) at 032 (classifying Logic Pro under “Closed Tanks” as opposed to “Cig-a-like”); *see also* RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” and classifying Logic Pro as a “Closed Tank” instead of a “Cig-a-like” or “Hybrid”).

### 1. Pod-Based Products And Cig-A-Likes Have Peculiar Characteristics

1388. Complaint Counsel and its expert, Dr. Rothman, argue that there is only one distinguishing feature between cig-a-likes and pods—shape. (PX5001 Rothman Rebuttal ¶ 30; CC Pretrial Br. at 33-34). But this argument both trivializes the functional importance of the difference in shape and ignores at least two other distinguishing features between these two types of e-vapor products.

#### **Response to Finding No. 1388**

Complaint Counsel does not disagree with the first sentence of the proposed finding. The second sentence of the proposed finding is unsupported and should therefore be disregarded. The second sentence is also conclusory, vague, and argumentative and thus not appropriate for a factual finding. Furthermore, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. The evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

Finally, the proposed finding is incomplete and misleading because it ignores evidence demonstrating that there is no clear-cut way of classifying a closed-system e-cigarette product as either a cigalike or a pod-based product. The distinction between cigalikes and pod-based products is minimal at best and centers on the shape of the products. (CCFF ¶¶ 83-88). Indeed, Altria's internal classifications for some products are contradicted by third-party witnesses and

Respondents' own economic expert. (RX0865 (Altria) at 032 (classifying the Vuse Vibe under "Closed Tanks" as opposed to "Cig-a-like"); RX1290 (Altria) at 007 (depicting the "Evolving E-Vapor Category" and classifying the Vuse Vibe as a "Closed Tank" instead of a "Cig-a-like" or "Hybrid"); *but see* Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike); (RX1217 at 026 (¶ 38), 091-92 (¶ 129), 112 (¶ 171) (Murphy Report) (Dr. Murphy classifies Vuse Vibe as a cigalike)). Furthermore, there is a "hybrid" category between cigalikes and pod-based products, and the lines of distinction between these categories are unclear. (Crozier (Sheetz) Tr. 1489-90 (identifying Logic Pro as a hybrid and identifying the hybrid category) ("Q. Is that product you mentioned right now, is it Logic Pro? A. Yes. Q. And do you consider that product a cigalike or a pod system? A. I kind of consider that a hybrid, if you will, because it's kind of a -- it doesn't exactly -- it's too big, I think, to consider it a true cigalike, a longer, wider, heavier type product. Q. So you used the term hybrid, so hybrid between cigalike and pod system products, that's what you mean? A. Yes."); *but see* RX1217 at 026 (¶ 37), (Murphy Report) (Dr. Murphy classifies Logic Pro as a "pod-based vaporizer"); RX0865 (Altria) at 032 (classifying Logic Pro under "Closed Tanks" as opposed to "Cig-a-like"); *see also* RX1290 (Altria) at 007 (depicting the "Evolving E-Vapor Category" and classifying Logic Pro as a "Closed Tank" instead of a "Cig-a-like" or "Hybrid"))).

1389. *First*, there is a significant difference in the form of the two types of closed-system e-vapor products. A cig-a-like is "an e-vapor product that looks like a cigarette. It's white, it's cylindrical, and frankly, it's more similar in size to a cigarette than these more recently introduced pod-based products." (Willard (Altria) Tr. 1352; Farrell (NJOY) Tr. 365 (because "cigalikes as a whole . . . try to mimic the appearance and shape and the feel of combustible cigarettes," an "adult smoker that wants to try them as an alternative [will] see[] some similarities between what they were using previously"); *see also supra* Part I.B.1).

### **Response to Finding No. 1389**

The first sentence of the proposed finding is unsupported and should therefore be disregarded. The second sentence of the proposed finding is incomplete and misleading. On the very same page of cited trial testimony, Willard acknowledged that “the cigalike product, in some respects, bears some similarity to these pod-based products in that you can unscrew the top part of that cigarette-looking thing, and I guess technically one could call the top part the pod and the bottom part the battery.” (Willard (Altria) Tr. 1352). Willard was also asked if the cigalike was considered a disposable or whether the customer could replace the liquid, and he testified: “Yes. [The customer could replace the liquid.] The customer on the cigalike would keep the battery. They would charge that.” (Willard (Altria) Tr. 1352-53). Complaint Counsel does not disagree with Farrell’s testimony.

The second sentence of the proposed finding is also incomplete, misleading, and contrary to the weight of evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. The evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 7-17).

Finally, the proposed finding is incomplete and misleading because it ignores evidence demonstrating that there is no clear-cut way of classifying a closed-system e-cigarette product as either a cigalike or a pod-based product. The distinction between cigalikes and pod-based products is minimal at best and centers on the shape of the products. (CCFF ¶¶ 83-88). Indeed, Altria’s internal classifications for some products are contradicted by third-party witnesses and Respondents’ own economic expert. (RX0865 (Altria) at 032 (classifying the Vuse Vibe under “Closed Tanks” as opposed to “Cig-a-like”); RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” and classifying the Vuse Vibe as a “Closed Tank” instead of a “Cig-a-like” or

“Hybrid”); *but see* Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike); (RX1217 at 026 (¶ 38), 091-92 (¶ 129), 112 (¶ 171) (Murphy Report) (Dr. Murphy classifies Vuse Vibe as a cigalike)). Furthermore, there is a “hybrid” category between cigalikes and pod-based products, and the lines of distinction between these categories are unclear. (Crozier (Sheetz) Tr. 1489-90 (identifying Logic Pro as a hybrid and identifying the hybrid category) (“Q. Is that product you mentioned right now, is it Logic Pro? A. Yes. Q. And do you consider that product a cigalike or a pod system? A. I kind of consider that a hybrid, if you will, because it’s kind of a -- it doesn’t exactly -- it’s too big, I think, to consider it a true cigalike, a longer, wider, heavier type product. Q. So you used the term hybrid, so hybrid between cigalike and pod system products, that’s what you mean? A. Yes.”); *but see* RX1217 at 026 (¶ 37), (Murphy Report) (Dr. Murphy classifies Logic Pro as a “pod-based vaporizer”); RX0865 (Altria) at 032 (classifying Logic Pro under “Closed Tanks” as opposed to “Cig-a-like”); *see also* RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” and classifying Logic Pro as a “Closed Tank” instead of a “Cig-a-like” or “Hybrid”)).

1390. By contrast, pod products are “not tubular or similar to a traditional cigarette.” They are “larger” and “more rectangular in nature.” (Huckabee (Reynolds) Tr. 385; *see also supra* Part I.B.2).

### **Response to Finding No. 1390**

While Complaint Counsel does not disagree that pod-based products are “not tubular” and are “more rectangular in nature,” the proposed finding is incomplete and misleading to the extent that it relies on the cited testimony of Reynolds’ Huckabee. In describing the appearance of cigalikes and pod devices, Huckabee did not testify that cigalikes and pod-based products appealed to different customer groups; rather, he testified that “the market for our products is comprised of adult smokers here in the U.S. . . . Our closed-system products tend to be very convenient and have wide distribution, so they are -- they are easily purchased by adult consumers. In occasions where

-- where a closed system and convenient product that is also typically very discreet in nature, meaning its vapor cloud is relatively low, consumers find those combinations of factors appealing. In occasions where they are perhaps in their car, if they are -- if they are traveling, if they are driving to work, if they are in an area where they -- they may be moving or with a group of friends where discretion is more important, closed-system products can be very -- very appealing.” (Huckabee (Reynolds) Tr. 385-86).

The proposed finding is unsupported to the extent that it relies on Part I.B.2 of Respondents’ Proposed Findings of Fact. Part I.B.2 discussed open-system e-cigarettes, not closed-system pod-based devices. (*See* Responses to RPF 18-26).

Furthermore, the proposed finding is incomplete and misleading because it ignores evidence demonstrating that there is no clear-cut way of classifying a closed-system e-cigarette product as either a cigalike or a pod-based product. The distinction between cigalikes and pod-based products is minimal at best and centers on the shape of the products. (CCFF 83-88). Indeed, Altria’s internal classifications for some products are contradicted by third-party witnesses and Respondents’ own economic expert. (RX0865 (Altria) at 032 (classifying the Vuse Vibe under “Closed Tanks” as opposed to “Cig-a-like”); RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” and classifying the Vuse Vibe as a “Closed Tank” instead of a “Cig-a-like” or “Hybrid”); *but see* Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike); (RX1217 at 026 (¶ 38), 091-92 (¶ 129), 112 (¶ 171) (Murphy Report) (Dr. Murphy classifies Vuse Vibe as a cigalike)). Furthermore, there is a “hybrid” category between cigalikes and pod-based products, and the lines of distinction between these categories are unclear. (Crozier (Sheetz) Tr. 1489-90 (identifying Logic Pro as a hybrid and identifying the hybrid category) (“Q. Is that product you mentioned right now, is it Logic Pro? A. Yes. Q. And do you consider that

product a cigalike or a pod system? A. I kind of consider that a hybrid, if you will, because it's kind of a -- it doesn't exactly -- it's too big, I think, to consider it a true cigalike, a longer, wider, heavier type product. Q. So you used the term hybrid, so hybrid between cigalike and pod system products, that's what you mean? A. Yes.”); *but see* RX1217 at 026 (¶ 37), (Murphy Report) (Dr. Murphy classifies Logic Pro as a “pod-based vaporizer”); RX0865 (Altria) at 032 (classifying Logic Pro under “Closed Tanks” as opposed to “Cig-a-like”); *see also* RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” and classifying Logic Pro as a “Closed Tank” instead of a “Cig-a-like” or “Hybrid”).

Finally, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel's Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1391. Contrary to Complaint Counsel's assertions, this difference in shape “is far more than just an aesthetic issue.” (Begley (Altria) Tr. 1079).

### **Response to Finding No. 1391**

The proposed finding is vague, incomplete, and misleading to the extent that it suggests that a difference in shape between cigalikes and pod-based devices demonstrates that they are in separate relevant product markets. Begley's testimony, which is cited as support for this proposed finding, concerns a slide in his November 2017 “Investor Day” presentation. (Begley (Altria) Tr. 1075-79 (discussing PX4015 (Altria) at 008)). In this exhibit, Altria discusses how “different segments of adult smokers and vapers are looking for a range of different product formats, flavors, nicotine levels and vapor volumes. As a result, [Altria] believes a portfolio of products that address a broad spectrum of adult consumer preferences will be required to lead in the U.S. e-vapor

market.” (PX4015 (Altria) at 008). The exhibit does not discuss the percentage of e-cigarette consumers for which the difference in shape between pods and cigalikes is “more than just an aesthetic issue.” (PX4015 (Altria) at 008).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

The proposed finding is also incomplete and misleading to the extent that it suggests that the difference in shape of Altria’s cigalike products contributed to an inferior performance or that Altria’s cigalikes were not being improved and updated. The evidence shows that up until Altria announced that it was removing the MarkTen cigalike products from the market in December 2018, Altria was developing an improved version of its MarkTen cigalike product with a new battery, the BVR 2.8. (*See* CCFF ¶¶ 1275-80).

The proposed finding is further incomplete and misleading to the extent that it suggests that all cigalikes contain smaller and inferior batteries, because it ignores evidence demonstrating that Vuse Vibe, a cigalike, “has the largest capacity cartridge and the longest-lasting battery of the VUSE product line.” (PX8008 at 009 (¶ 18(c)) (Huckabee (Reynolds), Decl.) (“The VIBE has the largest capacity cartridge and the longest-lasting battery of the VUSE product line.”); Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike)).

1392. Cig-a-likes’ resemblance to a traditional cigarette means that this form also “unfortunately still carrie[s] some of the stigmas of smoking a cigarette.” (Begley (Altria) Tr. 1100). Many “smokers who want[] to convert to non-combustible tobacco products d[o] not want to appear to be smoking a cigarette,” which makes the form of a cig-a-like “just wrong for conversion.” (PX7036 Garnick (Altria) Dep. at 135; *see also* O’Hara (JLI) Tr. 624-25 (explaining that a cigarette shape “isn’t ideal for people that are trying to switch from

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cigarettes”); PX7033 O’Hara (JLI) Dep. at 191-92 (“[Cig-a-likes] generally were not . . . a strong form factor for converting smokers.”)). The photos below depict cig-a-like products:



(RX0279 (Altria) at 052 (left, MarkTen cig-a-like); RX2025 (right, NJOY King)).

### **Response to Finding No. 1392**

The first sentence of the proposed finding is vague, incomplete, and misleading to the extent that it suggests that a difference in shape between cigalikes and pod-based devices demonstrates they are in separate relevant product markets. In the cited testimony, Begley admits that he is not a smoker. (Begley (Altria) Tr. 1100). Thus, the finding is unsupported because the basis for his testimony is unclear. The first sentence of the proposed finding is also vague, incomplete, and misleading because Begley’s testimony does not provide the percentage of consumers for which a cigalike allegedly still carries the “stigma” of smoking.

The second sentence of the proposed finding is unsupported, incomplete, and misleading to the extent that it suggests that smokers trying to convert from combustible cigarettes to e-cigarette products uniformly reject cigalikes. Altria’s own documents describe how the cigalike



“generally appeal[s] to adult smokers looking for an experience that closely resembles cigarette smoking.” (PX4015 (Altria) at 009 (Begley’s Nov. 2017 Investor Day presentation and speaker notes)). Moreover, Altria’s MarkTen Bold cigalikes offered nicotine delivery at levels approaching that of cigarettes. (CCFF ¶ 1197). The second sentence of the proposed finding is also unsupported to the extent that it suggests that Garnick—or anyone else at Altria—understood what drove conversion. The evidence shows that, as of September 2018, Altria had never measured the conversion potential of any of its products, including its MarkTen cigalikes. (See CCFF ¶ 1304 (citing RX1175 (Altria) at 010 (“We can’t/haven’t measured conversion potential of any of our products to effectively know what is working, what isn’t and why.”))).

The proposed finding is also incomplete, misleading, and unreliable because it relies only on the self-serving testimony of Altria and JLI executives. When asked whether cigalikes were less attractive because they maintained the “stigma” of smoking, Paul Crozier, who is Sheetz’s category manager for cigarettes and tobacco products, responded that he did not “recall that being a product concern.” (PX7019 (Crozier (Sheetz), Dep. at 35)).

The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (See PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); see also PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

Finally, the proposed finding is incomplete and misleading because it ignores evidence demonstrating that there is no clear-cut way of classifying a closed-system e-cigarette product as either a cigalike or a pod-based product. The distinction between cigalikes and pod-based products is minimal at best and centers on the shape of the products. (CCFF ¶¶ 83-88). Indeed, Altria’s internal classifications for some products are contradicted by third-party witnesses and Respondents’ own economic expert. (RX0865 (Altria) at 032 (classifying the Vuse Vibe under “Closed Tanks” as opposed to “Cig-a-like”); RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” and classifying the Vuse Vibe as a “Closed Tank” instead of a “Cig-a-like” or “Hybrid”); *but see* Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike); (RX1217 at 026 (¶ 38), 091-92 (¶ 129), 112 (¶ 171) (Murphy Report) (Dr. Murphy classifies Vuse Vibe as a cigalike)). Furthermore, there is a “hybrid” category between cigalikes and pod-based products, and the lines of distinction between these categories are unclear. (Crozier (Sheetz) Tr. 1489-90 (identifying Logic Pro as a hybrid and identifying the hybrid category) (“Q. Is that product you mentioned right now, is it Logic Pro? A. Yes. Q. And do you consider that product a cigalike or a pod system? A. I kind of consider that a hybrid, if you will, because it’s kind of a -- it doesn’t exactly -- it’s too big, I think, to consider it a true cigalike, a longer, wider, heavier type product. Q. So you used the term hybrid, so hybrid between cigalike and pod system products, that’s what you mean? A. Yes.”); *but see* RX1217 at 026 (¶ 37), (Murphy Report) (Dr. Murphy classifies Logic Pro as a “pod-based vaporizer”); RX0865 (Altria) at 032 (classifying Logic Pro under “Closed Tanks” as opposed to “Cig-a-like”); *see also* RX1290 (Altria) at 007

(depicting the “Evolving E-Vapor Category” and classifying Logic Pro as a “Closed Tank” instead of a “Cig-a-like” or “Hybrid”).

1393. As a result, pod products, by virtue of not looking like a cigarette, offer “an emotional benefit to an adult smoker, because they aren’t viewed as a smoker. It really solves a problem for them.” (Begley (Altria) Tr. 1079).

### **Response to Finding No. 1393**

The proposed finding is incomplete, misleading, and unreliable because it relies only on the self-serving testimony of an Altria executive. When asked whether cigalikes were less attractive because they maintained the “stigma” of smoking, Paul Crozier, who is Sheetz’s category manager for cigarettes and tobacco products, responded that he did not “recall that being a product concern.” (PX7019 (Crozier (Sheetz), Dep. at 35)).

The proposed finding is also vague, incomplete, and misleading to the extent that it suggests that a difference in shape between cigalikes and pod-based devices demonstrates that they are in separate relevant product markets. Begley’s testimony, which is cited as support for this proposed finding, concerns a slide in his November 2017 “Investor Day” presentation. (Begley (Altria) Tr. 1075-79 (discussing PX4015 (Altria) at 008)). In this exhibit, Altria discusses how “different segments of adult smokers and vapers are looking for a range of different product formats, flavors, nicotine levels and vapor volumes. As a result, [Altria] believes a portfolio of products that address a broad spectrum of adult consumer preferences will be required to lead in the U.S. e-vapor market.” (PX4015 (Altria) at 008). The exhibit does not discuss the percentage of e-cigarette consumers for which the difference in shape between pods and cigalikes is “more than just an aesthetic issue.” (PX4015 (Altria) at 008).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the

evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that smokers trying to convert from combustible cigarettes to e-cigarette products uniformly reject cigalikes. Altria's own documents describe how the cigalike "generally appeal[s] to adult smokers looking for an experience that closely resembles cigarette smoking." (PX4015 (Altria) at 009 (Begley's Nov. 2017 Investor Day presentation and speaker notes)). Moreover, Altria's MarkTen Bold cigalikes offered nicotine delivery at levels approaching that of cigarettes. (CCFF ¶ 1197).

Finally, the proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (See PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); see also PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria's Board that the MarkTen cigalike platform was declining and citing the fact that Altria's MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). { [REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

1394. *Second*, pod-based products are generally larger, (Willard (Altria) Tr. 1348), which means they can use larger batteries. These "larger" and "more effective batteries" make pod-based products "more effective at taking the liquid and turning it into vapor and giving consumers an experience they desire." (PX7030 Wexler (Turning Point Brands) Dep. at 42).

#### **Response to Finding No. 1394**

The first sentence of the proposed finding is vague in that it does not identify the products to which pod-based products are being compared. In addition, the statement that pod-based products “can use larger batteries” is unsupported.

The second sentence of the proposed finding is vague in that it does not identify the products to which pod-based products are being compared. If the proposed finding is comparing pod-based products with disposable e-cigarettes or disposable cigalikes, (*see* CCFF ¶¶ 84-85), the finding is incomplete and misleading. Disposable devices do not have rechargeable batteries. (CCFF ¶ 85). To the extent that the proposed finding is comparing pod-based products with cigalikes, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

The proposed finding is further incomplete and misleading to the extent that it suggests that all cigalikes contain smaller and inferior batteries, because it ignores evidence demonstrating that Vuse Vibe, a cigalike, “has the largest capacity cartridge and the longest-lasting battery of the VUSE product line.” (PX8008 at 009 (¶ 18(c)) (Huckabee (Reynolds), Decl.) (“The VIBE has the largest capacity cartridge and the longest-lasting battery of the VUSE product line.”); Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike)).

The proposed finding is also incomplete and misleading in that it suggests that all e-vapor customers are looking for a similar vaping experience, when in fact substantial evidence indicates otherwise. (*See* CCFF ¶ 1177 (citing the trial testimony of Altria’s Dr. Gardner admitting that some consumers prefer e-vapor products with a lower nicotine strength); *see also* CCFF ¶ 82 (cigalikes

and pod products can have an array of nicotine strengths), ¶¶ 1166-72, 1177-88 (manufacturers sell products without nicotine salts or with low nicotine strength)). For example, in its 2017 Investor Day presentation, Altria discussed how “different segments of adult smokers and vapers are looking for a range of different product formats, flavors, nicotine levels and vapor volumes. As a result, [Altria] believes a portfolio of products that address a broad spectrum of adult consumer preferences will be required to lead in the U.S. e-vapor market.” (PX4015 (Altria) at 008). Likewise, Reynolds’ Huckabee testified that consumers have different preferences, which is evident in the fact that Reynolds offers several products and several nicotine strengths in their products. (Huckabee (Reynolds) Tr. 395; *see* CCFF ¶¶ 165-70).

Finally, the proposed finding is incomplete and misleading because it ignores evidence demonstrating that there is no clear-cut way of classifying a closed-system e-cigarette product as either a cigalike or a pod-based product. The distinction between cigalikes and pod-based products is minimal at best and centers on the shape of the products. (CCFF ¶¶ 83-88). Indeed, Altria’s internal classifications for some products are contradicted by third-party witnesses and Respondents’ own economic expert. (RX0865 (Altria) at 032 (classifying the Vuse Vibe under “Closed Tanks” as opposed to “Cig-a-like”); RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” and classifying the Vuse Vibe as a “Closed Tank” instead of a “Cig-a-like” or “Hybrid”); *but see* Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike); (RX1217 at 026 (¶ 38), 091-92 (¶ 129), 112 (¶ 171) (Murphy Report) (Dr. Murphy classifies Vuse Vibe as a cigalike)). Furthermore, there is a “hybrid” category between cigalikes and pod-based products, and the lines of distinction between these categories are unclear. (Crozier (Sheetz) Tr. 1489-90 (identifying Logic Pro as a hybrid and identifying the hybrid category) (“Q. Is that product you mentioned right now, is it Logic Pro? A. Yes. Q. And do you consider that

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product a cigalike or a pod system? A. I kind of consider that a hybrid, if you will, because it's kind of a -- it doesn't exactly -- it's too big, I think, to consider it a true cigalike, a longer, wider, heavier type product. Q. So you used the term hybrid, so hybrid between cigalike and pod system products, that's what you mean? A. Yes.”); *but see* RX1217 at 026 (¶ 37), (Murphy Report) (Dr. Murphy classifies Logic Pro as a “pod-based vaporizer”); RX0865 (Altria) at 032 (classifying Logic Pro under “Closed Tanks” as opposed to “Cig-a-like”); *see also* RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” and classifying Logic Pro as a “Closed Tank” instead of a “Cig-a-like” or “Hybrid”).

1395.

**Response to Finding No. 1395**

The proposed finding is unsupported, vague, incomplete, and misleading to the extent that it suggests that cigalikes provide users with less nicotine satisfaction due to the size of a cigalike battery as compared to a pod-based device battery. {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Furthermore,

Huckabee testified that for Reynolds' cigalikes, “[w]e regard our competitive set as all products

that are sold and available in our channels. So products that compete for consumer purchase, very primarily in the convenience store channel, as I mentioned, these are -- these are almost without exception closed-system products . . . [including] [p]ods and cigalike products.” (Huckabee (Reynolds) Tr. 388-89).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1396. And pod-manufacturers, such as Reynolds, view superior battery performance as one of the product attributes that contributes to a “better experience [for] consumers.” (PX7037 Huckabee (Reynolds) Dep. at 44). By contrast, weaker battery power is a significant and long-recognized drawback of cig-a-likes. As explained by Larry Wexler, the CEO of Turning Point Brands, battery performance is an “inherent limitation[]” of cig-a-likes. (PX7030 Wexler (Turning Point Brands) Dep. at 60). Cig-a-like’s small size means a small battery; a “small battery create[s] less vape; less vape carries less nicotine. So, therefore, the consumer [will] get less satisfaction.” (PX7030 Wexler (Turning Point Brands) Dep. at 35; *see also* PX2289 (JLI) at 121 (improved battery is a key element of pod-based products’ ability to “fill a gap between low performance easy to use cig-a-likes and high performance complex open system devices”)).

### **Response to Finding No. 1396**

The first sentence of the proposed finding is vague, unsupported, incomplete, and misleading to the extent that it is trying to claim that cigalikes provide users with less nicotine satisfaction due to the size of a cigalike battery as compared to a pod-based device battery. In the cited Huckabee trial testimony, he was asked “And do you have an understanding of why that is [that nicotine salts are important to nicotine delivery]?” (PX7037 Huckabee (Reynolds) Dep. at 44). Huckabee was asked only about nicotine salts, not to compare cigalikes and pod-based devices and, as such, his testimony does not support a distinction between cigalikes and pod-based devices.



On the contrary, the evidence shows that both cigalikes and pod-based devices may contain nicotine salts. (CCFF ¶¶ 81, 288).

The second sentence of the proposed finding should be disregarded because it contains no citations to the record.

The third sentence of the proposed finding is incomplete and misleading. In the cited Wexler deposition testimony, Wexler is comparing cigalikes to open system devices, not to other closed-system devices such as pod-based products: “Now, there were some inherent limitations to Cigalikes; the battery, the amount of vapor it produced, the way the vapor got into your system, the amount of satisfaction that you got. When open systems came *along*, all of a sudden, you got this plethora; this whole range of products.” (PX7030 Wexler (Turning Point Brands) Dep. at 60 (emphasis added)).

The fourth sentence of the proposed finding is unsupported to the extent that it relies on PX2289 (JLI) at 121. There is no discussion of batteries or a reference to how batteries are related to performance on the cited page of PX2289.

The proposed finding is also incomplete and misleading because it ignores evidence demonstrating that the Reynolds Vuse Vibe, a cigalike, “has the largest capacity cartridge and the longest-lasting battery of the VUSE product line.” (PX8008 at 009 (¶ 18(c)) (Huckabee (Reynolds), Decl.) (“The VIBE has the largest capacity cartridge and the longest-lasting battery of the VUSE product line.”); Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike)).

The proposed finding is further incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the

evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1397. *Third*, the cartridges for pod-based devices are engineered differently than those of cig-a-likes, which also impacts the user experience. With a pod product, the cartridge generally clicks into place while with cig-a-likes the cartridge usually screws into the battery. (PX7019 Crozier (Sheetz) Dep. at 34-35; *see also* Crozier (Sheetz) Tr. 1487-88 (explaining screw vs. click distinction in context of MarkTen products); Huckabee (Reynolds) Tr. 378-79 (explaining that Vuse cig-a-like products screw together while its pod device connects with magnet)).

### **Response to Finding No. 1397**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record.

The second sentence of the proposed finding is unsupported, vague, incomplete, and misleading to the extent that it suggests that the click versus screw methods of attaching cartridges to e-cigarette devices matter to consumers or their enjoyment of the products. The cited testimony of Crozier and Huckabee describe how the click/magnet and screw attachments work, but provide no support for the unfounded claim that the click versus screw methods of attachment mattered to consumers. (PX7019 (Crozier (Sheetz) Dep. at 34-35); *see also* Crozier (Sheetz) Tr. 1487-88; Huckabee (Reynolds) Tr. 378-79).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel's Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

## **2. Pod-Based Products And Cig-A-Likes Have Distinct Customers**

1398. In addition, cig-a-likes and pod-based products are forms that appeal to different demographics. (Begley (Altria) Tr. 1091).

**Response to Finding No. 1398**

The proposed finding is vague and incomplete in that it does not explain with any specificity how cigalikes and pod-based products appeal to different demographics. The proposed finding does not describe which demographics prefer which products or the strength of these purported preferences. The proposed finding is also unreliable because Begley offered no basis for his testimony other than his personal impression about demographics. (Begley (Altria) Tr. 1091) (Begley responded “yes” when asked whether it was his “view” that “these different forms [appealed] to different consumer segments”).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1399. According to Quigley, Altria’s consumer research indicated that cig-a-likes and pods were not “comparable”; cig-a-likes appeal to “a different consumer,” one who is “looking for different things than a person who is looking for a pod.” (Quigley (Altria) Tr. 2034, 2038).

**Response to Finding No. 1399**

The proposed finding is vague and incomplete in that it does not explain with any specificity how cigalikes and pod-based products are not “comparable.” The proposed finding does not describe what it means by “a different consumer” who prefers cigalikes or the strength of such purported preferences. Likewise, the proposed finding does not describe at all the “different things” for which cigalike and pod users are purportedly looking. The proposed finding is also unsupported, incomplete, and misleading. In the cited testimony, Quigley does not identify the “consumer research” on which he bases his opinion. When characterizing different forms of e-cigarette products, Quigley only stated: “They were a different consumer. That’s *kind of what* our

research had told us.” (Quigley (Altria) Tr. 2034 (emphasis added)). Quigley qualified his answer with the phrase “kind of what” the research told them. (Quigley (Altria) Tr. 2034). In the other cited testimony, Quigley stated that “the cigalike consumer is different and looking for different things than a person who is looking for a pod,” once again without identifying the source of that claim or providing any specifics about it. (Quigley (Altria) Tr. 2038).

The proposed finding is also incomplete and misleading to the extent that it suggests that few consumers preferred cigalikes. In the cited trial testimony, Quigley testified that “[Altria] had the cigalikes, which here were declining and were a smaller piece of the overall vapor business, but the point I was making is although they were declining, they were not going to zero.” (Quigley (Altria) Tr. 2034 (testifying about PX1644 (Altria) at 010, which shows only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); *see also* PX1008 (Altria) at 001 (email from Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1400. Cig-a-like consumers were “generally an older consumer who is not worried about the social friction of cigarettes, and so they want a product that looks and feels and performs similar to their cigarette product.” (Myers (Altria) Tr. 3350; *see also* PX7000 Garnick (Altria) IHT at 108 (“I think our traditional cig-a-like were generally used more by the older cohorts, I’m not sure what the age group was, but the older cohorts than the pod products.”)).

**Response to Finding No. 1400**

The proposed finding is unsupported, incomplete, and misleading to the extent that it suggests that Altria has conducted any studies to provide a basis for the claims made in this proposed finding. Neither the cited testimony of Myers nor the document about which he was testifying (PX4080 (Altria) at 015) references any Altria study on the types of consumers that use various e-vapor products. Likewise, in the cited testimony of Garnick, he provides no basis for his statement, and states that Altria “certainly ha[s] not done any studies on youth usage of our products.” (PX7000 (Garnick (Altria) IHT at 108)).

The proposed finding is also incomplete, misleading, and unreliable because it relies only on the self-serving testimony of Altria executives to support its claim about the “social friction” of traditional cigarettes. When asked whether cigalikes were less attractive because they maintained the “stigma” of smoking, Paul Crozier, who is Sheetz’s category manager for cigarettes and tobacco products, responded that he did not “recall that being a product concern.” (PX7019 (Crozier (Sheetz), Dep. at 35)).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1401. Pods, by contrast “were used more by the younger adult cohorts.” (PX7000 Garnick (Altria) IHT at 108). That demographic was concerned about “the social friction aspect of [a cigarette], they wanted something that looked different.” (Myers (Altria) Tr. 3350).

**Response to Finding No. 1401**

The first sentence of the proposed finding is unsupported, incomplete, and misleading. In the cited testimony, Garnick states: “I *think* the pod products were used more by the younger adult

cohorts.” (PX7000 (Garnick (Altria) IHT at 108) (emphasis added)). He does not reference any specific study, data, or other analysis as the basis for his testimony. Garnick’s testimony is therefore wholly speculative and should be disregarded. Moreover, just prior to the cited testimony, Garnick testifies that Altria “certainly ha[s] not done any studies on youth usage of our products.” (PX7000 (Garnick (Altria) IHT at 108)).

The second sentence of the proposed finding is vague in that it does not specifically identify “[t]hat demographic” to which it refers. To the extent that it refers to “younger adult cohorts,” that term is similarly undefined. The second sentence is also unsupported, incomplete, and misleading to the extent that it suggests that Altria has conducted any studies to provide a basis for the claims made in this proposed finding. Neither the cited testimony of Myers nor the document about which he was testifying (PX4080 (Altria) at 015) reference any Altria study on the types of consumers that use various e-vapor products.

The proposed finding is also incomplete, misleading, and unreliable because it relies only on the self-serving testimony of Altria executives to support its claim about the “social friction” of traditional cigarettes. When asked whether cigalikes were less attractive because they maintained the “stigma” of smoking, Paul Crozier, who is Sheetz’s category manager for cigarettes and tobacco products, responded that he did not “recall that being a product concern.” (PX7019 (Crozier (Sheetz), Dep. at 35)).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1402. Competitors and retailers in the e-vapor industry share this understanding. [REDACTED] }; *see also* PX7019 Crozier (Sheetz) Dep. at 34).

### **Response to Finding No. 1402**

The first sentence in the proposed finding is unsupported.

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel's Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

The proposed finding is further incomplete and misleading because it ignores the full context of Crozier's deposition testimony, which is cited in support for the proposed finding. While [REDACTED], at his deposition, Crozier testified in full about what he meant when he said that MarkTen and JUUL might appeal to "a different type of consumer." (PX7019 (Crozier (Sheetz), Dep. at 33-34) ("Q. And did [the lower margin], all things being equal, make the MarkTen products less attractive to you [than JUUL] as the manager responsible for P&L in this tobacco category? A. I wouldn't say they were less attractive. It was just a different type of consumer. Q. What do you mean it was a different type of consumer? A. So the way I kind of viewed MarkTen was a lower cost product. Maybe that's somebody looking to get into the category. It was also a round product, cigalike, so that might have appealed to somebody looking to switch from cigarettes and wanting still a round-type device.")). Crozier testified that, apart from their shape, the difference between cigalikes and pod-based products was how the battery attached. (PX7019 (Crozier (Sheetz), Dep. at 34-35). But Crozier disavowed that there is any stigma to cigalike use. (PX7019 (Crozier (Sheetz), Dep. at 35) (when asked whether

cigalikes were less attractive because they maintained the “stigma” of smoking, Crozier responded that he did not “recall that being a product concern.”). Moreover, Crozier did not mention any differences between cigalikes and pod-based products based on nicotine strength or salts. (*See* PX7019 (Crozier (Sheetz), Dep. at 33-36)).

Finally, the proposed finding is incomplete and misleading because it ignores Crozier’s testimony that the classification of a product as either a cigalike or a pod-based product can be unclear. (Crozier (Sheetz) Tr. 1489-90 (identifying Logic Pro as a hybrid and identifying the hybrid category) (“Q. Is that product you mentioned right now, is it Logic Pro? A. Yes. Q. And do you consider that product a cigalike or a pod system? A. I kind of consider that a hybrid, if you will, because it’s kind of a -- it doesn’t exactly -- it’s too big, I think, to consider it a true cigalike, a longer, wider, heavier type product. Q. So you used the term hybrid, so hybrid between cigalike and pod system products, that’s what you mean? A. Yes.”)).

1403. Wexler, of Turning Point Brands, said the same: “[I]f you look at the demographics of Cigalike users today, the average age of a Cigalike user . . . is probably over the age of 50. I think the average age is about 55. . . . Pod systems are significantly younger in our particular database. They’d be -- 30 and under somewhere is around the average.” “[T]hey’re very different demographics.” (PX7030 Wexler (Turning Point Brands) Dep. at 51).

### **Response to Finding No. 1403**

Complaint Counsel has no specific response to the cited testimony, but notes that the proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. The evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

### **3. Pod-Based Products And Cig-A-Likes Are Priced Separately**

1404. E-vapor manufacturers also priced their cig-a-like and pod-based products differently, and they did so by reference to the specific closed-system segment they competed in. (Begley



(Altria) Tr. 991 (explaining that Nu Mark took JUUL’s price into account when pricing Elite); King (PMI) Tr. 2356 (explaining that internationally VEEV is priced “head to head” with JUUL)).

#### **Response to Finding No. 1404**

The proposed finding is incorrect, unsupported, incomplete, and misleading. In the cited Begley trial testimony, he was asked “[i]n setting Elite’s price at launch, NuMark took into account JUUL’s price, correct?” (Begley (Altria) Tr. 991). Begley was *not* asked about cigalikes or about which products Altria references when setting the prices of its cigalikes. (Begley (Altria) Tr. 991). Nu Mark’s 2018 Three-Year Strategic Plan, which Begley presented to Altria’s Board, shows that Altria did, in fact, consider the price of both cigalike and pod-based closed-system e-cigarette products when setting the initial price of MarkTen Elite. (PX4012 (Altria) at 029 (“e-vapor pricing ladder” comparing Elite’s device and cartridge pricing at launch with JUUL (a pod product), Vuse Solo (a cigalike), and MarkTen cigalikes)). Likewise, in the cited King trial testimony, he was asked “[w]here you compete with JUUL, do you know if VEEV is more or less expensive?” (King (PMI) Tr. 2356). King was *not* asked about cigalikes or about whether PMI considers the price of cigalikes when setting the price of VEEV. (King (PMI) Tr. 2356).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1405. For example, Robbins, the Chief Growth Officer at JLI, explained that JLI *never* “change[d] its pricing” or “promotions” of JUUL—a pod-based product—“as a result of cig-a-like competition.” (Robbins (JLI) Tr. 3245).

#### **Response to Finding No. 1405**

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The proposed finding is unsupported, incomplete, misleading, and unreliable as it is based only on the self-serving testimony of a JLI executive. Ordinary course JLI documents show that JLI tracked and compared its pod-based JUUL product against Altria's MarkTen cigalikes products well before Altria introduced its pod-based Elite product in February 2018. (CCFF ¶¶ 299-308). Even after Altria introduced MarkTen Elite, JLI continued to track Altria's cigalike and pod products. (CCFF ¶¶ 309-26).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel's Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1406. Similarly, witnesses for each of the competitor brands that submitted a declaration and were deposed in this case indicated that they analyze cig-a-likes and pod-based products separately for purposes of pricing and promotions:

- (a). **NJOY:** A competitor offering a promotion on a cig-a-like would not be a "primary driver" of whether to offer a promotion on a pod-based device. (PX7029 Farrell (NJOY) Dep. at 118-19). { [REDACTED]

- (b). **Reynolds:** [REDACTED] Instead, its cig-a-like prices have been relatively stable over time. (Huckabee (Reynolds) Tr. 389).

- (c). **ITG Brands:** For price competition, ITG Brands "compare[s] pods to pods." (PX7012 Eldridge (ITG Brands) Dep. at 130). [REDACTED]

- (d). **Turning Point Brands:** Wexler testified that, in setting the price of pod-based products, “[i]t would never occur to [him] to look at the price of Cigalikes.” (PX7030 Wexler (Turning Point Brands) Dep. at 50-51).

**Response to Finding No. 1406**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

(a) NJOY: The proposed finding is unsupported. In the cited portion of Farrell’s deposition, he testified that “the final decisions on our promotions aren’t made by me. I contribute to those discussions with information. And so for NJOY, I can’t speak to whether or not the actual decisions would be made if we saw a disposable, on behalf of the company.” (PX7029 (Farrell (NJOY), Dep. at 118-19)). Moreover, the proposed finding is unsupported, incomplete, and misleading to the extent that it suggests that cigalikes do not compete with pod-based products based on Farrell’s testimony. In fact, Farrell testified that { [REDACTED]

[REDACTED]  
[REDACTED] }

(b) Reynolds: The proposed finding is incomplete and misleading to the extent that it suggests that Reynolds never discounted its cigalike products. { [REDACTED]

[REDACTED]  
[REDACTED] }

Moreover, the proposed finding is incorrect, incomplete, and misleading to the extent that it suggests that Reynolds’ Huckabee does not think that cigalikes compete with pod-based products. In fact, Huckabee testified that for Reynolds’ cigalikes, “[w]e regard our competitive set as all products that are sold and available in our channels. So products that compete

for consumer purchase, very primarily in the convenience store channel, as I mentioned, these are -- these are almost without exception closed-system products . . . [including] [p]ods and cigalike products.” (Huckabee (Reynolds) Tr. 388-389).

(c) ITG Brands: The proposed finding is incomplete and misleading to the extent that it suggests that ITG Brands does not consider competition from all closed-system e-vapor products when setting the prices of its products. In the testimony cited deposition testimony, Eldridge was asked, “So if NJOY started running promotions just on daily [disposable cigalikes], that’s not the kind of thing that would make you think, Oh, gee, we have to run a promotion on myblu?” (PX7012 Eldridge (ITG Brands), Dep. at 131)). Eldridge answered: “We’re always looking at the pricing in the marketplace” and did not agree that ITG would not discount on its pod products in response to cigalikes discounting. (PX7012 Eldridge (ITG Brands), Dep. at 131)).

(d) Turning Point Brands: Complaint Counsel has no specific response to this testimony beyond the overall response to this proposed finding.

#### **4. Market Participants Distinguish Between Pod-Based Products And Cig-A-Likes**

1407. Finally, market participants assess the competitive landscape by distinguishing between pod-based products and cig-a-likes. (*See infra* ¶¶ 1047-14).

#### **Response to Finding No. 1407**

The proposed finding is vague and conclusory in that it does not identify the features or other factors by which market participants allegedly distinguish pod-based products and cigalikes. The proposed finding is also unsupported. Paragraph 1047 of Respondent’s proposed findings and those that follow do not discuss pod-based products and cigalikes. (*See, e.g.*, RPF ¶ 1047). To the extent that Respondents meant to cite to RPF ¶¶ 1408-14, Complaint Counsel refers to its responses to those proposed findings. (*See Responses to RPF ¶¶ 1408-14*).

The proposed finding is unsupported, incomplete, and misleading because there are scores of ordinary course documents in which Respondents assessed the e-vapor competitive landscape in terms of closed-system e-cigarettes and did not distinguish between pod-based products and cigalikes. Indeed, Respondents consistently analyzed closed-system e-cigarette products together (including both cigalikes and pods) when presenting market shares and discussing product attributes, including flavors and nicotine strength. (CCFF ¶¶ 240-43, 246, 248, 252, 256-59, 304-05, 309, 314-16, 319, 331, 334-36, 339).

For example, Altria's Begley conceded at the hearing that the market share figures that he presented to Altria's Board in August 2017 take into account both cigalike and pod-based products. (Begley (Altria) Tr. 974-76 (referring to PX4028 (Altria) at 011 (presenting e-vapor market share by closed-system brands and showing the market shares for Vuse, MarkTen, JUUL, blu, and Logic)). Likewise, an April 2018 presentation that Begley made to Altria Board members compares closed-system products with open systems. (CCFF ¶ 234). It depicts both cigalikes and "closed pods" as closed-system e-cigarettes and illustrates that cigalikes and pod-based products are "more like a cigarette" than "closed tanks" and open systems. (CCFF ¶ 234).

JLI—which only sells a pod-based product—also viewed its competition as all closed-system e-cigarettes. (CCFF ¶¶ 252-59, 299-326). For example, in an internal email exchange from April 2017—ten months before Elite was introduced—JLI executives discussed the extent to which MarkTen's growth was funded by couponing as well as the nature of MarkTen promotions over the previous year. (CCFF ¶ 299; *see also* CCFF ¶ 301 (discussing a June 2017 McKinsey slide deck on pricing strategy prepared for JLI that compares prices of JUUL's pod product with other closed-system e-cigarette products, including cigalikes MarkTen XL, Vuse Solo, and Blu Plus); PX2079 (JLI) at 014 ("Product Roadmap" dated January 2018) (slide entitled "Competition

from big companies” and listing MarkTen Bold, a cigalike, as one of JUUL’s competitors)). Similarly, a May 2018 JLI slide deck entitled “Flavor Competitive Landscape” includes a slide comparing JUUL’s flavor offerings to those of “top competitors,” including both Elite and MarkTen, as well as cigalikes Vuse Solo, Vuse Ciro, and Blu Plus. (CCFF ¶ 316).

The proposed finding is also incomplete and misleading because it ignores evidence demonstrating that there is no clear-cut way of classifying a closed-system e-cigarette product as either a cigalike or a pod-based product. The distinction between cigalikes and pod-based products is minimal at best and centers on the shape of the products. (CCFF ¶¶ 83-88). Indeed, Altria’s internal classifications for some products are contradicted by third-party witnesses and Respondents’ own economic expert. (RX0865 (Altria) at 032 (classifying the Vuse Vibe under “Closed Tanks” as opposed to “Cig-a-like”); RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” and classifying the Vuse Vibe as a “Closed Tank” instead of a “Cig-a-like” or “Hybrid”); but see Huckabee (Reynolds) Tr. 378 (Reynolds classifies its product, the Vuse Vibe, as a cigalike); (RX1217 at 026 (¶ 38), 091-92 (¶ 129), 112 (¶ 171) (Murphy Report) (Dr. Murphy classifies Vuse Vibe as a cigalike)). Furthermore, there is a “hybrid” category between cigalikes and pod-based products, and the lines of distinction between these categories are unclear. (Crozier (Sheetz) Tr. 1489-90 (identifying Logic Pro as a hybrid and identifying the hybrid category) (“Q. Is that product you mentioned right now, is it Logic Pro? A. Yes. Q. And do you consider that product a cigalike or a pod system? A. I kind of consider that a hybrid, if you will, because it’s kind of a -- it doesn’t exactly -- it’s too big, I think, to consider it a true cigalike, a longer, wider, heavier type product. Q. So you used the term hybrid, so hybrid between cigalike and pod system products, that’s what you mean? A. Yes.”); *but see* RX1217 at 026 (¶ 37), (Murphy Report) (Dr. Murphy classifies Logic Pro as a “pod-based vaporizer”); RX0865 (Altria) at 032 (classifying

Logic Pro under “Closed Tanks” as opposed to “Cig-a-like”); *see also* RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” and classifying Logic Pro as a “Closed Tank” instead of a “Cig-a-like” or “Hybrid”). In fact, industry sales data published by Nielsen and IRI do not systematically distinguish between cigalikes and pod-based products, as neither data set includes an indicator variable for this purpose. (*See* PX5001 at 026-27 (¶ 38 & n.112) (Rothman Rebuttal Report)). As a result, Dr. Murphy appears to make his own judgment calls about how to classify closed-system e-cigarettes as either a cigalike or pod-based product. (*See* PX5001 at 026-27 (¶ 38 & n.112) (Rothman Rebuttal Report)).

Finally, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1408. For example, as Quigley explained, Nu Mark separated pods and cig-a-likes in its internal market analysis because “different product forms . . . were behaving differently in the market because they were different . . . consumer trends.” Pods were “driven exponentially by JUUL, and then we had cigalikes, which . . . were declining and were a smaller piece of the overall vapor business.” (Quigley (Altria) Tr. 2034 (discussing PX1644 (Altria) at 010 (analyzing “Volume by Form,” between cig-a-likes and hybrids/pods)); *see also* RX0865 (Altria) at 032 (explaining that “[c]losed systems include multiple product types”: cig-a-like, closed tank, and pod-based system); RX1290 (Altria) at 007 (depicting the “Evolving E-Vapor Category” as including cig-a-like, hybrid, closed tank, and open tank)).

### **Response to Finding No. 1408**

The proposed finding is unsupported, incomplete, and misleading. In the cited Quigley testimony, he does not state the basis for his statement that “different product forms . . . were behaving differently.” When characterizing different forms of e-cigarette products, Quigley only stated: “They were a different consumer. That’s *kind of what* our research had told us.” (Quigley

(Altria) Tr. 2034 (emphasis added)). Quigley qualified his answer with the phrase “kind of what” the research told them. (Quigley (Altria) Tr. 2034).

The proposed finding is also incomplete and misleading to the extent that it suggests that few consumers preferred cigalikes. In the cited trial testimony, Quigley testified that “[Altria] had the cigalikes, which here were declining and were a smaller piece of the overall vapor business, but the point I was making is although they were declining, they were not going to zero.” (Quigley (Altria) Tr. 2034 (testifying about PX1644 (Altria) at 010, which shows only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); *see also* PX1008 (Altria) at 001 (email from Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)).

Complaint Counsel has no specific response to the other cited exhibits except to state that the proposed finding is incomplete and misleading to the extent that it suggests that cigalikes and pod-based closed system devices are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that Respondents regularly distinguished pod-based products and cigalikes in their internal market analyses. There are scores of ordinary course documents in which Respondents assessed the e-vapor competitive landscape in terms of closed-system e-cigarettes and did not distinguish between pod-based products and cigalikes. Indeed, Respondents consistently analyzed



closed-system e-cigarette products together (including both cigalikes and pods) when presenting market shares and discussing product attributes, including flavors and nicotine strength. (CCFF ¶¶ 240-43, 246, 248, 252, 256-59, 304-05, 309, 314-16, 319, 331, 334-36, 339; *see also* Response to RPF ¶ 1407).

1409. Nu Mark also separated the different e-cigarette categories by form when presenting market data to Altria's Board. In explaining one such slide delineating between different types of closed-system products, Begley testified, "I thought it was important to understand, especially for the board to understand that . . . the winning product proposition in the market that was really driving the growth of the category were pod-based products." (Begley (Altria) Tr. 1091 (discussing PX4012 (Altria) at 014 (splitting the market into cig-a-like, open, closed tank, and pod products))).

### **Response to Finding No. 1409**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record.

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that Altria regularly distinguished pod-based products and cigalikes in its market analyses presented to the Board. On the contrary, the evidence overwhelming shows that Altria consistently assessed the e-vapor competitive landscape in terms of closed-system e-cigarettes and did not typically distinguish between pod-based products and cigalikes. (*See, e.g.*, PX4029 (Altria) at 013-14 ("Nu Mark BOD Orientation" presented by Begley on April 11, 2018) (presenting market shares for MarkTen, JUUL, Vuse, and other closed-system e-cigarette products based on MOC data); PX4012 (Altria) at 012 ("Nu Mark 2018 Three Year Strategic Plan" presented by Begley to Altria's Board on February 28, 2018) (same); PX4032 (Altria) at 014 ("Nu Mark 2017 Three Year Strategic Plan" presented by Begley to Altria's Board on February 28, 2017) (same); PX4040 (Altria) at 006 ("Nu Mark 2016-2018 Strategic Plan" presented by Begley to Altria's Board on February 23, 2016) (identifying one of Nu Mark's "Key Objectives by the end of 2017" as "achieving a top 2 share position in *the closed system market*") (emphasis added); PX4042 (Altria)

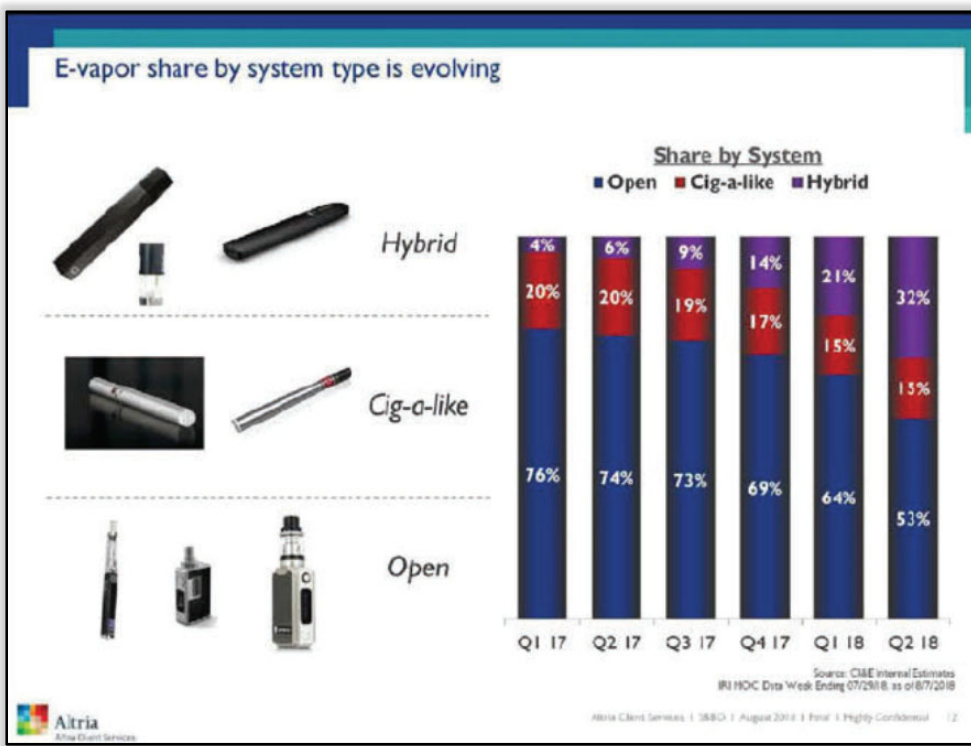
at 006 { [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] }; *see also* Begley (Altria) Tr. 972 (conceding that the “MOC channel” sells predominantly closed-system products and that the MOC channel is “primarily a closed-system outlet”); Begley (Altria) Tr. 1014 { [REDACTED]  
[REDACTED] }; PX4029 (Altria) at 007 (“Nu Mark BOD Orientation” dated April 11, 2018) (depicting cigalikes and “closed pods” as closed-system e-cigarettes and illustrating that both cigalikes and pod-based products are “more like a cigarette” than “closed tanks” and open systems); *see* Response to RPF ¶ 1407).

The proposed finding is also incomplete and misleading to the extent that it suggests that few consumers preferred cigalikes. Altria’s Quigley testified that “[Altria] had the cigalikes, which here were declining and were a smaller piece of the overall vapor business, but the point I was making is although they were declining, they were not going to zero.” (Quigley (Altria) Tr. 2034 (testifying about PX1644 (Altria) at 010, which shows only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); *see also* PX1008 (Altria) at 001 (email from Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States

behind only JUUL); CCF 1087, 1098-99, 1107, 1173-76 (showing that Respondents’ argument that cigalikes are financially challenged is unsupported and pretextual)).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCF 208-407).

1410. The different categories also were delineated in the August 2018 Board presentation:



(PX1424 (Altria) at 012).

**Response to Finding No. 1410**

The proposed finding is unsupported, incomplete, and misleading to the extent that it suggests that this document is representative of market analyses presented to Altria’s Board or that Altria regularly distinguished pod-based products and cigalikes in its market analyses presented to

the Board. On the contrary, the evidence overwhelming shows that Altria consistently assessed the e-vapor competitive landscape in terms of closed-system e-cigarettes and did not typically distinguish between pod-based products and cigalikes. (*See* Response to RPF ¶ 1409).

1411. Altria's leadership was similarly precise when describing the e-vapor industry to its investors. For example, at Altria's Investor Day in November 2017, Begley conveyed to the audience that there were three primary product formats: cig-a-likes, pods, and open tank systems. (Begley (Altria) Tr. 1080 (discussing PX4015 (Altria) at 008)).

### **Response to Finding No. 1411**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The proposed finding is also vague in its use of the phrase "three primary product formats." It is unclear how this terminology relates to product market definition.

The proposed finding is also unsupported, incomplete, and misleading to the extent that it suggests that Altria regularly distinguished pod-based products and cigalikes in their ordinary course market analyses. On the contrary, the evidence overwhelming shows that Altria consistently assessed the e-vapor competitive landscape in terms of closed-system e-cigarettes and did not typically distinguish between pod-based products and cigalikes. (*See* Response to RPF ¶ 1409). In fact, in the November 2017 Investor Day presentation cited by Respondents in support of this proposed finding, Altria presented its market share to investors in terms of the closed-system e-cigarette market. (PX4015 (Altria) at 014 (showing that MarkTen had a 13.5 percent national share in Q3 2017); *see also* Begley (Altria) Tr. 972 (conceding that the "MOC channel" sells predominantly closed-system products and that the MOC channel is "primarily a closed-system outlet"))).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel's Proposed Findings of Fact, the

evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1412. JLI also viewed closed-system vapor products as segmented and largely disregarded cig-a-likes because it did not compete in that market. As Burns explained, “we didn’t spend much time looking at cigalike products and their relevance in the marketplace. It was a very small percentage of the marketplace and one that was shrinking over time.” (PX7025 Burns (JLI) Dep. at 200; *see also* PX7025 Burns (JLI) Dep. at 199-200 (“We really didn’t look at the cigalike products as a product category that we were competing against. It was a very small category and one that was not growing and one that we did not believe was going to be around, you know, forever.”)). To the extent JLI was tracking cig-a-like products, it was because, as O’Hara explained at trial, he “tracked everything from cigarettes to nicotine gum to nicotine patches, as well as all kinds of vapor products, including . . . open-pod systems.” (O’Hara (JLI) Tr. 506).

### **Response to Finding No. 1412**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The second sentence of the proposed finding is unreliable to the extent that it suggests that cigalikes were an obsolete product category because it relies on the self-serving testimony of a JLI executive. Altria’s Quigley testified that “[Altria] had the cigalikes . . . although they were declining, they were not going to zero.” (Quigley (Altria) Tr. 2034 (testifying about PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales in the e-vapor industry from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). { [REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

The third sentence of the proposed finding is vague, unsupported, incomplete, and misleading to the extent that it suggests that O’Hara disregarded cigalikes as a competing e-vapor product to JUUL. In the cited testimony, O’Hara was asked “And you tracked MarkTen cigalike products like you would any other e-vapor product, correct?” (O’Hara (JLI) Tr. 507). And O’Hara answered “Correct. Correct.” (O’Hara (JLI) Tr. 507). O’Hara was not asked whether, in his opinion, cigalikes competed with pod-based products.

The proposed finding is unsupported, incomplete, and misleading to the extent that it suggests that JLI regularly distinguished pod-based products and cigalikes in its internal market analyses. On the contrary, JLI—which only sells a pod-based product—viewed its competition as all closed-system e-cigarettes. (CCFF ¶¶ 252-59, 299-326). For example, in an internal email exchange from April 2017—ten months before Elite was introduced—JLI executives discussed the extent to which MarkTen’s growth was funded by couponing as well as the nature of MarkTen promotions over the previous year. (CCFF ¶ 299; *see also* CCFF ¶ 301 (discussing a June 2017 McKinsey slide deck on pricing strategy prepared for JLI that compares prices of JUUL’s pod product with other closed-system e-cigarette products, including cigalikes MarkTen XL, Vuse Solo, and Blu Plus)). Similarly, a May 2018 JLI slide deck entitled “Flavor Competitive Landscape” includes a slide comparing JUUL’s flavor offerings to those of “top competitors,” including both Elite and MarkTen, as well as cigalikes Vuse Solo, Vuse Ciro, and Blu Plus. (CCFF ¶ 316).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the

evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1413. [REDACTED]

### **Response to Finding No. 1413**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record.

The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (See PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); see also PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). [REDACTED]

[REDACTED] ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that Reynolds’ Huckabee does not think that cigalikes compete with pod-based products. On the contrary, Huckabee testified that for Reynolds’ cigalikes, “[w]e regard our competitive set

as all products that are sold and available in our channels. So products that compete for consumer purchase, very primarily in the convenience store channel, as I mentioned, these are -- these are almost without exception closed-system products . . . [including] [p]ods and cigalike products.” (Huckabee (Reynolds) Tr. 388-89).

1414. [REDACTED]

**Response to Finding No. 1414**

The proposed finding is vague, incomplete, and misleading. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Not all cigalikes are disposable; some contain rechargeable batteries. (CCFF ¶ 85).

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).



**B. Dr. Rothman’s Application Of The Hypothetical Monopolist Test Does Not Support His Conclusion That The Market Is All Closed-Systems Products**

1415. Dr. Rothman’s reliance on the hypothetical monopolist test cannot carry Complaint Counsel’s burden to demonstrate the market is all closed systems, including both pod-based and cig-a-like products. (PX7048 Rothman Trial Dep. at 14 (“Q. What framework did you use to define the relevant product market? A. I used the hypothetical monopolist test described in the Horizontal Merger Guidelines.”)).

**Response to Finding No. 1415**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion about Dr. Rothman’s reliance on the hypothetical monopolist test and Complaint Counsel’s burden to prove a relevant product market. Respondents inappropriately state their own arguments as a “fact.”

Complaint Counsel does not disagree that Dr. Rothman used the hypothetical monopolist described in the Horizontal Merger Guidelines to define the relevant product market in this case. (CCFF ¶¶ 395-407). But the proposed finding is incorrect, incomplete, and misleading to the extent that it suggests that Complaint Counsel relies only on Dr. Rothman’s application of the hypothetical monopolist test to prove that the relevant product market is the sale of closed-system e-cigarettes. On the contrary, a wealth of “practical indicia” evidence also shows that closed-system e-cigarettes constitutes a relevant product market. (See CCFF ¶¶ 218-394).

1416. *First*, although Complaint Counsel bears the burden on this issue, Dr. Rothman did not use the hypothetical monopolist test to analyze whether there are distinct submarkets within closed-system e-cigarettes. In fact, he concedes that he made no attempt to determine whether a hypothetical monopolist with a pod-based device, such as JUUL, could profitably impose a price increase within a pod-based market. (PX7048 Rothman Trial Dep. at 128; *see also* Murphy Tr. 3114 (explaining that Dr. Rothman “didn’t do anything [in his initial report] dealing with the question of whether it is appropriate to think about a smaller market or, equivalently, whether it was important to think about differential rates of substitution between pod-based and cigalikes”)).

**Response to Finding No. 1416**

Complaint Counsel does not disagree that Dr. Rothman did not conduct a hypothetical monopolist test on a candidate market consisting only of pod-based devices. But the proposed finding is incorrect, incomplete, and misleading to the extent that it suggests that Dr. Rothman misapplied the hypothetical monopolist test. The Horizontal Merger Guidelines state that: “The hypothetical monopolist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market. The Agencies may evaluate a merger in any relevant market satisfying the test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects.” (PX9098 (Horizontal Merger Guidelines) at 012-13 (§ 4.1.1)). Dr. Rothman’s application of the hypothetical monopolist test to a candidate market consisting of all closed-system e-cigarettes is consistent not only with this principle, (PX5000 at 040-41 (¶¶ 78-82)), but also with the ordinary course evidence showing that Respondents and other market participants view competition within the context of all closed-system e-vapor products. (CCFF ¶¶ 218-394). Complaint Counsel adds that Dr. Murphy did not offer an opinion on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel’s Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1417. This evinces a complete disregard for the “smallest market principle,” (RX217 Murphy Report ¶ 108), which reflects the customary practice that “when the Agencies rely on market shares and concentration, they usually do so in the smallest relevant market satisfying the hypothetical monopolist test.” (PX9098 Horizontal Merger Guidelines (“HMG”) at 013 § 4.1.1). Dr. Rothman’s report does not even acknowledge the existence of this principle. (PX5000 Rothman Report ¶¶ 63-66).

**Response to Finding No. 1417**

The proposed finding is vague, unsupported, argumentative, conclusory, incomplete, misleading, and improper because it is not a “finding of fact,” but a legal conclusion that misstates the application of the hypothetical monopolist test. Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that Dr. Rothman misapplied the hypothetical monopolist test. The Horizontal Merger Guidelines state that: “The hypothetical monopolist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market. The Agencies may evaluate a merger in any relevant market satisfying the test, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects.” (PX9098 (Horizontal Merger Guidelines) at 012-13 (§ 4.1.1)). Dr. Rothman’s application of the hypothetical monopolist test to a candidate market consisting of all closed-system e-cigarettes is consistent not only with this principle, (PX5000 at 040-41 (¶¶ 78-82)), but also with the ordinary course evidence showing that Respondents and other market participants view competition within the context of all closed-system e-vapor products. (CCFF ¶¶ 218-394). Complaint Counsel adds that Dr. Murphy did not offer an opinion on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087).

The proposed finding is also incomplete and misleading to the extent that it suggests that the sale of closed-system e-cigarettes did not pass the hypothetical monopolist test. Dr. Rothman’s analysis utilizing the hypothetical monopolist test demonstrates that the sale of closed-system e-cigarettes is a relevant product market. (CCFF ¶¶ 395-407; PX5000 at 040-41 (¶¶ 78-82), 106-07 (Ex. 2), 138-40 (Appendix C) (Rothman Expert Report)). Other “practical indicia” further establish

that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 218-394).

1418. *Second*, Dr. Rothman’s analysis in support of a market of all closed-system products relied on outdated elasticity studies that do not accurately reflect the market conditions in 2018—much less the market conditions today—and therefore are not probative of the extent to which consumers will substitute one e-vapor product for another. (RX1217 Murphy Report ¶¶ 102-06).

### **Response to Finding No. 1418**

The proposed finding is vague, conclusory, argumentative, and improper because it is not a “finding of fact,” but rather a legal conclusion about the relevancy of evidence. Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is vague, unsupported, incomplete, and misleading. The proposed finding is vague in that it does not identify with specificity how the elasticity studies upon which Dr. Rothman relied do not reflect 2018 or current market conditions or how the older data impacts Dr. Rothman’s results. The proposed finding is also unsupported because, in the cited sections of Dr. Murphy’s report, he merely “hypothesizes about potential issues with the [elasticity] estimates” that Dr. Rothman used in his hypothetical monopolist test. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report))). Dr. Murphy did not offer any analysis to demonstrate that his “hypothetical” issues would change the elasticity estimates or Dr. Rothman’s hypothetical monopolist test results. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report))).

Finally, the proposed finding is incomplete and misleading because it refers only to the “academic” studies and ignores { [REDACTED] } which is dated June 2018 and reflects first quarter 2018 data, that Dr. Rothman also used as a basis for his elasticity estimates. (CCFF ¶¶ 318, 406 (*in camera*); PX5001 at 028 (¶ 41) (Rothman Rebuttal Report); RX1217 at 75-76 (¶¶ 102-03) (Murphy Report) (discussing only the six “academic” studies)). { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Dr. Rothman relied on { [REDACTED] }, as well as the academic studies, for the elasticities used in his hypothetical monopolist test showing that closed-system e-cigarettes is a relevant product market. (PX5000 at 041 (¶¶ 81-82) (Rothman Expert Report) (*in camera*)).

1419. Dr. Rothman acknowledged that “[e]lasticity could change over time and in different ways as the market evolves and matures.” (PX7048 Rothman Trial Dep. at 108).

#### **Response to Finding No. 1419**

The proposed finding is vague in that it does not indicate if it is making a claim about elasticities generally or a specific product market. If the proposed finding is referring to e-cigarettes, the proposed finding is incomplete and misleading to the extent that it suggests that Respondents have presented evidence that e-cigarette elasticities have changed over time. In his report, Dr. Murphy merely “hypothesizes about potential issues with the [elasticity] estimates” that Dr. Rothman used in his hypothetical monopolist test. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)). Dr. Murphy did not offer any analysis to demonstrate that his “hypothetical” issues would change the elasticity estimates or Dr. Rothman’s hypothetical monopolist test results. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)).

The proposed finding is also incomplete and misleading to the extent that it suggests that Respondents have presented conflicting evidence of the appropriate price elasticities or the relevant product market. Dr. Murphy’s report does not include a critical elasticity analysis or an

analysis in which he compares the actual elasticity of demand for e-vapor products with the critical elasticity. (CCFF ¶¶ 2092-93). Moreover, Dr. Murphy conceded that he did not express an opinion in his report on what the appropriate relevant product market is in this case. (CCFF ¶ 2086). Likewise, Dr. Murphy did not reach an opinion on whether the relevant market includes open-system and closed-system e-cigarette products, (CCFF ¶ 2086), or whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087).

1420. Dr. Rothman also acknowledged that the e-vapor industry is dynamic. (PX7048 Rothman Trial Dep. at 108).

#### **Response to Finding No. 1420**

The proposed finding is incomplete because Respondents have not presented evidence that elasticities have changed over time in the e-vapor industry. In his report, Dr. Murphy merely “hypothesizes about potential issues with the [elasticity] estimates” that Dr. Rothman used in his hypothetical monopolist test. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)). Dr. Murphy did not offer any analysis to demonstrate that his “hypothetical” issues would change the elasticity estimates or Dr. Rothman’s hypothetical monopolist test results. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)). Dr. Murphy’s report does not include a critical elasticity analysis or an analysis in which he compares the actual elasticity of demand for e-vapor products with the critical elasticity. (CCFF ¶¶ 2092-93). Moreover, Dr. Murphy conceded that he did not express an opinion in his report on what the appropriate relevant product market is in this case. (CCFF ¶ 2086). Likewise, Dr. Murphy did not reach an opinion on whether the relevant market includes open-system and closed-system e-cigarette products, (CCFF ¶ 2086), or whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087).

1421. One of the market dynamics, Dr. Rothman agrees, was “JUUL’s growth,” which “really took off” in late 2017. (PX7048 Rothman Trial Dep. at 108-09). And that sort of change could “imply changes in elasticity.” (PX7048 Rothman Trial Dep. at 109).

**Response to Finding No. 1421**

The proposed finding is incomplete because Respondents have not presented evidence that elasticities have changed over time in the e-vapor industry. In his report, Dr. Murphy merely “hypothesizes about potential issues with the [elasticity] estimates” that Dr. Rothman used in his hypothetical monopolist test. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)). Dr. Murphy did not offer any analysis to demonstrate that his “hypothetical” issues would change the elasticity estimates or Dr. Rothman’s hypothetical monopolist test results. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)). Dr. Murphy’s report does not include a critical elasticity analysis or an analysis in which he compares the actual elasticity of demand for e-vapor products with the critical elasticity. (CCFF ¶¶ 2092-93). Moreover, Dr. Murphy conceded that he did not express an opinion in his report on what the appropriate relevant product market is in this case. (CCFF ¶ 2086). Likewise, Dr. Murphy did not reach an opinion on whether the relevant market includes open-system and closed-system e-cigarette products, (CCFF ¶ 2086), or whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087).

The proposed finding is also incomplete and misleading because it ignores the { [REDACTED] } which Dr. Rothman also used as a basis for his elasticity estimates. (CCFF ¶¶ 318, 406 (*in camera*); PX5001 at 028 (¶ 41) (Rothman Rebuttal Report)). { [REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } Dr. Rothman relied on { [REDACTED]

[REDACTED] }, as well as the academic studies, for the elasticities used in his hypothetical monopolist test showing that closed-system e-cigarettes is a relevant product market. (PX5000 at 041 (¶¶ 81-82) (Rothman Expert Report) (*in camera*)).

1422. Despite recognizing that the market has changed in ways that could affect elasticity, *all* of the elasticity studies Dr. Rothman relies on in his hypothetical monopolist test are, as he admits, based on data from 2017 or earlier, *before* JLI was a significant player. (PX7048 Rothman Trial Dep. at 109; RX1217 Murphy Report ¶ 106).

**Response to Finding No. 1422**

The proposed finding is incorrect, incomplete, and misleading. In addition to academic studies, Dr. Rothman also relied on the e-vapor industry elasticities reported in the { [REDACTED] } (PX5000 at 041 (¶ 81) (Rothman Expert Report); PX5001 at 028 (¶ 41) (Rothman Rebuttal Report)). { [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] } Dr.

Rothman relied on { [REDACTED] }, as well as the academic studies, for the elasticities



used in his hypothetical monopolist test showing that closed system e-cigarettes is a relevant product market. (PX5000 at 041 (¶¶ 81-82) (Rothman Expert Report) (*in camera*)).

The proposed finding is also unsupported. In the cited section of Dr. Murphy’s report, he merely “hypothesizes about potential issues with the [elasticity] estimates” that Dr. Rothman used in his hypothetical monopolist test. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)). Dr. Murphy did not offer any analysis to demonstrate that his “hypothetical” issues would change the elasticity estimates or Dr. Rothman’s hypothetical monopolist test results. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)). Dr. Murphy’s report does not include a critical elasticity analysis or an analysis in which he compares the actual elasticity of demand for e-vapor products with the critical elasticity. (CCFF ¶¶ 2092-93). Moreover, Dr. Murphy conceded that he did not express an opinion in his report on what the appropriate relevant product market is in this case. (CCFF ¶ 2086). Likewise, Dr. Murphy did not reach an opinion on whether the relevant market includes open-system and closed-system e-cigarette products, (CCFF ¶ 2086), or whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087).

1423. In fact, most of the data in these studies predate the introduction of pod-based products entirely. (PX7048 Rothman Trial Dep. at 109; *see also* RX1217 Murphy Report ¶ 105 (explaining that the studies “fail[] to differentiate between cig-a-likes and pod-based vaporizers”)).

### **Response to Finding No. 1423**

The proposed finding is incorrect, incomplete, and misleading. In addition to academic studies, Dr. Rothman also relied on the e-vapor industry elasticities reported in the { [REDACTED] } (PX5000 at 041 (¶ 81) (Rothman Expert Report); PX5001 at 028 (¶ 41) (Rothman Rebuttal Report)). { [REDACTED] } [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Dr. Rothman relied on { [REDACTED] }, as well as the academic studies, for the elasticities used in his hypothetical monopolist test showing that closed system e-cigarettes is a relevant product market. (PX5000 at 041 (¶¶ 81-82) (Rothman Expert Report) (*in camera*)).

The proposed finding is also unsupported. In the cited section of Dr. Murphy's report, he merely "hypothesizes about potential issues with the [elasticity] estimates" that Dr. Rothman used in his hypothetical monopolist test. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)). Dr. Murphy did not offer any analysis to demonstrate that his "hypothetical" issues would change the elasticity estimates or Dr. Rothman's hypothetical monopolist test results. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)). Dr. Murphy's report does not include a critical elasticity analysis or an analysis in which he compares the actual elasticity of demand for e-vapor products with the critical elasticity. (CCFF ¶¶ 2092-93). Moreover, Dr. Murphy conceded that he did not express an opinion in his report on what the appropriate relevant product market is in this case. (CCFF ¶ 2086). Likewise, Dr. Murphy did not reach an opinion on whether the relevant market includes open-system and closed-system e-cigarette products, (CCFF ¶ 2086), or whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087).

1424. But despite this dramatic change in product offerings, Dr. Rothman relied on those outdated studies and made no attempt to assess whether the elasticity of pod-based products as a

category is different from cig-a-like products as a category. (PX7048 Rothman Trial Dep. at 109).

**Response to Finding No. 1424**

The proposed finding is incorrect, incomplete, and misleading. In addition to academic studies, Dr. Rothman also relied on the e-vapor industry elasticities reported in the { [REDACTED]

[REDACTED] } (PX5000 at 041 (¶ 81) (Rothman Expert Report); PX5001 at 028 (¶ 41)

(Rothman Rebuttal Report)). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Dr.

Rothman relied on { [REDACTED] }, as well as the academic studies, for the elasticities used in his hypothetical monopolist test showing that closed system e-cigarettes is a relevant product market. (PX5000 at 041 (¶¶ 81-82) (Rothman Expert Report) (*in camera*)).

The proposed finding is also unsupported. In his report, Dr. Murphy merely “hypothesizes about potential issues with the [elasticity] estimates” that Dr. Rothman used in his hypothetical monopolist test. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)). Dr. Murphy did not offer any analysis to demonstrate that his “hypothetical” issues would change the elasticity estimates or Dr. Rothman’s hypothetical monopolist test results. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)). Dr. Murphy’s report does not include a critical elasticity analysis

or an analysis in which he compares the actual elasticity of demand for e-vapor products with the critical elasticity. (CCFF ¶¶ 2092-93). Moreover, Dr. Murphy conceded that he did not express an opinion in his report on what the appropriate relevant product market is in this case. (CCFF ¶ 2086). Likewise, Dr. Murphy did not reach an opinion on whether the relevant market includes open-system and closed-system e-cigarette products, (CCFF ¶ 2086), or whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087).

1425. And this is just a small sample of the many ways in which the market has evolved since the elasticity data that underpins Dr. Rothman's analysis was collected. As Professor Murphy details in his report, the elasticity studies that Dr. Rothman relies upon in his hypothetical monopolist test also:

- (a). Predate MarkTen Elite's entry into the market and thus "cannot shed light on whether, in fact, MarkTen Elite competitively constrained JUUL," an issue that is "central to the market definition question in this case." (RX1217 Murphy Report ¶ 103).
- (b). Predate the rapid growth of the e-vapor products, much of which occurred after 2017, thereby failing to account for any different substitution behavior between early and later adopters of closed-system e-cigarettes. (RX1217 Murphy Report ¶ 104).
- (c). Predate the stagnation of growth in cig-a-likes, which reflects "very different demand conditions in the relevant period," trends that make it "unlikely that demand elasticities would be the same for cig-a-likes and pod-based vaporizers." (RX1217 Murphy Report ¶ 105).
- (d). Predate a period that "saw multiple brands trade the leading position in closed-system device sales (during 1H 2018), evidencing the highly dynamic nature of competition." (RX1217 Murphy Report ¶ 106).

### **Response to Finding No. 1425**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The proposed finding, including its sub-parts, is vague, incorrect, and unsupported in the claims it makes about the data that Dr. Rothman relied upon in his hypothetical monopolist test. In the cited section of Dr. Murphy's report, he merely "hypothesizes about potential issues with the [elasticity] estimates" that Dr. Rothman used in his hypothetical

monopolist test. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)). Dr. Murphy does not offer any analysis to demonstrate that his “hypothetical” issues would change the elasticity estimates or Dr. Rothman’s hypothetical monopolist test results. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report)).

Moreover, Dr. Murphy ignores the fact that, in addition to the academic studies of elasticity, Dr. Rothman also relied on the e-vapor industry elasticities reported in the { [REDACTED] } (PX5000 at 041 (¶ 81) (Rothman Expert Report); PX5001 at 028 (¶ 41) (Rothman Rebuttal Report)). { [REDACTED] }

[REDACTED] } Dr. Rothman relied on { [REDACTED] }, as well as the academic studies, for the elasticities used in his hypothetical monopolist test showing that closed system e-cigarettes is a relevant product market. (PX5000 at 041 (¶¶ 81-82) (Rothman Expert Report) (*in camera*)).

In addition, Dr. Murphy’s report does not include a critical elasticity analysis or an analysis in which he compares the actual elasticity of demand for e-vapor products with the critical elasticity. (CCFF ¶¶ 2092-93). Moreover, Dr. Murphy conceded that he did not express an opinion in his report on what the appropriate relevant product market is in this case. (CCFF ¶ 2086).

Likewise, Dr. Murphy did not reach an opinion on whether the relevant market includes open-system and closed-system e-cigarette products, (CCFF ¶ 2086), or whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087).

Finally, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel's Proposed Findings of Fact, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

1426. These outdated and unrepresentative elasticity studies make Dr. Rothman's hypothetical monopolist test for a prospective market of closed-system devices unreliable. (RX1217 Murphy Report ¶¶ 102-06).

#### **Response to Finding No. 1426**

The proposed finding is vague, conclusory, argumentative, and improper because it is not a "finding of fact," but rather a legal conclusion about the reliability of evidence. Respondents inappropriately state their own arguments as a "fact."

The proposed finding is also vague and unsupported in the claims it makes about the data that Dr. Rothman relied upon in his hypothetical monopolist test. In the cited section of Dr. Murphy's report, he merely "hypothesizes about potential issues with the [elasticity] estimates" that Dr. Rothman used in his hypothetical monopolist test. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report))). Dr. Murphy does not offer any analysis to demonstrate that his "hypothetical" issues would change the elasticity estimates or Dr. Rothman's hypothetical monopolist test results. (PX5001 at 028 (¶ 41) (Rothman Rebuttal Report) (citing RX1217 at 076-78 (¶¶ 104-06) (Murphy Report))).

Moreover, Dr. Murphy ignores the fact that, in addition to the academic studies of elasticity, Dr. Rothman also relied on the e-vapor industry elasticities reported in the { [REDACTED] }

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[REDACTED] } (PX5000 at 041 (¶ 81) (Rothman Expert Report); PX5001 at 028 (¶ 41) (Rothman Rebuttal Report)). [REDACTED]

[REDACTED] } Dr. Rothman relied on [REDACTED], as well as the academic studies, for the elasticities used in his hypothetical monopolist test showing that closed system e-cigarettes is a relevant product market. (PX5000 at 041 (¶¶ 81-82) (Rothman Expert Report) (*in camera*)).

In addition, Dr. Murphy's report does not include a critical elasticity analysis or an analysis in which he compares the actual elasticity of demand for e-vapor products with the critical elasticity. (CCFF ¶¶ 2092-93). Moreover, Dr. Murphy conceded that he did not express an opinion in his report on what the appropriate relevant product market is in this case. (CCFF ¶ 2086). Likewise, Dr. Murphy did not reach an opinion on whether the relevant market includes open-system and closed-system e-cigarette products, (CCFF ¶ 2086), or whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087).

Finally, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. As shown in Complaint Counsel's Proposed Findings of Fact, the

evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

#### **XV. COMPLAINT COUNSEL CANNOT CARRY ITS BURDEN USING A PRESUMPTION BASED ON MARKET CONCENTRATION**

1427. Ignoring all the real-world evidence discussed above, Complaint Counsel asks the Court to presume the transaction 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.” (CC Pretrial Br. at 62).

#### **Response to Finding No. 1427**

The proposed finding should be disregarded because it is not a “finding of fact,” but a legal conclusion regarding the relevance of so-called “real-world” evidence and the appropriate legal standard under Section 7. Respondents inappropriately state their own arguments as a “fact.” The proposed finding is also contrary to the weight of the evidence as both ordinary course documents and Dr. Rothman’s calculations demonstrate that the closed-system e-cigarette market was highly concentrated before the transaction and that Altria’s exit increased concentration. (CCFF ¶¶ 1735-63). The proposed finding is also incomplete and misleading because it ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that Complaint Counsel—or its expert, Dr. Rothman—ignored “real-world” evidence. Dr. Rothman provided a detailed explanation for why competitive conditions as the market exists today (i.e., after Altria’s transaction with JLI) do not change his opinion that Altria’s transaction with JLI harmed competition. First, using data from the market as it exists today “ignores confounding factors” and confuses “correlation and causation.” (PX7048 (Rothman, Trial Dep. at



40)). Dr. Rothman points out that “Respondents, Dr. Murphy claim the market has become more competitive over time,” but “They are not asserting, nor have they shown, that the – Altria’s exit caused the market to become more competitive over time. So to the extent that the market has become more competitive over time, it’s due to other factors, but if that’s the case, the evolution of the market over time doesn’t indicate anything about the effects of Altria’s exit from competition.” (PX7048 (Rothman, Trial Dep. at 40)).

Second, Dr. Rothman pointed out that because the closed-system e-cigarette market “is a dynamic market,” it means that “Competition plays out over time.” (PX7048 (Rothman, Trial Dep. at 40); *see also* PX5000 at 083 (¶ 145) (Rothman Expert Report) [REDACTED]). In other words, “Competitive outcomes in 2019, 2020, etcetera, reflect competitive initiatives from prior to 2019 when Altria was still competing. So the evolution of the market over time, it reflects competition from Altria” prior to Altria’s exit. (PX7048 (Rothman, Trial Dep. at 40-41)).

As Dr. Rothman explained, Respondents’ simple “before and after analysis . . . might be fine in a static market, but it doesn’t work in a dynamic market in which competition plays out over time.” (PX7048 (Rothman, Trial Dep. at 41)). Dr. Rothman further explained that looking at post-transaction data without accounting for the transaction and other confounding variables “effectively assumes that Altria’s competitive initiatives in 2018 that weren’t reflected in 2018 market outcomes, as well as competitive initiatives that Altria would have undertaken after 2018, would have failed.” (PX7048 (Rothman, Trial Dep. at 41)). As explained in Complaint Counsel’s Proposed Findings of Fact, this is an inappropriate assumption. (*See* CCFE Part X).

1428. As an initial matter, Altria’s decisions to pull its e-vapor products were not effects—anticompetitive or otherwise—of the transaction. *First*, the transaction is not *why* the products were withdrawn. As previously demonstrated, Altria removed its products from the market for independent business reasons, not as the result of an agreement with JLI.

(*See supra* Parts IX.B, IX.F, X.F). And Complaint Counsel acknowledged in its opening statement that if Altria removed its products for independent business reasons, Complaint Counsel is left with only a “potential competition claim,” (Tr. 72-73), a topic taken up below, (*see infra* Part XVI.C).

### **Response to Finding No. 1428**

The first and second sentences of the proposed finding should be disregarded because they contain no citations to the record. The third sentence of the proposed finding should be disregarded because it contains no citations to the record and is vague, argumentative, incomplete, and misleading because it does not identify any “independent business reasons.” The Respondents are inappropriately stating their arguments as a “fact.” (*See Responses to RPF Part IX.B, IX.F, X.F*). Moreover, as Complaint Counsel demonstrated in its Proposed Findings of Fact, Altria’s justifications for removing its e-cigarette products from the market are pretextual and inconsistent with the evidence and Altria’s incentives if it had not entered into the transaction with JLI. (*See CCF ¶¶ 1034-407*). The fourth sentence of the proposed finding should be disregarded because it is not a “finding of fact,” but a legal conclusion regarding the viability of Complaint Counsel’s claims. Respondents inappropriately state their own arguments as a “fact.” (*See Responses to RPF Part XVI.C*).

1429. *Second*, even assuming Altria removed its products because of the deal, Altria’s exit from the e-vapor marketplace is not an effect of the transaction based on *when* the products were pulled. Altria’s pre-transaction decisions, announced on October 25 and December 7, 2018, cannot be an effect of a partial acquisition that was not consummated until December 20, 2018. (*See supra* Parts IX.D.2, IX.F.3, X.B; *see also* CoL ¶¶ 65-66).

### **Response to Finding No. 1429**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The second sentence of the proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the relevance of the timing of Altria’s withdrawal of its e-cigarette products to Complaint Counsel’s Section 7 claim.

Respondents inappropriately state their own argument as a “fact.” (*See* Responses to RPFf Parts IX.D.2, IX.F.3, X.B; *see also* Responses to Respondents’ Proposed COL ¶¶ 65-66).

1430. Separate from this threshold problem, as explained below, Complaint Counsel is not entitled to a presumption, (*see infra* Part XV.A), and, even if it were, the presumption is rebutted based on the market conditions here, (*see infra* Part XV.B).

### **Response to Finding No. 1430**

The proposed finding is vague in that it does not identify the “threshold problem” to which it refers. To the extent that the proposed finding concerns a presumption of anticompetitive harm based on post-transaction HHIs, the proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion about the appropriate standard under Section 7, as well as the relevance and sufficiency of evidence. Respondents inappropriately state their own arguments as a “fact.”

Furthermore, Complaint Counsel 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. (*See* Complaint Counsel’s Proposed COL ¶ 82; *see also* Responses to RPFf Parts XV.A, XV.B). Here, the evidence shows that the sale of closed-system e-cigarettes is a relevant product market, (CCFF ¶¶ 208-407), and there is no dispute that the relevant geographic market is the United States. (JX0004 at 001 (¶ 1)). Moreover, both ordinary course documents and Dr. Rothman’s calculations demonstrate that the closed-system e-cigarette market was highly concentrated before the transaction and that Altria’s exit from the market increased concentration. (CCFF ¶¶ 1735-63).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that Complaint Counsel—or its expert, Dr. Rothman—ignored “the market conditions here.” Dr. Rothman provided a detailed explanation for why competitive conditions as the market exists today (i.e., after Altria’s transaction with JLI) do not change his opinion that Altria’s

transaction with JLI harmed competition. First, using data from the market as it exists today “ignores confounding factors” and confuses “correlation and causation.” (PX7048 (Rothman, Trial Dep. at 40)). Dr. Rothman points out that “Respondents, Dr. Murphy claim the market has become more competitive over time,” but “They are not asserting, nor have they shown, that the – Altria’s exit caused the market to become more competitive over time. So to the extent that the market has become more competitive over time, it’s due to other factors, but if that’s the case, the evolution of the market over time doesn’t indicate anything about the effects of Altria’s exit from competition.” (PX7048 (Rothman, Trial Dep. at 40)).

Second, Dr. Rothman pointed out that because the closed-system e-cigarette market “is a dynamic market,” it means that “Competition plays out over time.” (PX7048 (Rothman, Trial Dep. at 40); *see also* PX5000 at 083 (¶ 145) (Rothman Expert Report) [REDACTED]). In other words, “Competitive outcomes in 2019, 2020, etcetera, reflect competitive initiatives from prior to 2019 when Altria was still competing. So the evolution of the market over time, it reflects competition from Altria” prior to Altria’s exit. (PX7048 (Rothman, Trial Dep. at 40-41)).

As Dr. Rothman explained, Respondents’ simple “before and after analysis . . . might be fine in a static market, but it doesn’t work in a dynamic market in which competition plays out over time.” (PX7048 (Rothman, Trial Dep. at 41)). Dr. Rothman further explained that looking at post-transaction data without accounting for the transaction and other confounding variables “effectively assumes that Altria’s competitive initiatives in 2018 that weren’t reflected in 2018 market outcomes, as well as competitive initiatives that Altria would have undertaken after 2018, would have failed.” (PX7048 (Rothman, Trial Dep. at 41)). As explained in Complaint Counsel’s Proposed Findings of Fact, this is an inappropriate assumption. (*See* CCF Part X).

**A. Complaint Counsel's HHI Calculation Is Methodologically Flawed And Cannot Form The Basis Of A Presumption Of Anticompetitive Harm**

1431. Complaint Counsel's HHI calculation depends on three inputs—market definition, pre-transaction share figures, and post-transaction share figures—each of which are incorrect. (*See infra* Part XV.A.1-3).

**Response to Finding No. 1431**

The proposed finding should be disregarded because it contains no citations to the record and is conclusory, incorrect, incomplete, and misleading. (*See* Responses to RPFf Part XV.A.1-3). First, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPFf ¶¶ 1388-414). Second, the qualitative and quantitative evidence is consistent: both ordinary course documents and Dr. Rothman's calculations demonstrate that the closed-system e-cigarette market was highly concentrated before the transaction and that Altria's exit increased concentration. (CCFF ¶¶ 1735-63).

**1. Dr. Rothman's Market Definition Is Unsubstantiated For The Reasons Explained Above**

1432. *First*, as explained above, there is no support for Complaint Counsel's proffered market definition. Practical indicia show that cig-a-likes and pod-based products are not close substitutes. (*See supra* Part XIV.A). And Dr. Rothman's HMT analysis of a prospective closed-system market cannot be credited because it rests on outdated and unrepresentative elasticity studies. (*See supra* Part XIV.B).

**Response to Finding No. 1432**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The second sentence of the proposed finding should be disregarded because it contains no citations to the record and is incorrect, incomplete, misleading, and contrary to the weight of the evidence, which establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPFf Part XIV.A).



product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

1433. But, even if the Court accepts that cig-a-likes and pods are in a single closed-system market, Complaint Counsel is still not entitled to a presumption because Dr. Rothman has not accurately calculated the market shares of the major competitors, as discussed in the sections that follow.

### **Response to Finding No. 1433**

The proposed finding should be disregarded because it contains no citations to the record and is vague because it does not identify the “sections that follow” to which it refers. The proposed finding should also be disregarded because it is not a “finding of fact,” but rather a legal conclusion about the sufficiency of the evidence. Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

## **2. Dr. Rothman’s Pre-Transaction Market Share Calculation Improperly Disregards The Dramatic Decline Of Cig-A-Likes**

1434. Dr. Rothman calculates pre-transaction HHI using the “shares of Altria, JLI, ITG, JTI, NJOY, and Reynolds in the *12-month period* from October 2017 to September 2018, before Altria began to remove its e-cigarette products from the market.” (PX5000 Rothman Report ¶ 87 (emphasis added)).

#### **Response to Finding No. 1434**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it implies that Dr. Rothman did not conduct the appropriate analysis under the Horizontal Merger Guidelines. (CCFF ¶ 1759). The proposed finding is also incomplete and misleading because it ignores Dr. Rothman’s testimony that Dr. Murphy’s critiques of Dr. Rothman’s concentration analysis are misguided and wrong in many ways. (CCFF ¶¶ 1757-58, 1760-61). For example, Dr. Murphy ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

1435. Regardless of whether a twelve-month measurement may be appropriate in some contexts, “[i]n a dynamic market, relying on historical market shares is unlikely to provide a reliable assessment of the relative competitive strengths of different firms.” (RX1217 Murphy Report ¶ 130).

#### **Response to Finding No. 1435**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion about the reliability of evidence. Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is also incomplete and misleading. In the cited section of the Murphy report, Dr. Murphy assumes that Altria’s position in the U.S. e-cigarette marketplace is declining and would continue to decline even if it had not exited the e-cigarette business in December 2018. Dr. Murphy conceded, however, that his report does not mention Altria’s Joint Research, Development, and Technology Sharing Agreement (“JRDTA”) with PMI, nor the e-cigarette



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products that were in development under the JRDTA or that PMI had already commercialized and was selling in other parts of the world, e.g., VEEV. (CCFF ¶¶ 2115-16, 2118, 2121). Likewise, Dr. Murphy's report makes no mention of Altria's work to produce an updated Elite 2.0 pod-based product. (*See generally* RX1217 (Murphy Report); *see also* CCFF ¶ 2117).

Furthermore, the statement that the market is "dynamic" should be disregarded because it is vague and does not explain what it means by a dynamic market. To the extent that Respondents are referring to the purported decline of cigalikes, the proposed finding should be disregarded because the evidence shows that e-cigarette manufacturers continue to market and sell cigalikes.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

1436. During the twelve-month window that Dr. Rothman uses to measure pre-transaction HHI, the total share of cartridge volume for cig-a-likes declined rapidly, falling from having a majority (59 percent) of the market in January 2018 to a minority (19 percent) in late 2018. (RX1217 Murphy Report ¶ 80).

### **Response to Finding No. 1436**

The proposed finding is incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (*See* PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria's Board that the MarkTen cigalike platform was declining and citing the fact that Altria's MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76). The proposed finding is also vague because it uses the word “market” and does not define what products are included in that “market.”

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

1437. Dr. Rothman admits that relative shares of cig-a-likes and pod-based systems “reversed” between 2017 and 2019. (PX7046 Rothman Dep. at 224).

#### **Response to Finding No. 1437**

The proposed finding is vague because it does not define what it means by “relative shares.” In the cited testimony, Dr. Rothman was testifying about relative “volume shares.” (PX7046 (Rothman, Dep. at 224) (“So in terms of *relative sales*, I think what you’re -- if you look at November 7, November 2017, the monthly cartridge volume share in this chart for cigalikes is 80 percent and the monthly cartridge volume share for pod-based vaporizers is 20 percent. Two years later, those ratios were reversed.”) (emphasis added)). The cited testimony does not address the *total volume* of cigalikes and pod-based products.

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The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (See PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); see also PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). { [REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; see also Responses to RPF ¶¶ 1388-414).

1438. Unit volume reinforces the fact that cig-a-like sales were declining. The weekly sales volume of all cig-a-likes fell by approximately 500,000 units between cig-a-likes’ peak in the May of 2018 and October of that year. (RX1217 Murphy Report ¶ 115, Fig. VI.3 (showing unit sales fall from approximately 3.6 million to approximately 3.1 million); see also RX1217 Murphy Report ¶ 111 (“Sales of cig-a-like devices and cartridges peaked in 2018 2Q and have declined since that time . . . ”)).

**Response to Finding No. 1438**

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While Complaint Counsel does not disagree that cigalike sales declined between May and October of 2018, the proposed finding is incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (See PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018)). { [REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

The proposed finding is also incomplete and misleading to the extent that it suggests that few consumers preferred cigalikes. Altria's Quigley testified that "[Altria] had the cigalikes, which here were declining and were a smaller piece of the overall vapor business, but the point I was making is although they were declining, they were not going to zero." (Quigley (Altria) Tr. 2034 (testifying about PX1644 (Altria) at 010, which shows only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); see also PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria's Board that the MarkTen cigalike platform was declining and citing the fact that Altria's MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there

are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

1439. This decline was particularly significant for competitors like Altria, whose sales were heavily weighted towards cig-a-likes. (RX1217 Murphy Report ¶ 12; Murphy Tr. 3106-07).

### **Response to Finding No. 1439**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (*See* Order on Post-Trial Filings at 3, dated June 28, 2021). The proposed finding is also vague because it does not identify with specificity what is meant by “[t]his decline.”

Moreover, neither the cited section of Dr. Murphy’s report nor his trial testimony provide any basis for his claim about Altria’s sales. As an initial matter, paragraph 12 of RX1217 does not include a citation to any record evidence. Likewise, Dr. Murphy’s trial testimony at pages 3106-07 refers to a demonstrative exhibit that is not in evidence. Moreover, Dr. Murphy conceded that, in his report, he did not compare the profitability of Altria’s e-vapor business to other e-vapor competitors at the time of Altria’s exit. (CCFF ¶ 2119). Dr. Murphy also conceded that he did not offer an opinion in this case as to whether Altria would have exited the e-vapor business but for the transaction. (CCFF ¶ 2122).

The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (*See* PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was

declining and citing the fact that Altria's MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). { [REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

1440. Although Dr. Rothman calculated that Altria had a 10.1 percent share among closed-system products, as measured over 12 months, (PX5000 Rothman Report ¶ 89, Tbl. 2), during his trial testimony he admitted that "Altria's share between 2017 and 2018 went down." (PX7048 Rothman Trial Dep. at 113).

#### **Response to Finding No. 1440**

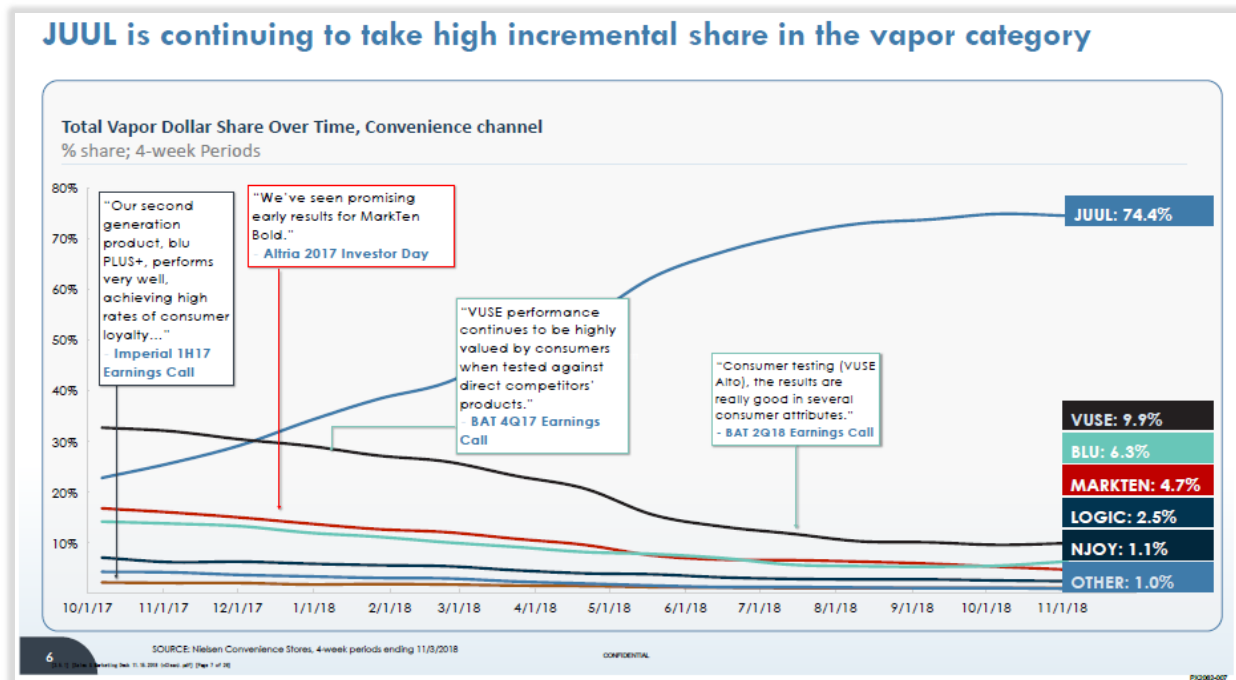
The proposed finding is incomplete and misleading to the extent that it implies that Dr. Rothman did not conduct a proper market share analysis. (*See* CCFF ¶ 1759; *see also* ¶¶ 1757-58, 1760-61 (describing how Dr. Murphy's critiques of Dr. Rothman's concentration analysis are misguided and wrong in many ways)).

1441. It not only went down, it had fallen to 7.5 percent among closed-system products, as measured by unit share, as of September 2018. (PX1127 (Altria) at 003).

#### **Response to Finding No. 1441**

The proposed finding is incomplete and misleading to the extent that it implies that Dr. Rothman did not conduct a proper market share analysis. (See CCF ¶ 1759; *see also* ¶¶ 1757-58, 1760-61 (describing how Dr. Murphy’s critiques of Dr. Rothman’s concentration analysis are misguided and wrong in many ways)). Assuming that the “It” that “not only went down” in the proposed finding refers to Altria’s share, Complaint Counsel does not disagree that Altria estimated that its 2018 September year-to-date “MarkTen Retail Share” was 7.5 percent; Complaint Counsel adds, however, that this share estimate reflects Altria’s share of the closed-system e-cigarette market. (PX1127 (Altria) at 003 (“Nu Mark Finance Update – September YTD”) (noting that “Retail Share is MOC only”); *see also* PX4029 (Altria) at 008 (“Nu Mark BOD Orientation”) (stating that 90% of the e-vapor volume in the “Mass/Convenience (MOC)” channel consists of closed-system e-cigarettes); Begley (Altria) Tr. 972 (conceding that the “MOC channel” sells predominantly closed-system products and that the MOC channel is “primarily a closed-system outlet”)).

1442. According to a JLI slide that Complaint Counsel presented during its opening statement, (Tr. 52), by November 2018, the dollar share of each of the major competitors had changed substantially over the course of October 2017 to September 2018:



(PX2062 (JLI) at 007).

**Response to Finding No. 1442**

The proposed finding is vague because it does not define the phrase “changed substantially” with any specificity. Complaint Counsel adds that PX2062 shows that JLI and Altria’s combined “Total Vapor Dollar Share” in November 2018 was 79.1 percent. (PX2062 (JLI) at 007 (“Sales & Marketing” presentation dated November 15, 2018). Complaint Counsel further adds that, while JLI only sells a pod-based product, the share estimates in PX2062 reflect “Total Vapor Dollar Shares” in the closed-system e-cigarette market. (PX2062 (JLI) at 007 (stating “SOURCE: Nielsen Convenience Stores, 4-week periods ending 11/3/2018”); *see also* PX4029 (Altria) at 008 (“Nu Mark BOD Orientation”) (stating that 90% of the e-vapor volume in the “Mass/Convenience (MOC)” channel consists of closed-system e-cigarettes); Begley (Altria) Tr. 972 (conceding that the “MOC channel” sells predominantly closed-system products and that the MOC channel is “primarily a closed-system outlet”)).



1443. Altria's share had fallen even lower to 4.7 percent, below both Vuse and ITG's share (PX2062 (JLI) at 007).

**Response to Finding No. 1443**

The proposed finding is vague, incomplete, and misleading because it does not provide a basis for the statement that Altria's share "had fallen even lower." The share figures provided in PX2062 reflect "Total Vapor Dollar Share," whereas the share figures provided in Respondents' prior proposed findings reflect *volume* share. (*Compare* PX2062 (JLI) at 007 *with* RPF ¶ 1441 (citing PX1127 (Altria) at 003 (providing an estimate of "MarkTen Retail Share" in terms of "Volume (in millions)") (emphasis added))).

Complaint Counsel adds that PX2062 shows that JLI and Altria's combined "Total Vapor Dollar Share" in November 2018 was 79.1 percent. (PX2062 (JLI) at 007 ("Sales & Marketing" presentation dated November 15, 2018). Complaint Counsel further adds that, while JLI only sells a pod-based product, the share estimates in PX2062 reflect "Total Vapor Dollar Shares" in the closed-system e-cigarette market. (PX2062 (JLI) at 007 (stating "SOURCE: Nielsen Convenience Stores, 4-week periods ending 11/3/2018"); *see also* PX4029 (Altria) at 008 ("Nu Mark BOD Orientation") (stating that 90% of the e-vapor volume in the "Mass/Convenience (MOC)" channel consists of closed-system e-cigarettes); Begley (Altria) Tr. 972 (conceding that the "MOC channel" sells predominantly closed-system products and that the MOC channel is "primarily a closed-system outlet"))).

The proposed finding is also incomplete and misleading to the extent that it suggests that Altria would not have been a significant competitor in the closed-system e-cigarette market if it had remained in the market. The evidence shows that Altria was one of only a few firms well-positioned to compete in the e-vapor business, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio.

(CCFF ¶¶ 1832-41). Furthermore, the evidence demonstrates that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730).

**3. Dr. Rothman’s Post-Transaction HHI Is Based On A Faulty And Disproven Assumption That The Remaining Competitors’ Post-Transaction Shares Increased In Proportion To Their Pre-Transaction Shares**

1444. Dr. Rothman posits an increase in HHI by assuming—contrary to reality—that Altria’s share was “reallocated to the remaining competitors in proportion to their shares.” (PX5000 Rothman Report ¶¶ 85, 88; *see also* PX7048 Rothman Trial Dep. at 123). Specifically, Dr. Rothman’s HHI calculation assumes that approximately half of Nu Mark’s customers switched to JUUL (which had a 51 percent share as of late 2018), approximately a quarter switched to Vuse (which had a 23 percent share), and so on. (RX1217 Murphy Report ¶ 124; PX5000 Rothman Report ¶ 89, Tbl. 2).

**Response to Finding No. 1444**

The statement that Dr. Rothman’s assumption for reallocating Altria’s share was “contrary to reality” should be disregarded because it is not a “finding of fact,” but rather an argumentative, conclusory, and unsupported legal statement. Respondents inappropriately state their own argument as a “fact.”

The proposed finding is also incomplete and misleading to the extent that it implies that Dr. Rothman did not conduct a proper market share analysis. (*See* CCFF ¶ 1759; *see also* ¶¶ 1757-

58, 1760-61 (describing how Dr. Murphy's critiques of Dr. Rothman's concentration analysis are misguided and wrong in many ways)). While Complaint Counsel does not disagree that, in calculating post-transaction and post-exit market shares, Dr. Rothman reallocated Altria's share to the remaining competitors in proportion to their shares, (CCFF ¶ 1752), the cited paragraph of Dr. Murphy's report contains no citations to the record demonstrating that Dr. Rothman's assumption was inappropriate. (RX1217 at 088 (¶ 124) (Murphy Report)). As Dr. Rothman explained, reallocating Altria's share to the remaining closed-system e-cigarette competitors in proportion to their shares is the "best way" to estimate the effect of Altria's exit on competition. (PX7048 (Rothman, Trial Dep. at 26-27)). This is because "the effect of Altria's exit on competition was the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal. Reallocating Altria's share equally among the remaining participants in proportion to their share, that holds all else equal." (PX7048 (Rothman, Trial Dep. at 26-27); *see also* PX5001 at 040-41 (¶ 72) (Rothman Rebuttal Report)).

1445. Despite having access to post-transaction data and document productions of various market participants, Dr. Rothman admitted that he did nothing to test this arbitrary assumption. (PX7048 Rothman Trial Dep. at 123-34). Had he done so, we would have seen that his assumption of diversion proportionate to share is contrary to fact. In March 2019, JLI determined that the share that it had picked up from Nu Mark's products was "pretty minimal," as "most of the MarkTen share [was] picked up by VUSE Alto and other legacy players (i.e., Logic, VUSE ciro/vibe/solo and Blu)." (PX2457 (JLI) at 001). Those "legacy players" are mostly cig-a-likes. (*See supra* Parts I.B.1, II.A.1). That was unsurprising to JLI as MarkTen purchasers were "customers who for whatever reason were choosing markten over juul already." (PX2457 (JLI) at 001).

#### **Response to Finding No. 1445**

The first sentence of the proposed finding is vague because it does not define the "arbitrary assumption" to which it refers. To the extent that the proposed finding is referring to Dr. Rothman's assumption that Altria's share would be reallocated to the remaining competitors in proportion to their shares, the first sentence is also unsupported, incorrect, incomplete, and misleading. Far from

being “arbitrary,” Dr. Rothman testified that his assumption was the “best way” to estimate the effect of Altria’s exit on competition because “the effect of Altria’s exit on competition was the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal. Reallocating Altria’s share equally among the remaining participants in proportion to their share, that holds all else equal.” (PX7048 (Rothman, Trial Dep. at 26-27)).

The second sentence of the proposed finding should be disregarded because it contains no citations to the record. The second sentence of the proposed finding is also incomplete and misleading because it ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The third, fourth, and fifth sentences of the proposed finding are incomplete and misleading because they ignore the evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence

demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that Dr. Rothman ignored “post-transaction data and document productions of various market participants.” Dr. Rothman provided a detailed explanation for why competitive conditions as the market exists today (i.e., after Altria’s transaction with JLI) do not change his opinion that Altria’s transaction with JLI harmed competition. First, using data from the market as it exists today “ignores confounding factors” and confuses “correlation and causation.” (PX7048 (Rothman, Trial Dep. at 40)). Dr. Rothman points out that “Respondents, Dr. Murphy claim the market has become more competitive over time,” but “They are not asserting, nor have they shown, that the – Altria’s exit caused the market to become more competitive over time. So to the extent that the market has become more competitive over time, it’s due to other factors, but if that’s the case, the evolution of the market over time doesn’t indicate anything about the effects of Altria’s exit from competition.” (PX7048 (Rothman, Trial Dep. at 40)).

Second, Dr. Rothman pointed out that because the closed-system e-cigarette market “is a dynamic market,” it means that “Competition plays out over time.” (PX7048 (Rothman, Trial Dep. at 40); *see also* PX5000 at 083 (¶ 145) (Rothman Expert Report) [REDACTED]). In other words, “Competitive outcomes in 2019, 2020, etcetera, reflect competitive initiatives from prior to 2019 when Altria was still competing. So the evolution of the market over time, it reflects competition from Altria” prior to Altria’s exit. (PX7048 (Rothman, Trial Dep. at 40-41)).

As Dr. Rothman explained, Respondents’ simple “before and after analysis . . . might be fine in a static market, but it doesn’t work in a dynamic market in which competition plays out over time.” (PX7048 (Rothman, Trial Dep. at 41)). Dr. Rothman further explained that looking at post-transaction data without accounting for the transaction and other confounding variables “effectively assumes that Altria’s competitive initiatives in 2018 that weren’t reflected in 2018 market outcomes, as well as competitive initiatives that Altria would have undertaken after 2018, would have failed.” (PX7048 (Rothman, Trial Dep. at 41)). As explained in Complaint Counsel’s Proposed Findings of Fact, this is an inappropriate assumption. (*See* CCFE Part X).

Finally, the proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFE ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFE ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

1446. Similarly, Crozier, the category manager from Sheetz, agreed that “JUUL didn’t pick up the share that left the market when MarkTen came out, other competitors did.” (Crozier (Sheetz) Tr. 1548).

#### **Response to Finding No. 1446**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria would not have continued competing in the closed-system e-cigarette market absent the transaction. (*See* CCFE ¶¶ 493-544, 1034-407). Crozier testified that when he first learned about Altria’s exit from the e-cigarette business on December 7, 2018, he was “surprised they were exiting the category” because Altria had a leadership position in the other

tobacco categories, such as combustible cigarettes, smokeless tobacco, and cigars, and Altria's e-cigarettes were also Sheetz's number two product in the category. (CCFF ¶ 1027 (citing (Crozier (Sheetz) Tr. 1501-02)).

The proposed finding is also incomplete and misleading because it ignores evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

1447.  }

#### **Response to Finding No. 1447**

The proposed finding is incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 493-544, 1034-407). Dr. Rothman

testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759 (citing PX5001 at 008-09 (¶ 14, n.26) (Rothman Rebuttal Report))). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (See Response to RPF ¶ 1388). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also vague and misleading. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Finally, the proposed finding is incomplete and misleading because it ignores evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-



cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

1448. It is improper simply to assume—as Dr. Rothman does—that Nu Mark customers would overwhelmingly switch to JUUL when the actual market data shows that they in fact overwhelmingly switched to other brands. (Murphy Tr. 3145 (“[T]here’s nothing that would tell you that . . . proportional allocation is even close to what you would expect.”); Murphy Tr. 3118-20 (similar)).

#### **Response to Finding No. 1448**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (See Order on Post-Trial Filings at 3, dated June 28, 2021). The proposed finding should also be disregarded because it is vague, misleading, and unsupported by the cited evidence. The proposed finding is vague because it does not identify the “actual market data” to which it refers. Moreover, the cited testimony of Dr. Murphy does not refer to any specific data results or data source.

As Dr. Rothman explained, reallocating Altria’s share to the remaining closed-system e-cigarette competitors in proportion to their shares is the “best way” to estimate the effect of Altria’s

exit on competition. (PX7048 (Rothman, Trial Dep. at 26-27)). This is because “the effect of Altria’s exit on competition was the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal. Reallocating Altria’s share equally among the remaining participants in proportion to their share, that holds all else equal.” (PX7048 (Rothman, Trial Dep. at 26-27)).

The proposed finding is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 493-544, 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759 (citing PX5001 at 008-09 (¶ 14, n.26) (Rothman Rebuttal Report))). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPFF ¶ 1388). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that Complaint Counsel—or its expert, Dr. Rothman—ignored “real-world” evidence. Dr. Rothman provided a detailed explanation for why competitive conditions as the market exists

today (i.e., after Altria's transaction with JLI) do not change his opinion that Altria's transaction with JLI harmed competition. First, using data from the market as it exists today "ignores confounding factors" and confuses "correlation and causation." (PX7048 (Rothman, Trial Dep. at 40)). Dr. Rothman points out that "Respondents, Dr. Murphy claim the market has become more competitive over time," but "They are not asserting, nor have they shown, that the – Altria's exit caused the market to become more competitive over time. So to the extent that the market has become more competitive over time, it's due to other factors, but if that's the case, the evolution of the market over time doesn't indicate anything about the effects of Altria's exit from competition." (PX7048 (Rothman, Trial Dep. at 40)).

Second, Dr. Rothman pointed out that because the closed-system e-cigarette market "is a dynamic market," it means that "Competition plays out over time." (PX7048 (Rothman, Trial Dep. at 40); *see also* PX5000 at 083 (¶ 145) (Rothman Expert Report) [REDACTED]). In other words, "Competitive outcomes in 2019, 2020, etcetera, reflect competitive initiatives from prior to 2019 when Altria was still competing. So the evolution of the market over time, it reflects competition from Altria" prior to Altria's exit. (PX7048 (Rothman, Trial Dep. at 40-41)).

As Dr. Rothman explained, Respondents' simple "before and after analysis . . . might be fine in a static market, but it doesn't work in a dynamic market in which competition plays out over time." (PX7048 (Rothman, Trial Dep. at 41)). Dr. Rothman further explained that looking at post-transaction data without accounting for the transaction and other confounding variables "effectively assumes that Altria's competitive initiatives in 2018 that weren't reflected in 2018 market outcomes, as well as competitive initiatives that Altria would have undertaken after 2018,

would have failed.” (PX7048 (Rothman, Trial Dep. at 41)). As explained in Complaint Counsel’s Proposed Findings of Fact, this is an inappropriate assumption. (*See* CCF Part X).

1449. This illustrates one of the central problems with Dr. Rothman’s analysis: His “share reallocation calculation implicitly assumes that all e-cigarette products are equally close substitutes to one another, regardless of their product differentiation.” (RX1217 Murphy Report ¶ 124).

#### **Response to Finding No. 1449**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the relevance of economic analysis. Respondents inappropriately state their own arguments—or, more specifically, their expert’s arguments—as a “fact.” Moreover, in the cited section of the Murphy report, Dr. Murphy ignores evidence showing that cigalikes and pod-based products are in the same relevant market. (RX1217 at 088 (¶ 124) (Murphy Report) (ignoring evidence that establishes that the sale of closed-system e-cigarettes is a relevant product market); *see* CCF ¶¶ 208-407).

The proposed finding is also incorrect, incomplete, and misleading. As Dr. Rothman explained, reallocating Altria’s share to the remaining closed-system e-cigarette competitors in proportion to their shares is the “best way” to estimate the effect of Altria’s exit on competition. (PX7048 (Rothman, Trial Dep. at 26-27)). This is because “the effect of Altria’s exit on competition was the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal. Reallocating Altria’s share equally among the remaining participants in proportion to their share, that holds all else equal.” (PX7048 (Rothman, Trial Dep. at 26-27)).

1450. Dr. Rothman’s decision to disregard what actually happened has dramatic implications. Dr. Rothman’s incorrect assumption that JLI would capture over half of Altria’s diverted sales accounts for nearly the entirety—94 percent, to be exact—of his calculated HHI increase of 652 points. (RX1217 Murphy Report ¶ 125 & n.220).

#### **Response to Finding No. 1450**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record and is vague, conclusory, incomplete, and misleading because it does not identify what it means by the phrase “what actually happened,” nor does it specify or explain the “dramatic implications” to which the sentence refers. The second sentence of the proposed finding should be disregarded because it is unsupported, incomplete, and misleading. In the cited section of the Murphy report, Dr. Murphy provides no citations to record evidence to support his claim that “Altria’s sales would divert more strongly towards products that share a similar look-and-feel and nicotine experience.” (RX1217 at 088-89 (¶ 125) (Murphy Report)). Thus, the second sentence should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (See Order on Post-Trial Filings at 3, dated June 28, 2021). Moreover, in the cited section of the Murphy report, Dr. Murphy ignores evidence showing that cigalikes and pod-based products are in the same relevant market. (RX1217 at 088 (¶ 124) (Murphy Report) (ignoring evidence that establishes that the sale of closed-system e-cigarettes is a relevant product market); see CCFF ¶¶ 208-407).

The proposed finding is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the Horizontal Merger Guidelines. The proposed finding ignores evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the transaction. (CCFF ¶¶ 493-544, 1034-407). Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759 (citing PX5001 at 008-09 (¶ 14, n.26) (Rothman Rebuttal Report))). Dr. Rothman used an Antitrust Logit Model to compare the “actual world”

with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1388). The proposed finding also ignores the substantial evidence demonstrating that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

Furthermore, the proposed finding is incomplete and misleading because it ignores Dr. Rothman’s testimony that reallocating Altria’s share to the remaining closed-system e-cigarette competitors in proportion to their shares is the “best way” to estimate the effect of Altria’s exit on competition. (PX7048 (Rothman, Trial Dep. at 26-27)). This is because “the effect of Altria’s exit on competition was the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal. Reallocating Altria’s share equally among the remaining participants in proportion to their share, that holds all else equal.” (PX7048 (Rothman, Trial Dep. at 26-27)).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that Dr. Rothman ignored “what actually happened” in the market. Dr. Rothman provided a detailed explanation for why competitive conditions as the market exists today (i.e., after Altria’s transaction with JLI) do not change his opinion that Altria’s transaction with JLI harmed competition. First, using data from the market as it exists today “ignores confounding factors” and confuses “correlation and causation.” (PX7048 (Rothman, Trial Dep. at 40)). Dr. Rothman points out that “Respondents, Dr. Murphy claim the market has become more competitive over time,” but “They are not asserting, nor have they shown, that the – Altria’s exit caused the market to become more competitive over time. So to the extent that the market has become more competitive

over time, it's due to other factors, but if that's the case, the evolution of the market over time doesn't indicate anything about the effects of Altria's exit from competition." (PX7048 (Rothman, Trial Dep. at 40)).

Second, Dr. Rothman pointed out that because the closed-system e-cigarette market "is a dynamic market," it means that "Competition plays out over time." (PX7048 (Rothman, Trial Dep. at 40); *see also* PX5000 at 083 (¶ 145) (Rothman Expert Report) [REDACTED]). In other words, "Competitive outcomes in 2019, 2020, etcetera, reflect competitive initiatives from prior to 2019 when Altria was still competing. So the evolution of the market over time, it reflects competition from Altria" prior to Altria's exit. (PX7048 (Rothman, Trial Dep. at 40-41)).

As Dr. Rothman explained, Respondents' simple "before and after analysis . . . might be fine in a static market, but it doesn't work in a dynamic market in which competition plays out over time." (PX7048 (Rothman, Trial Dep. at 41)). Dr. Rothman further explained that looking at post-transaction data without accounting for the transaction and other confounding variables "effectively assumes that Altria's competitive initiatives in 2018 that weren't reflected in 2018 market outcomes, as well as competitive initiatives that Altria would have undertaken after 2018, would have failed." (PX7048 (Rothman, Trial Dep. at 41)). As explained in Complaint Counsel's Proposed Findings of Fact, this is an inappropriate assumption. (*See* CCF Part X).

1451. An accurate assessment of HHI, using *actual market data*, shows that market concentration has decreased substantially following the transaction, regardless of whether the Court defines the market as pod-based products or all closed-system e-vapor products. (RX1217 Murphy Report ¶¶ 67-68).

#### **Response to Finding No. 1451**

The statement that the market for closed-system e-vapor products has become "substantially" less concentrated following the transaction and Altria's exit from the e-cigarette

business is incorrect, incomplete, misleading, and contrary to the weight of the evidence. Both ordinary course documents and Dr. Rothman's calculations demonstrate that the closed-system e-cigarette market was highly concentrated before the transaction and that Altria's exit increased concentration. (CCFF ¶¶ 1735-63).

Dr. Murphy's method of calculating post-transaction market concentration was improper and ignored the significance of the loss of Altria's competition in the market. (PX5001 at 040-43 (¶¶ 71-78) (Rothman Rebuttal Report)). Moreover, Dr. Murphy's "before-and-after" comparisons of market concentration violate basic principles of economic analysis by not controlling for confounding factors. (CCFF ¶ 1758). Dr. Murphy's "before-and-after" analyses of market concentration do not identify the effect of the transaction on concentration because Dr. Murphy's analysis confuses correlation with causation. (CCFF ¶ 1758). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (CCFF ¶¶ 2094-124). As Dr. Rothman explained, reallocating Altria's share to the remaining closed-system e-cigarette competitors in proportion to their shares is the "best way" to estimate the effect of Altria's exit on competition. (PX7048 (Rothman, Trial Dep. at 26-27)). This is because "the effect of Altria's exit on competition was the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal. Reallocating Altria's share equally among the remaining participants in proportion to their share, that holds all else equal." (PX7048 (Rothman, Trial Dep. at 26-27)).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that pod-based products is an appropriate relevant product market in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate



relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF 1388-414).

1452. As Professor Murphy calculated, from October 2018 to September 2020 the HHI for *pod-based products* fell over 3,000 points, a decrease of over 35 percent. (RX1217 Murphy Report ¶ 67 (explaining that HHI fell from 8,492 in October 2018 to 5,440 in September 2020)). In addition, the HHI for all *closed-system e-vapor products* decreased by nearly 500 points during the same time period. (RX1217 Murphy Report ¶ 68 (showing that HHI fell from 5,493 in October 2018 to 5,022 in September 2020, a decrease of 471 points)).

### **Response to Finding No. 1452**

The proposed finding is incorrect, incomplete, misleading, and contrary to the weight of the evidence in its claim that the market for closed-system e-vapor products has become less concentrated following the transaction and Altria's exit from the e-cigarette business. Both ordinary course documents and Dr. Rothman's calculations demonstrate that the closed-system e-cigarette market was highly concentrated before the transaction and that Altria's exit increased concentration. (CCFF ¶¶ 1735-63).

Dr. Murphy's method of calculating post-transaction market concentration was improper and ignored the significance of the loss of Altria's competition in the market. (PX5001 at 040-43 (¶¶ 71-78) (Rothman Rebuttal Report)). Moreover, Dr. Murphy's "before-and-after" comparisons of market concentration violate basic principles of economic analysis by not controlling for confounding factors. (CCFF ¶ 1758). Dr. Murphy's "before-and-after" analyses of market concentration do not identify the effect of the transaction on concentration because Dr. Murphy's analysis confuses correlation with causation. (CCFF ¶ 1758). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (CCFF ¶¶ 2094-124). As Dr. Rothman explained, reallocating Altria's share to the remaining closed-system e-cigarette

competitors in proportion to their shares is the “best way” to estimate the effect of Altria’s exit on competition. (PX7048 (Rothman, Trial Dep. at 26-27)). This is because “the effect of Altria’s exit on competition was the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal. Reallocating Altria’s share equally among the remaining participants in proportion to their share, that holds all else equal.” (PX7048 (Rothman, Trial Dep. at 26-27)).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that pod-based products is an appropriate relevant product market in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

1453. Complaint Counsel does not challenge the accuracy of these HHI calculations. To the contrary, Complaint Counsel’s expert, Dr. Rothman, does not dispute that, in the real world, “HHI levels are . . . lower than they were prior to December 2018.” (PX7048 Rothman Trial Dep. at 97).

#### **Response to Finding No. 1453**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record and is incorrect, incomplete, and misleading. On the contrary, both Complaint Counsel and Dr. Rothman vigorously dispute the “accuracy” of Dr. Murphy’s “before and after” market concentration calculations. As Dr. Rothman explained in his Rebuttal Report, Dr. Murphy’s method of calculating post-transaction market concentration was improper and ignored the significance of the loss of Altria’s competition in the market. (PX5001 at 040-43 (¶¶

71-78) (Rothman Rebuttal Report)). Moreover, as Complaint Counsel demonstrated in its Proposed Findings of Fact, the evidence shows that the closed-system e-cigarette market remains highly concentrated and that Altria's exit increased concentration in the market. (See CCFF ¶¶ 1749-61).

The proposed finding is also incomplete and misleading to the extent that it suggests that post-transaction marketplace conditions demonstrate that the market was not harmed by Altria's exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." (CCFF ¶ 1759 (citing PX5001 at 008-09 (¶ 14, n.26) (Rothman Rebuttal Report))). Dr. Rothman used an Antitrust Logit Model to compare the "actual world" with the "but-for world," calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (See Response to RPF ¶ 1388).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that Complaint Counsel—or its expert, Dr. Rothman—ignored "real-world" evidence. Dr. Rothman provided a detailed explanation for why competitive conditions as the market exists today (i.e., after Altria's transaction with JLI) do not change his opinion that Altria's transaction with JLI harmed competition. First, using data from the market as it exists today "ignores confounding factors" and confuses "correlation and causation." (PX7048 (Rothman, Trial Dep. at 40)). Dr. Rothman points out that "Respondents, Dr. Murphy claim the market has become more competitive over time," but "They are not asserting, nor have they shown, that the – Altria's exit caused the market to become more competitive over time. So to the extent that the market has become more competitive over time, it's due to other factors, but if that's the case, the evolution

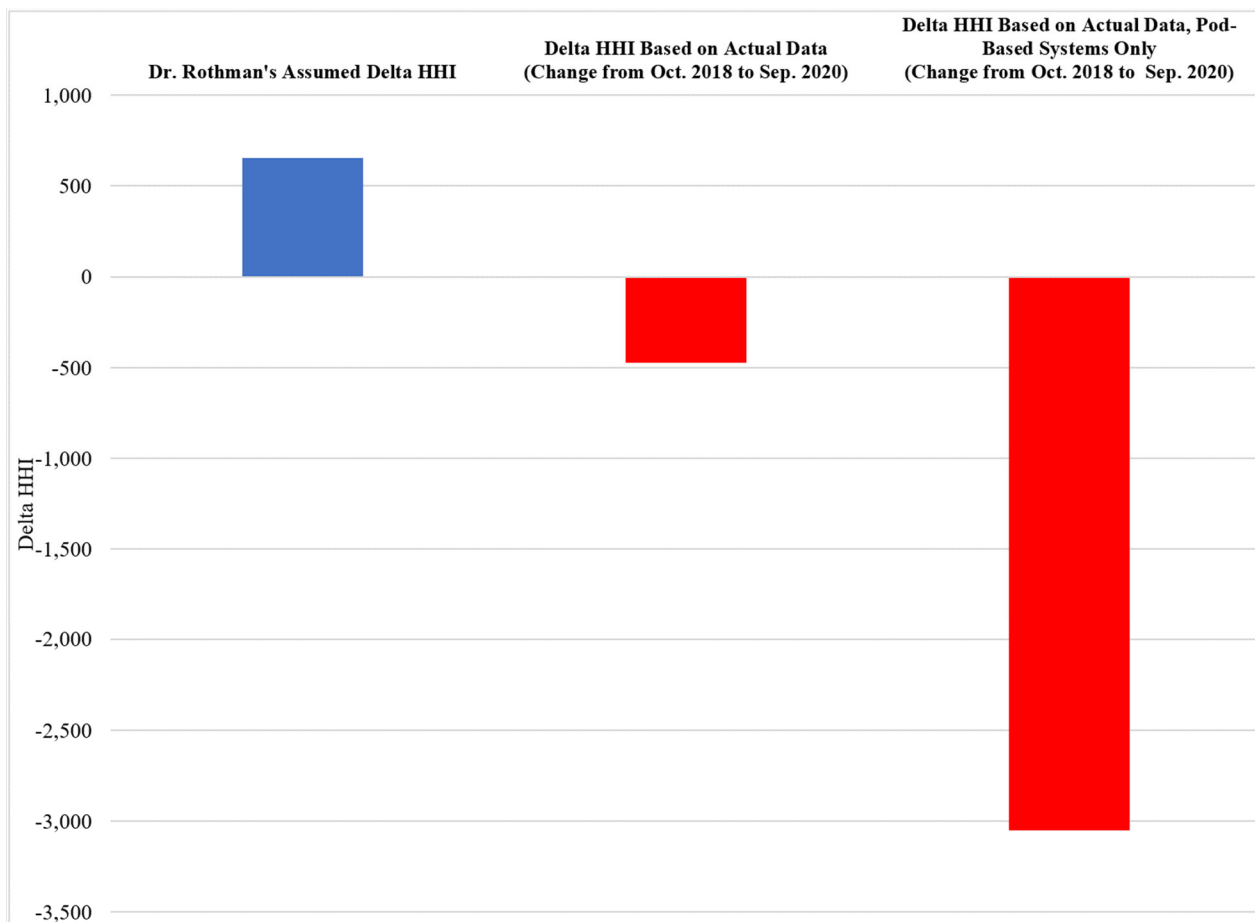
of the market over time doesn't indicate anything about the effects of Altria's exit from competition." (PX7048 (Rothman, Trial Dep. at 40)).

Second, Dr. Rothman pointed out that because the closed-system e-cigarette market "is a dynamic market," it means that "Competition plays out over time." (PX7048 (Rothman, Trial Dep. at 40); *see also* PX5000 at 083 (¶ 145) (Rothman Expert Report) [REDACTED]). In other words, "Competitive outcomes in 2019, 2020, etcetera, reflect competitive initiatives from prior to 2019 when Altria was still competing. So the evolution of the market over time, it reflects competition from Altria" prior to Altria's exit. (PX7048 (Rothman, Trial Dep. at 40-41)).

As Dr. Rothman explained, Respondents' simple "before and after analysis . . . might be fine in a static market, but it doesn't work in a dynamic market in which competition plays out over time." (PX7048 (Rothman, Trial Dep. at 41)). Dr. Rothman further explained that looking at post-transaction data without accounting for the transaction and other confounding variables "effectively assumes that Altria's competitive initiatives in 2018 that weren't reflected in 2018 market outcomes, as well as competitive initiatives that Altria would have undertaken after 2018, would have failed." (PX7048 (Rothman, Trial Dep. at 41)). As explained in Complaint Counsel's Proposed Findings of Fact, this is an inappropriate assumption. (*See* CCFF Part X).

1454. The difference between Dr. Rothman's HHI calculation and an HHI calculation based on actual data is illustrated in the following chart. The blue bar, which represents Dr. Rothman's calculation, shows an increase in HHI, while the middle bar, which represents the actual data for closed-system products, shows a substantial decrease in HHI:

**Fig. VII.1: Dr. Rothman’s Delta HHI Compared with Delta HHI from Actual Data**



(RX1217 Murphy Report ¶ 127, Fig. VII.1).

**Response to Finding No. 1454**

The proposed finding is vague, incomplete, and misleading, and should be disregarded because it relies on Dr. Murphy’s improper method of calculating post-transaction market concentration, which ignores the significance of the loss of Altria’s competition in the market. (PX5001 at 040-43 (¶¶ 71-78) (Rothman Rebuttal Report)).

The proposed finding is also incorrect, incomplete, misleading, and contrary to the weight of the evidence in its claim that the market for closed-system e-vapor products has become less concentrated following the transaction and Altria’s exit from the e-cigarette business. Both ordinary course documents and Dr. Rothman’s calculations demonstrate that the closed-system e-

cigarette market was highly concentrated before the transaction and that Altria's exit increased concentration. (CCFF ¶¶ 1735-63).

The proposed finding is also incomplete and misleading to the extent that it suggests that post-transaction marketplace conditions demonstrate that the market was not harmed by Altria's exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." (CCFF ¶ 1759 (citing PX5001 at 008-09 (¶ 14, n.26) (Rothman Rebuttal Report))). Dr. Rothman used an Antitrust Logit Model to compare the "actual world" with the "but-for world," calculating that the loss of consumer surplus from Altria's exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1388).

**B. Even If The Court Credits Dr. Rothman's HHI Calculations, In The Context Of This Case, HHI Is Not A Reliable Indicator Of Anticompetitive Effects**

1455. Moreover, were the Court to accept Dr. Rothman's HHI calculation, the presumption of anticompetitive effects is rebutted by evidence that HHI it is not a reliable indicator of Altria's competitive significance or the competitiveness of the market more broadly. (*See infra* Part XV.B.1-2).

**Response to Finding No. 1455**

The proposed finding should be disregarded because it is not a "finding of fact," but rather a legal conclusion about the appropriate legal standard under Section 7, the application of the Horizontal Merger Guidelines, and the sufficiency of the evidence. Respondents inappropriately state their own arguments as a "fact." (*See* Responses to RPF Parts XV.B.1-2). Complaint Counsel may rely on "the closest available approximation" of market shares when calculating concentration levels, and "[s]ufficiently large HHI figures establish the FTC's prima facie case that a merger is anticompetitive." (Complaint Counsel's Proposed COL ¶¶ 84-85 (quoting *FTC v.*

*PPG Indus.*, 798 F. 2d 1500, 1505 (D.C. Cir. 1986); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001)).

The proposed finding is also incomplete and misleading because it ignores Dr. Rothman's testimony that, in calculating the post-transaction HHIs, reallocating Altria's share to the remaining closed-system e-cigarette competitors in proportion to their shares is the "best way" to estimate the effect of Altria's exit on competition. (PX7048 (Rothman, Trial Dep. at 26-27)). This is because "the effect of Altria's exit on competition was the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal. Reallocating Altria's share equally among the remaining participants in proportion to their share, that holds all else equal." (PX7048 (Rothman, Trial Dep. at 26-27)).

As Dr. Rothman explained, Dr. Murphy's method of calculating post-transaction market concentration was improper and ignored the significance of the loss of Altria's competition in the market. (PX5001 at 040-43 (¶¶ 71-78) (Rothman Rebuttal Report)). Dr. Rothman concluded that Dr. Murphy's "before-and-after" comparisons of market concentration violate basic principles of economic analysis by not controlling for confounding factors. (CCFF ¶ 1758). Dr. Murphy's "before-and-after" analyses of market concentration do not identify the effect of the transaction on concentration because Dr. Murphy's analysis confuses correlation with causation. (CCFF ¶ 1758). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (CCFF ¶¶ 2094-124).

Finally, the proposed finding is also incomplete and misleading because it ignores the substantial evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the

elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

**1. Altria's Pre-Transaction Market Share Overstates Its Competitive Significance**

1456. Even assuming that Altria's pre-transaction market share among closed-system products was 10 percent, that share is not a reliable indicator of Altria's competitive significance in October 2018 or going forward. (*See infra* ¶¶ 1457-79).

**Response to Finding No. 1456**

The proposed finding should be disregarded because it is not a "finding of fact," but rather a legal conclusion on the application of the Horizontal Merger Guidelines and the weight to be given certain evidence. Respondents inappropriately state their own arguments as a "fact." (*See Responses to RPF* ¶¶ 1457-79).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence because it ignores evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-



system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

Finally, the proposed finding is incomplete and misleading because it ignores the substantial evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

1457. HHI levels are not “a rigid screen.” (PX9098 (HMG) at 022 § 5.3). Instead, market concentration analysis takes account of whether “recent or ongoing changes in market conditions may indicate that the current market share of a particular firm . . . overstates the firm's future competitive significance.” (PX9098 (HMG) at 019 § 5.2). This can be evidenced by “reasonably predictable effects of recent or ongoing changes in market conditions.” (PX9098 (HMG) at 019 § 5.2; *see also* PX9098 (HMG) at 021 § 5.3 (“Market shares may not full reflect the competitive significance of firms in the market or the impact of a merger.”)).

#### **Response to Finding No. 1457**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a series of legal conclusions regarding the application of the Horizontal Merger Guidelines. Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is also incomplete and misleading to the extent that it suggests that Altria's share prior to the withdrawal of its products from the market “overstates the firm's future competitive significance.” Prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was

also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

1458. Independent of the erroneous assumption regarding post-transaction HHI, Dr. Rothman’s *pre*-transaction market shares and resulting HHI calculation overstates Altria’s competitive significance because (1) Nu Mark’s offerings were primarily in the declining cig-a-like segment, (*see infra* ¶¶ 1459-63); (2) its pod-based product, Elite, lacked the nicotine salts that were nearly ubiquitous among its major pod-based competitors, (*see infra* ¶¶ 1464-69); and (3) following the flavor ban, at most one of the Elite cartridge flavors could remain on the market, (*see infra* ¶¶ 1470-74).

### **Response to Finding No. 1458**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the sufficiency of the evidence. Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (*See* PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that all e-vapor customers desire a product with nicotine salts or that nicotine salts are the only means to provide a satisfying e-vapor experience. [REDACTED]

[REDACTED] } Indeed, closed-system e-cigarette products without nicotine salts are still marketed today. (See CCFF ¶¶ 1166, 1176). The proposed finding is also incomplete and misleading because it ignores evidence demonstrating that in 2017, Altria launched MarkTen Bold, a product that contained nicotine salts. (CCFF ¶¶ 135, 1196).

Furthermore, the proposed finding is incomplete and misleading because it ignores Dr. Rothman's analysis that, with respect to the flavor ban and the future performance of Elite, "Dr. Murphy is effectively taking a static snapshot of MarkTen Elite in 2018 and projecting it forward. In 2018, most of Altria's sales were non-flavored cigalikes. It is reasonable to expect that Altria and others would have responded to the flavor ban over time, and Altria's substantial experience with non-flavored cigalike products would likely have been helpful in this regard." (PX5001 at 043-44 (¶ 79) (Rothman Rebuttal Report); see also Responses to RPF ¶¶ 1470-74; Responses to RPF ¶¶ 1434-43 (evidence demonstrates that cigalikes are not an obsolete product)).

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The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

**a. The Dramatic Decline Of Cig-A-Likes Undermined Altria's Ability To Compete**

1459. Just as the decline of cig-a-likes from October 2017 through September 2018 undermines the reliability of Dr. Rothman's calculation of pre-transaction market shares for all the competitors, it also overstates the competitive significance of Altria in particular. (*See infra* ¶¶ 1460-63).

**Response to Finding No. 1459**

The proposed finding should be disregarded because it is not a "finding of fact," but rather a legal conclusion regarding the sufficiency of the evidence. Respondents inappropriately state their own arguments as a "fact."

The proposed finding is incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (*See* PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria's Board that the MarkTen cigalike platform was declining and citing the fact that Altria's MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are distinct relevant product markets in which to evaluate the current and future anticompetitive effects of the transaction. Dr. Murphy conceded that he did not express an opinion in his report on whether there are separate relevant markets for cigalikes and pod-based products. (CCFF ¶ 2087). Moreover, the evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a properly-defined relevant product market. (CCFF ¶¶ 208-407; *see also* Responses to RPF ¶¶ 1388-414).

1460. The decline in cig-a-likes was particularly significant for Altria because 90 percent of its sales in 2018 were cig-a-likes. (RX1217 Murphy Report ¶ 12; Murphy Tr. 3106-07).

#### **Response to Finding No. 1460**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (*See* Order on Post-Trial Filings at 3, dated June 28, 2021). The proposed finding is also vague because it does not explain what it means by the phrase “[t]he decline in cig-a-likes” or how the alleged decline was “particularly significant for Altria.” The proposed finding is further vague because it does not identify the Altria “sales” of which cigalikes purportedly comprised 90 percent.

The proposed finding is also unsupported, incomplete, and misleading. Neither the cited section of Dr. Murphy’s report nor his cited testimony provide a basis for his claims about Altria’s sales. The statement in paragraph 12 of RX1217 about the percentage of Altria’s e-cigarette sales that consisted of cigalikes does not contain a citation to the record. Moreover, Dr. Murphy’s trial

testimony at pages 3106-07 references a demonstrative exhibit that is not in evidence. Instead, Dr. Murphy conceded that, in his report, he did not compare the profitability of Altria's e-vapor business to other e-vapor competitors at the time of Altria's exit. (CCFF ¶ 2119). Dr. Murphy also conceded that he did not offer an opinion in this case as to whether Altria would have exited the e-vapor business but for the transaction. (CCFF ¶ 2122).

The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (See PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); see also PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria's Board that the MarkTen cigalike platform was declining and citing the fact that Altria's MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). { [REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

1461. And, just as cig-a-likes' share of the e-vapor industry fell by more forty percent during the 12 months before the transaction, (RX1217 Murphy Report ¶ 41, Figs. IV.2, IV.3), distorting Dr. Rothman's inputs, they continued to decline in the wake of the transaction, falling to just 5 percent of closed-system volume share for both devices and cartridges as of September 2020, (RX1217 Murphy Report ¶ 62, n.143).

### **Response to Finding No. 1461**

The proposed finding is vague because it does not identify what it means by "Dr. Rothman's inputs" and it is unclear to whom or what "they" refers to in the clause "they continued to decline . . . ." The word "they" could refer either to cigalikes or "Dr. Rothman's inputs." To the extent that "they" refers to cigalikes, the proposed finding is incomplete and misleading if it

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suggests that cigalikes are an obsolete product. (See PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018)). [REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

The proposed finding is also misleading in how it describes the purported decline of cigalikes. The proposed finding uses closed-system volume *share* in reporting cigalikes decline. However, a decline in volume share does not necessarily correspond with a decline in volume if the total market is growing, or in this case, if the volume of pod-based devices grew. (CCFF ¶¶ 64-65; see also PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)).

1462. “Given the continually declining importance of cig-a-likes within all closed-system e-cigarettes,” Altria’s pre-transaction share, however measured, dramatically overstates its competitive significance going forward and “is a poor predictor of what its share would have been in the but-for world in which Altria continued to sell e-cigarette products.” (RX1217 Murphy Report ¶ 130; see also Murphy Tr. 3166-67 (“Altria’s importance would be lower if you . . . looked at the more relevant future in that picture as opposed to the past.”)).

### **Response to Finding No. 1462**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the weight to be given certain purported evidence. Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is also incomplete and misleading because in the cited section of Dr. Murphy's report, he ignores evidence that, before the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Dr. Murphy's report, however, makes no mention of Altria's work to produce an updated Elite 2.0 pod-based product. (*See generally* RX1217 (Murphy Report); *see also* CCFF ¶ 2117). Dr. Murphy also ignores the fact that Altria was collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Dr. Murphy conceded that his report does not mention Altria's Joint Research, Development, and Technology Sharing Agreement ("JRDTA") with PMI, nor the e-cigarette products that were in development under the JRDTA or that PMI had already commercialized and was selling in other parts of the world, e.g., VEEV. (CCFF ¶¶ 2115-16, 2118, 2121).

The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (*See* PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria's Board that the MarkTen cigalike platform was declining and citing the fact that Altria's MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). { [REDACTED]

[REDACTED]

[REDACTED]



[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

Finally, the proposed finding is also incomplete and misleading because it ignores the substantial evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

1463. In sum, a “recent . . . change[] in market conditions,” here the decline in cig-a-likes, “indicate[s] that the current market share of a particular firm,” in this case, Altria, “overstates the firm’s future competitive significance.” (PX9098 (HMG) at 019 § 5.2).

### **Response to Finding No. 1463**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the application of the Horizontal Merger Guidelines and the weight to be given certain purported evidence. Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is also incomplete and misleading because it ignores evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue

doing so. (CCFF ¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

Finally, the proposed finding is also incomplete and misleading because it ignores the substantial evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

**b. The Market Shift Toward Pod-Based Products With Nicotine Salts Undermined Altria's Ability To Compete**

1464. Altria's competitive significance is further overstated because the market was shifting towards pod-based products with *nicotine salts* and Altria was one of the few major participants without such a product. (RX1217 Murphy Report ¶ 40; Murphy Tr. 3137-38).

**Response to Finding No. 1464**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported "fact." (See Order on Post-Trial Filings at 3, dated June 28, 2021). The proposed finding should also be disregarded because it is unsupported. Neither the cited section of the Murphy report nor the cited testimony support Dr. Murphy's conclusions. Indeed, paragraph 40 of Dr. Murphy's report does not contain any citations to the record to support the claim that the market was shifting to pod-based products with nicotine salts. (RX1217 at 028 (¶ 40) (Murphy Report)).

The proposed finding is also incomplete and misleading because in the cited testimony at pages 3137-38, Dr. Murphy ignores evidence that in 2017 Altria launched MarkTen Bold, a product that contained nicotine salts. (CCFF ¶¶ 135, 1196). Dr. Murphy also ignores evidence that,

before the transaction, Altria was working to improve its existing e-cigarette products, including by incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Dr. Murphy's report, however, makes no mention of Altria's work to produce an updated Elite 2.0 pod-based product. (*See generally* RX1217 (Murphy Report); *see also* CCFF ¶ 2117). Indeed, Dr. Murphy does not even recall if Elite 2.0 contained nicotine salts. (CCFF ¶ 2117). Dr. Murphy also ignores the fact that Altria was collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Dr. Murphy conceded that his report does not mention Altria's Joint Research, Development, and Technology Sharing Agreement (“JRDTA”) with PMI, nor the e-cigarette products that were in development under the JRDTA or that PMI had already commercialized and was selling in other parts of the world, e.g., VEEV. (CCFF ¶¶ 2115-16, 2118, 2121).

1465. “[U]nlike JLI's JUUL, NJOY's Ace, ITG's myblu INTENSE and Reynolds'[s] Vuse Alto,” which all had nicotine salts, Elite did not contain nicotine salts in its e-liquid. (RX1217 Murphy Report ¶ 40; *see also supra* Part II.A, II.B.1-3).

#### **Response to Finding No. 1465**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (*See* Order on Post-Trial Filings at 3, dated June 28, 2021; *see also* Responses to RPF Part II.A, II.B.1-3). The proposed finding is also incomplete and misleading because it ignores evidence that, before the transaction, Altria was working to improve its existing e-cigarette products, including by incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). The proposed finding is also incomplete and misleading because it ignores the fact that in 2017 Altria launched MarkTen Bold, a product that contained nicotine salts. (CCFF ¶¶ 135, 1196).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that all e-vapor customers desire a product with nicotine salts or that nicotine salts are the

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only means to provide a satisfying e-vapor experience. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } Indeed,

closed-system e-cigarette products without nicotine salts are still marketed today. (See CCFF ¶¶ 1166, 1176).

1466. As Professor Murphy observed from analyzing the market data, “within the pod-based products, those that had nicotine salts tended to be far more successful than those that did not.” (Murphy Tr. 3138; *see also* PX7047 Murphy Dep. at 44; *supra* Part XII.C).

#### **Response to Finding No. 1466**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (See Order on Post-Trial Filings at 3, dated June 28, 2021). The proposed finding is also vague, incomplete, and misleading. In the cited testimony, Dr. Murphy refers to “looking at the marketplace and the outcomes” (Murphy Tr. 3138) and states that “it does appear that products that contain nicotine salts have been more successful.” (PX7047 (Murphy, Dep. at 44)). But Dr. Murphy fails to identify what data or measures he looked at and what precisely those data showed about sales or preferences or something else related to product success. (See Responses to RPF Part XII.C).

The proposed finding is also incomplete and misleading because it ignores evidence that, before the transaction, Altria was working to improve its existing e-cigarette products, including by incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). The proposed finding is also incomplete and misleading because it ignores the fact that in 2017 Altria launched MarkTen Bold, a product that contained nicotine salts. (CCFF ¶¶ 135, 1196).

1467. This dynamic was on full display with Elite. Although Dr. Rothman acknowledges that Altria was “pushing MarkTen Elite aggressively” during the time that it was on the market, (PX7048 Rothman Trial Dep. at 176), Elite never achieved more than a 0.9 percent share of cartridge sales in the closed-system market, (RX1217 Murphy Report ¶ 79; *see also supra* Part III.E).

### **Response to Finding No. 1467**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The proposed finding is also vague because it does not identify what is means by “[t]his dynamic.”

The second sentence of the proposed finding is incomplete and misleading because it ignores evidence that Elite was only the market for about nine months and was withdrawn before Altria had time to assess the product’s long-term potential. (CCFF ¶¶ 1144-62). The second sentence of the proposed finding is also unsupported, incomplete, and misleading because in the cited section of the Murphy report, Dr. Murphy ignores evidence that, before the transaction, Altria was working to improve its existing e-cigarette products, including by incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Dr. Murphy’s report, however, makes no mention of Altria’s work to produce an updated Elite 2.0 pod-based product. (*See generally* RX1217 (Murphy Report); *see also* CCFF ¶ 2117). Indeed, Dr. Murphy does not even recall if Elite 2.0 contained nicotine salts. (CCFF ¶ 2117). Dr. Murphy also ignores the fact that Altria was collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Dr. Murphy conceded that his report does not mention Altria’s Joint Research, Development, and Technology Sharing Agreement (“JRDTA”) with PMI, nor the e-cigarette products that were in development under the JRDTA or that PMI had already commercialized and was selling in other parts of the world, e.g., VEEV. (CCFF ¶¶ 2115-16, 2118, 2121; *see also* Responses to RPF Part III.E).

1468. In addition, based on 33 weeks of sales data analyzed by Professor Murphy, “MarkTen Elite’s sales were outperformed by sales of Reynolds’[s] Vuse Alto [and] NJOY Ace . . . during the corresponding post-launch periods for each of those competitors.” (RX1217 Murphy Report ¶ 133). Both of those products have salts. (RX1217 Murphy Report ¶ 133).

#### **Response to Finding No. 1468**

The proposed finding is incomplete and misleading because it ignores evidence that Elite was only the market for about nine months and was withdrawn before Altria had time to assess the product’s long-term potential. (CCFF ¶¶ 1144-62). The proposed finding is also incomplete and misleading because in the cited section of the Murphy report, Dr. Murphy ignores evidence that, before the transaction, Altria was working to improve its existing e-cigarette products, including by incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Dr. Murphy’s report, however, makes no mention of Altria’s work to produce an updated Elite 2.0 pod-based product. (*See generally* RX1217 (Murphy Report); *see also* CCFF ¶ 2117). Indeed, Dr. Murphy does not even recall if Elite 2.0 contained nicotine salts. (CCFF ¶ 2117). Furthermore, Dr. Murphy also ignores the fact that Altria was collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Dr. Murphy conceded that his report does not mention Altria’s Joint Research, Development, and Technology Sharing Agreement (“JRDTA”) with PMI, nor the e-cigarette products that were in development under the JRDTA or that PMI had already commercialized and was selling in other parts of the world, e.g., VEEV. (CCFF ¶¶ 2115-16, 2118, 2121).

1469. As the Commission has recognized, “if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agencies may conclude that that firm’s historical market share overstates its future competitive significance.” (PX9098 (HMG) at 019-20 § 5.2).

#### **Response to Finding No. 1469**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the application of the Horizontal Merger Guidelines. Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is also unsupported, incorrect, incomplete, and misleading to the extent that it suggests that Altria did not have access to the technology used in the development of pod-based products. On the contrary, the evidence shows that, before the transaction, Altria was working to improve its existing e-cigarette products, including by incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). The evidence also shows that Altria was collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716).

Finally, the proposed finding is incomplete and misleading because it ignores evidence that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

**c. The Flavor Ban Would Have Undermined Altria’s Ability To Compete**

1470. FDA’s ban on all cartridges that were not tobacco or menthol flavored, which took effect in February 2020, (PX9016 (FDA) at 002), would have further diminished Altria’s competitive significance, (*see infra* ¶¶ 1471-74).

**Response to Finding No. 1470**

The statement that the FDA’s so-called flavor ban “would have further diminished Altria’s competitive significance” should be disregarded because it contains no citations to the record and is vague, incomplete, and misleading.

The proposed finding is also incomplete and misleading to the extent that it suggests that Altria would not have been a significant competitor had it not exited the e-cigarette business. The

evidence shows that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

1471. Dr. Rothman incorrectly assumes that the flavor ban would have benefited Altria because, as of 2018, 83 percent of Altria’s cartridge sales were of tobacco and menthol products. (PX5000 Rothman Report ¶ 119, Tbl. 6).

#### **Response to Finding No. 1471**

The proposed finding should be disregarded because it contains no citations to the record for its statement that Dr. Rothman’s assumption was incorrect. The section of Dr. Rothman’s report cited here provides support for the fact that, as of 2018, 83 percent of Altria’s cartridge sales were of tobacco and menthol products. (PX5000 at 067-68 (¶ 119, Table 6) (Rothman Expert Report); *see also* Response to RPF ¶ 1470).

1472. This assumption is doubly flawed. *First*, “Dr. Rothman’s underlying assumption that the percent of tobacco and menthol flavored cartridges within a company’s portfolio of cartridge sales prior to the Flavor Ban predicts sales or sales growth post Flavor Ban is incorrect.” (RX1217 Murphy Report ¶ 156). Although Dr. Rothman made no attempt to test his assumption, Professor Murphy’s analysis shows there is no correlation between



pre-flavor ban sales and post-flavor ban sales. For example, JTI, which had the highest share of tobacco and menthol flavored cartridges in 2018, accounted for only 2.2 percent of cartridge sales from January through September of 2020. (RX1217 Murphy Report ¶ 155).

### **Response to Finding No. 1472**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The first sentence of the proposed finding is also vague because it does not identify the assumption to which it refers or explain with specificity how the assumption is “doubly flawed.”

The second sentence of the proposed finding should be disregarded because it is unsupported. Dr. Murphy’s analysis that is cited in support for this proposed finding did not take into account other factors that may impact sales. (RX1217 at 106 (¶ 156) (Murphy Report) (failing to describe any regression analysis that would have controlled for other factors impacting sales)). Moreover, Dr. Murphy admitted that he did not include in his report any regression analysis to explain why sales volumes of pod-based devices, as a whole, are higher than they were prior to Altria’s exit. (CCFF ¶ 2111; Murphy Tr. 3198).

The third sentence of the proposed finding should be disregarded because it contains no citations to the record.

The fourth sentence of the proposed finding should be disregarded because it is unsupported, incomplete, and misleading. Dr. Murphy’s analysis that is cited as support for this proposed finding did not take into account other factors that may impact sales. (RX1217 at 105-06 (¶ 155) (Murphy Report) (failing to describe any regression analysis that would have controlled for other factors impacting sales)). In the cited analysis, Dr. Murphy also fails to account for the overall size of JTI compared to JLI. (RX1217 at 105-06 (¶ 155) (Murphy Report) (failing to describe the relative sizes of JTI and JLI)). JTI’s Logic brand e-cigarettes held approximately a

3.7 percent market share in 2018 of closed-system e cigarettes, whereas JLI's JUUL products held approximately a 51 percent share. (CCFF ¶¶ 187, 162). Moreover, Dr. Murphy admitted that he did not include in his report any regression analysis to explain why sales volumes of pod-based devices, as a whole, are higher than they were prior to Altria's exit. (CCFF ¶ 2111; Murphy Tr. 3198).

1473. *Second*, Dr. Rothman fails to account for the fact that Altria's cig-a-likes had a "higher share of tobacco and menthol flavored [cartridges] than its pod-based vaporizer[s]" and "cig-a-likes were declining in demand such that the very factor Dr. Rothman identified as a predictor of future sales growth post Flavor Ban is in fact a predictor of declining sales in the case of Altria." (RX1217 Murphy Report ¶ 157).

### **Response to Finding No. 1473**

The proposed finding should be disregarded because the section of Dr. Murphy's report that is cited as support fails to cite to any record evidence.

The proposed finding is also incomplete and misleading because it ignores evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with

significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

As Dr. Rothman explained, “Dr. Murphy is effectively taking a static snapshot of MarkTen Elite in 2018 and projecting it forward. In 2018, most of Altria’s sales were non-flavored cigalikes. It is reasonable to expect that Altria and others would have responded to the flavor ban over time, and Altria’s substantial experience with non-flavored cigalike products would likely have been helpful in this regard.” (PX5001 at 043-44 (¶ 79) (Rothman Rebuttal Report); *see also* Responses to RPF ¶¶ 1434-43 (evidence demonstrates that cigalikes are not an obsolete product)).

1474. In addition, the flavor ban would have had significant negative consequences for Nu Mark’s pod-product, Elite, a product for which the primary selling point was its strong flavors. (PX4012 (Altria) at 023 (stating that one of “Elite’s primary benefit[s]” was its “good tasting flavors”)). Four of the five cartridge offerings for Elite indisputably would be barred by the flavor ban. (PX1647 (Altria) at 014 (listing Strawberry Brulee, Apple Cider, Hazelnut Cream, and Glacier Mint)). The fifth, “Sweet Original,” was described by Altria as having “a balanced tobacco blend with honeysuckle and fruit flavors,” (PX1647 (Altria) at 014), and it is not clear how FDA would have classified it, (PX9016 (FDA) at 002). What is clear is that, had Altria not discontinued all sales of its Elite product in October 2018, the flavor ban would have forced the company to discontinue selling nearly all or all of its MarkTen Elite pods beginning in February 2020. Even if Sweet Original had been allowed to remain on the market, “that flavor constituted less than one-quarter of MarkTen Elite sales and only 2.2 percent of Altria’s total e-cigarette product sales in 2018.” (RX1217 Murphy Report ¶ 53). Taken together, this suggests that, following the flavor ban, Altria would have become “an even smaller and more distant competitor” in the but-for world. (RX1217 Murphy Report ¶ 81).

#### **Response to Finding No. 1474**

The first sentence of the proposed finding should be disregarded because it is unsupported. The cited exhibit contains the quoted language about Elite’s “good tasting flavors,” but the exhibit does not support the claim in this sentence that the flavor ban would have had negative consequences for Elite. (*See* PX4012 (Altria) at 023 (containing no mention of the flavor ban)).

The fourth sentence of the proposed finding should be disregarded because it contains no citations to the record.

The fifth and sixth sentences of the proposed finding should be disregarded because, in the cited sections of Dr. Murphy’s report, he fails to take into account evidence of Altria’s plans, prior to the transaction, to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716).

Furthermore, as Dr. Rothman explained, “Dr. Murphy is effectively taking a static snapshot of MarkTen Elite in 2018 and projecting it forward. In 2018, most of Altria’s sales were non-flavored cigalikes. It is reasonable to expect that Altria and others would have responded to the flavor ban over time, and Altria’s substantial experience with non-flavored cigalike products would likely have been helpful in this regard.” (PX5001 at 043-44 (¶ 79) (Rothman Rebuttal Report); *see also* Responses to RPF ¶¶ 1434-43 (evidence demonstrates that cigalikes are not an obsolete product)).

## **2. Market Volatility Further Undermines The Reliability Of Dr. Rothman’s HHI Calculation**

1475. As the Commission recognizes, “even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings.” (PX9098 (HMG) at 021 § 5.3).

### **Response to Finding No. 1475**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the application of the Horizontal Merger Guidelines. Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is also incorrect, incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that the closed-system e-cigarette market is “very competitive” following Altria’s exit. Not only do both ordinary course documents and Dr. Rothman’s calculations demonstrate that the closed-system e-cigarette market was highly concentrated before the transaction and that Altria’s exit increased concentration, (CCFF ¶¶ 1735-63), but substantial evidence also demonstrates that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

1476. Thus, where market share statistics are volatile, HHI statistics are notoriously unreliable. (CoL ¶ 84; *see also* PX9098 (HMG) at 021 § 5.3 (“The Agencies give more weight to market concentration when market shares have been stable over time . . . ”)).

#### **Response to Finding No. 1476**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the application of the Horizontal Merger Guidelines and the weight to be given HHI calculations. Respondents inappropriately state their own arguments as a “fact.” (*See* Response to Respondents’ Proposed COL ¶ 84).

The proposed finding is also incorrect, incomplete, and misleading because it suggests that market shares for closed-system e-cigarettes are volatile. On the contrary, the evidence shows that shares of consumables in the U.S. closed-system e-cigarette market were relatively stable from 2018 to 2020. (*See* RX1217 at 052 (Fig. V.4) (Murphy Report) (showing that the HHI for the “All Closed-System E-Cigarettes” market, based on “Cartridge Volume in Units,” only moved from

5,493 to 5,022 over the three years); PX2782 (JLI) at 008 (“Investor Update 2020”) (showing that while JUUL’s dollar share of “Closed Pods and Disposable[s]” from 2019 to 2020 declined somewhat after the “FDA Flavor Guidance,” JUUL’s share rebounded and stood at approximately 60 percent in April 2020); *see also* CCFE ¶¶ 1740, 1742-48 (discussing ordinary course share estimates that show that the closed-system e-cigarette market has remained highly concentrated and JUUL has been the market leader since 2018); CCFE ¶¶ 1762-63 (discussing why share of device sales is not a reliable metric to assess competition in the market for closed-system e-cigarettes); Response to RPF ¶ 1479). Moreover, the proposed finding ignores evidence that JLI’s share of consumables has been relatively consistent and never fallen below 50 percent. (PX2782 (JLI) at 008; *see also* ¶¶ CCFE 1740, 1742-48).

The proposed finding is also incorrect, incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that the closed-system e-cigarette market has become less concentrated following the transaction and Altria’s exit from the e-cigarette business. Not only do both ordinary course documents and Dr. Rothman’s calculations demonstrate that the closed-system e-cigarette market was highly concentrated before the transaction and that Altria’s exit increased concentration, (CCFE ¶¶ 1735-63), but substantial evidence also demonstrates that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFE ¶¶ 1408-730).

Finally, the proposed finding is incomplete and misleading to the extent that it suggests that Altria would not have been a significant competitor had it not exited the e-cigarette business. The evidence shows that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of

improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

1477. This principle applies here: The dramatic fluctuations in market share among the e-vapor competitors further demonstrate that Dr. Rothman’s HHI calculation cannot support a presumption of anticompetitive effects. (RX1217 Murphy Report ¶ 72).

#### **Response to Finding No. 1477**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the presumption of anticompetitive effects. Respondents inappropriately state their own argument as a “fact.”

The proposed finding is also vague, incomplete, and misleading. The proposed finding is vague because it does not specify the “market share” to which it refers. It neither defines the market that it purports to be discussing nor identifies the basis (e.g., devices or consumables) on which it purports to measure market share. The proposed finding is also vague because it does not define or identify either the “principle” or “dramatic fluctuations” to which it refers.

The proposed finding is also incorrect, incomplete, and misleading because it suggests that there were “dramatic fluctuations” in the market shares of closed-system e-cigarette competitors.

On the contrary, the evidence shows that shares of consumables in the U.S. closed-system e-cigarette market were relatively stable from 2018 to 2020. (See RX1217 at 052 (Fig. V.4) (Murphy Report) (showing that the HHI for the “All Closed-System E-Cigarettes” market, based on “Cartridge Volume in Units,” only moved from 5,493 to 5,022 over the three years); PX2782 (JLI) at 008 (“Investor Update 2020”) (showing that while JUUL’s dollar share of “Closed Pods and Disposable[s]” from 2019 to 2020 declined somewhat after the “FDA Flavor Guidance,” JUUL’s share rebounded and stood at approximately 60 percent in April 2020); see also CCF 1740, 1742-48 (discussing ordinary course share estimates that show that the closed-system e-cigarette market has remained highly concentrated and JUUL has been the market leader since 2018); CCF 1762-63 (discussing why share of device sales is not a reliable metric to assess competition in the market for closed-system e-cigarettes); Response to RPF 1479). Moreover, the proposed finding ignores evidence that JLI’s share of consumables has been relatively consistent and never fallen below 50 percent. (PX2782 (JLI) at 008; see also CCF 1740, 1742-48).

Finally, the proposed finding is also incorrect, incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that the closed-system e-cigarette market has become less concentrated following the transaction and Altria’s exit from the e-cigarette business. Not only do both ordinary course documents and Dr. Rothman’s calculations demonstrate that the closed-system e-cigarette market was highly concentrated before the transaction and that Altria’s exit increased concentration, (CCF 1735-63), but substantial evidence also demonstrates that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCF 1408-730).

1478. Regardless of how one frames the HHI calculation or the market to which it is applied, the evidence indisputably shows that the market has experienced several “significant swings



in market share” in the last several years. (RX1217 Murphy Report ¶ 72; *see also* PX8006 Kloss (Wawa) Decl. at 003-04 ¶¶ 13-15 (explaining that category leadership has changed several times); PX7037 Huckabee (JLI) Dep. at 84-85 (similar)).

### **Response to Finding No. 1478**

The proposed finding is vague, incomplete, and misleading. The proposed finding is vague because it does not specify the “market share” to which it refers. In particular, the proposed finding does not identify the basis (e.g., devices or consumables) on which it purports to measure market share. The proposed finding is also vague because it does not explain what it means by the phrase “significant swings in market share,” nor does it specify the years which it purports to cover.

The proposed finding is also incorrect, incomplete, and misleading because it suggests that there were “significant swings in market share” in the closed-system e-cigarette market. On the contrary, the evidence shows that shares of consumables in the U.S. closed-system e-cigarette market were relatively stable from 2018 to 2020. (*See* RX1217 at 052 (Fig. V.4) (Murphy Report) (showing that the HHI for the “All Closed-System E-Cigarettes” market, based on “Cartridge Volume in Units,” only moved from 5,493 to 5,022 over the three years); PX2782 (JLI) at 008 (“Investor Update 2020”) (showing that while JUUL’s dollar share of “Closed Pods and Disposable[s]” from 2019 to 2020 declined somewhat after the “FDA Flavor Guidance,” JUUL’s share rebounded and stood at approximately 60 percent in April 2020); *see also* CCFF ¶¶ 1740, 1742-48 (discussing ordinary course share estimates that show that the closed-system e-cigarette market has remained highly concentrated and JUUL has been the market leader since 2018); CCFF ¶¶ 1762-63 (discussing why share of device sales is not a reliable metric to assess competition in the market for closed-system e-cigarettes); Response to RPF ¶ 1479). Moreover, the proposed finding ignores evidence that JLI’s share of consumables has been relatively consistent and never fallen below 50 percent. (PX2782 (JLI) at 008; *see also* ¶¶ CCFF 1740, 1742-48).

The proposed finding is also unsupported by the cited evidence. Paragraphs 13 through 15 of PX8006 discuss “JUUL’s rapid entry and expansion” and how “[o]nce JUUL entered the electronic cigarette market . . . JUUL quickly grew to dominate the space,” but the Kloss declaration does not discuss other swings—let alone “several” swings—in market share. (PX8006 at 003-04 (¶¶ 13-15) (Kloss (Wawa), Decl.)). Furthermore, while the cited Huckabee deposition testimony indicates that “there [have been] significant market participant moves,” his testimony is vague and does not concern market shares, but rather “price points.” (PX7037 Huckabee (Reynolds), Dep. at 85).

1479. “NJOY Ace expanding to nearly match JUUL’s market share in less than a year followed by Vuse Alto rapidly winning share and surpassing both JUUL and NJOY Ace, illustrate the dynamic nature of competition in e-cigarettes, with rival brands successfully repositioning and expanding to win sales.” (RX1217 Murphy Report ¶ 72; *see also supra* Part XII.A).

#### **Response to Finding No. 1479**

The proposed finding is vague, incomplete, and misleading. The proposed finding is vague because it does not specify the “market share” to which it refers. It neither defines the market that it purports to be discussing nor identifies the basis (e.g., devices or consumables) on which it purports to measure market share.

The proposed finding is incomplete and misleading because it appears to refer to market shares based on device sales. In paragraph 72 of Murphy’s report, which is cited as the support for this finding, Dr. Murphy analyzed market shares based on device sales. (RX1217 at 056-57 (¶ 72) (Murphy Report)). But device share is not a reliable metric to assess competition in the closed-system e-cigarette market. (CCFF ¶¶ 1762-63). In calculating market shares for the closed-system e-cigarette market, Dr. Rothman used shares of consumables (i.e., cartridges, pods, and disposables) rather than devices because “[c]onsumables better reflect the extent to which consumers are purchasing the products repeatedly. . . . -- devices are often heavily discounted to

encourage consumers to try products.” (PX7048 (Rothman, Trial Dep. at 69)). At trial, Reynolds’s Wade Huckabee explained that device share “is a good indicator for the amount of consumers that are trying our products,” but that “repeat trial and ongoing repertoire usage” are “different things.” (Huckabee (Reynolds) Tr. 398-99). Pod share, on the other hand, gives Reynolds “an indication for the amount of consumer purchases and uses of our product.” (Huckabee (Reynolds) Tr. 401).

The proposed finding is also incorrect, incomplete, and misleading because there is no evidence whatsoever to support the suggestion that either NJOY or Vuse surpassed—or even came close to—JLI’s share of the closed-system e-cigarette market as measured by the sale of consumables. On the contrary, Reynolds’s Wade Huckabee testified that JLI has the highest pod share today, (Huckabee (Reynolds) Tr. 402), and, moreover, { [REDACTED] } NJOY’s Andrew Farrell also testified that NJOY is number three “behind JUUL and Vuse in terms of total unit sales within the convenience and gas [electronic nicotine delivery system] market.” (PX7029 (Farrell (NJOY), Dep. at 146)). Furthermore, ordinary course business documents also demonstrate that JLI has remained the market leader of the closed-system e-cigarette market as measured by the sale of consumables. (PX2782 (JLI) at 008 (“Investor Update 2020”) (showing that JUUL’s share of pods (cartridges) and disposables is approximately 60 percent and that JUUL was the market leader in 2019 and 2020); *see also* CCF ¶¶ 1740, 1742-48 (discussing ordinary course share estimates that show that the closed-system e-cigarette market has remained highly concentrated and JUUL has been the market leader since 2018)).

Moreover, shares in the closed-system e-cigarette market were relatively stable from 2018 to 2020. (*See* RX1217 at 052 (Fig. V.4) (Murphy Report) (showing that the HHI for the “All Closed-System E-Cigarettes” market, based on “Cartridge Volume in Units,” only moved from

5,493 to 5,022 over the three years); PX2782 (JLI) at 008 (“Investor Update 2020”) (showing that while JUUL’s dollar share of “Closed Pods and Disposable[s]” from 2019 to 2020 declined somewhat after the “FDA Flavor Guidance,” JUUL’s share rebounded and stood at approximately 60 percent in April 2020); *see also* CCFE ¶¶ 1740, 1742-48 (discussing ordinary course share estimates that show that the closed-system e-cigarette market has remained highly concentrated and JUUL has been the market leader since 2018)).

The proposed finding is also incorrect, incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that the closed-system e-cigarette market has become less concentrated following the transaction and Altria’s exit from the e-cigarette business. Not only do both ordinary course documents and Dr. Rothman’s calculations demonstrate that the closed-system e-cigarette market was highly concentrated before the transaction and that Altria’s exit increased concentration, (CCFE ¶¶ 1735-63), but substantial evidence also demonstrates that the transaction and Altria’s exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFE ¶¶ 1408-730).

The proposed finding is also incomplete and misleading to the extent that it suggests that Altria would not have been a significant competitor had it not exited the e-cigarette business. The evidence shows that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFE ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFE ¶¶ 1538-52). Altria was

also collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

Finally, the proposed finding is also incomplete and misleading because it ignores the substantial evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition, as well as the elimination of products that appealed to consumers and future product development by Altria. (CCFF ¶¶ 1408-730).

#### **XVI. COMPLAINT COUNSEL CANNOT DEMONSTRATE ANTICOMPETITIVE EFFECTS BY SHOWING THAT ALTRIA WOULD HAVE BEEN A SIGNIFICANT COMPETITOR**

1480. Nor can Complaint Counsel satisfy its burden to demonstrate anticompetitive effects by showing that, but for the transaction, Altria would have been a “significant competitor” in the e-vapor industry, either through (1) Nu Mark's on-market products, (2) its development pipeline, or (3) potential partnership opportunities. (CC Pretrial Br. at 12-14, 52, 72-74; PX5000 Rothman Report at ¶¶ 131-33).

#### **Response to Finding No. 1480**

The proposed finding should be disregarded because it is argumentative, misleading, conclusory, and contrary to the weight of the evidence. Respondents' own documents and public statements clearly indicate that Altria would not have exited the e-cigarette business absent the transaction, and that Altria would have been a significant competitor in closed-system e-cigarettes if it had not entered into the transaction. (CCFF ¶¶ 409-1730; PX5000 at 043-83 (¶¶ 91-145) (Rothman Expert Report); PX5001 at 016-31 (¶¶ 24-48) (Rothman Rebuttal Report)).

1481. As explained below, the record overwhelmingly refutes this assertion. (*See infra* Part XVI.A-C).

**Response to Finding No. 1481**

The proposed finding should be disregarded because it contains no citations to the record and is unfounded, misleading, conclusory, and contrary to the evidence. As explained below, the record overwhelmingly supports the assertion that Altria had the incentive and ability to compete in e-cigarettes, and that Altria would have been a significant competitor absent the transaction. Moreover, Dr. Rothman’s quantitative analysis is consistent with the qualitative evidence in this case. (*See Responses to RPF Parts XVI.A-C*).

**A. Dr. Rothman’s Opinion That Altria Would Have Been A Significant Competitor Lacks A Reliable Methodology And Is Devoid Of Meaningful Analysis Of The But-For World**

1482. As an initial matter, Dr. Rothman’s opinion that Altria would have been a significant competitor cannot be credited because it lacks a reliable methodology and offers no tangible predictions about what would have happened in the but-for world where Altria remained in the e-vapor marketplace. (*See infra* Part XVI.A.1-2).

**Response to Finding No. 1482**

The proposed finding should be disregarded because it contains no citations to the record and is unfounded, incomplete, misleading, conclusory, and contrary to the evidence. Dr. Rothman’s quantitative analysis is consistent with the qualitative evidence in this case. In addition to relying on Respondents’ own documents, testimony, and data, Dr. Rothman utilized reliable economic tools such as the Antitrust Logit Model and the Compensating Marginal Cost Reduction calculation to reach his opinion that the transaction harmed competition. (PX5000 at 075-83 (¶¶ 130-45) (Rothman Expert Report); *see also Responses to RPF Parts XVI.A.1-2*).

**1. Dr. Rothman Has No Scientific Methodology And Concedes That His Analysis Is Not Replicable**

1483. Complaint Counsel retained Dr. Rothman to “conduct an economic analysis of the effects of the transaction on competition.” (PX5000 Rothman Report ¶ 8). The bulk of his report

is devoted to a factual discussion of whether Altria would have been a significant competitor based on Dr. Rothman's review of selected documents and testimony, (PX5000 Rothman Report ¶¶ 91-140; *see also* PX5000 Rothman Report ¶¶ 18-61), and ignores the evidence presented by Respondents, (PX5000 Rothman Report at B-1 to B-15; PX5001 Rothman Rebuttal at A-1 to A-3).

### **Response to Finding No. 1483**

The proposed finding is false, misleading, and vague. Dr. Rothman's quantitative analysis is consistent with the qualitative evidence in this case. As any credible expert would do, Dr. Rothman reviewed data, documents, and testimony to form his opinions, but it is false that "[t]he bulk" of Dr. Rothman's report was devoted to a factual discussion of whether Altria would have been a significant competitor. Respondents cite to Paragraphs 91 to 140 of Dr. Rothman's expert report to justify their assertion, but a cursory review of those paragraphs shows that Dr. Rothman analyzed and prepared tables depicting [REDACTED] [REDACTED] (PX5000 at 066-69 (¶¶ 115-20) (Rothman Expert Report)). Respondents also ignore Dr. Rothman's entire rebuttal report, appendices, and other supporting materials.

Respondents have also not provided any support for their false allegation that Dr. Rothman "ignores" evidence presented by Respondents. Dr. Rothman testified that he had full access to the production record, that Appendix B to his initial report and Appendix A to his rebuttal report list the materials that he relied upon to form his opinions, and that there are additional materials that he reviewed but did not rely upon to form his opinions. (PX7048 (Rothman, Trial Dep. at 9)). Moreover, a comparison of Dr. Rothman's and Dr. Murphy's expert reports shows that Dr. Rothman relied on a far larger set of materials than Dr. Murphy did. (*Compare* PX5000 at 119-37 (Rothman Expert Report, Appendix B); PX5001 at 052-55 (Rothman Rebuttal Report, Appendix A) *with* RX1217 at 151-54 (Murphy Report, Appendix B)).

1484. And, although Dr. Rothman does not know the “exact figure” that he has been paid for his work on this matter, he estimates that it is “between a million and \$2 million.” (PX7048 Rothman Trial Dep. at 192).

**Response to Finding No. 1484**

The proposed finding is irrelevant and misleading. Like all experts, Dr. Rothman was paid for his time working on this matter. Complaint Counsel adds that Dr. Rothman’s billing rate on this matter was \$730 per hour, (PX5000 at 004 (¶ 4) (Rothman Expert Report)), less than half of the hourly rate charged by Respondents’ expert, Dr. Murphy. (Murphy (Altria) Tr. 3170-71 (testifying that he was compensated at a rate of \$1,500 per hour)).

1485. But Dr. Rothman’s approach flouts the foundational principle that it is inappropriate for experts to serve as a vehicle for factual narrative. (CoL ¶ 120).

**Response to Finding No. 1485**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion on the role of experts. (See Complaint Counsel’s Response to Respondents’ Proposed COL ¶ 120). Respondents inappropriately state their own argument as a “fact.”

Dr. Rothman’s quantitative analysis is consistent with the qualitative evidence in this case. Dr. Rothman conducted an economic analysis and modeled projected harm from the transaction that is consistent with the qualitative evidence in this case. (PX5000 at 043-83 (¶¶ 91-145) (Rothman Expert Report)). In addition to relying on Respondents’ own documents, testimony, and data, Dr. Rothman utilized reliable economic tools such as the Antitrust Logit Model and the Compensating Marginal Cost Reduction calculation to reach his opinion that the transaction and Altria’s exit from the e-cigarette business harmed competition. (PX5000 at 075-83 (¶¶ 130-45) (Rothman Expert Report); see also Responses to RPF Part XVI.A.1-2). Moreover, unlike Dr. Murphy, Dr. Rothman also implemented the hypothetical monopolist test as described in the Horizontal Merger Guidelines to determine that the sale of closed-system e-cigarettes in the United



States is the relevant product market. (PX5000 at 040-41 (¶¶ 78-82) (Rothman Expert Report); Murphy (Altria) Tr. 3179-83). As Dr. Rothman explained, “The documents and testimony” in the record “are directly relevant to whether a hypothetical monopolist of closed-system e-cigarettes would likely impose at least a SSNIP,” and Dr. Rothman also used critical elasticities identified in party documents in the hypothetical monopolist test. (PX5000 at 040-41 (¶¶ 78, 81) (Rothman Expert Report); PX2486 (JLI) at 013-15).

1486. Dr. Rothman’s significant competitor discussion opines on lay matters that the Court is capable of understanding and deciding without his testimony. For example, Dr. Rothman asserts that “Altria would not have shut Nu Mark down but for the transaction,” (PX5000 Rothman Report ¶ 121), even though intent is not a proper question for an expert, (CoL ¶ 120). And he admits that his significant competitor finding “was not based on a prediction of an economic model, but rather on an economic analysis of a broad collection of facts—data, documents, and testimony.” (PX5001 Rothman Rebuttal ¶ 57; *see also* PX7046 Rothman Dep. at 160-65 (explaining that he did not use econometric analysis for his significant competitor conclusion); PX7048 Rothman Trial Dep. at 164 (agreeing that he did not use the antitrust logit model to determine whether Altria was a significant competitor)).

### **Response to Finding No. 1486**

The proposed finding is incomplete, misleading, and inaccurate. Based on his review of the documents, testimony, and data in this matter, Dr. Rothman’s expert opinion is that it did not make business sense for Altria to exit the sale of e-cigarettes absent the transaction. (PX5000 at 058 (¶ 109) (Rothman Expert Report) (“Altria’s internal documents, testimony, and data indicate that it would not have made business sense for Altria to shut Nu Mark down but for the transaction”); *see also* PX5000 at 058-75 (¶¶ 110-29) (Rothman Expert Report)). Dr. Rothman never opined on Altria’s intent. In addition, the proposed finding is misleading because it ignores the full analysis that Dr. Rothman conducted to reach his conclusion that “Altria would not have shut Nu Mark down but for the transaction,” which is based in large part on his analysis of company data. (PX5000 at 057-75 (¶¶ 108-29) (Rothman Expert Report); *see also* CCFF ¶¶ 1034-407).

The proposed finding is also vague in its use of the term “significant competitor finding.” Insofar as it refers to Dr. Rothman’s opinion that Altria would have been a significant competitor absent the transaction, the claim that Dr. Rothman’s opinion was not based on “a prediction of an economic model” is incomplete and misleading. As Dr. Rothman explained in his trial deposition, the Antitrust Logit Model was designed to *quantify* the harm from the transaction. As Dr. Rothman explained, his conclusion that Altria would have been a significant competitor absent the transaction was based on his analysis of the “data, documents, and testimony.” (PX5001 at 034 (¶ 57) (Rothman Rebuttal Report)).

1487. Dr. Rothman acknowledged that he is unable to explain his methodology for choosing what documents and testimony to rely on and what to disregard: “I’m not sure how I would explain to a judge or to another economist [what I did].” (PX7046 Rothman Dep. at 167; *see also* PX7048 Rothman Trial Dep. at 138-39, 181-82 (similar)). Nor can he explain why he skipped over critical documents like the August 19 term sheet. (PX7046 Rothman Dep. at 279; PX7048 Rothman Trial Dep. at 139-40).

#### **Response to Finding No. 1487**

The proposed finding is incomplete and misleading. Dr. Rothman’s quantitative analysis is consistent with the qualitative evidence in this case. When Respondents’ counsel asked Dr. Rothman to explain why he cited to one term sheet but not another, Dr. Rothman testified that he would need to “go back and to reconstruct why I cited one term sheet but not another.” (PX7048 (Rothman, Trial Dep. at 140)).

The record does not support the unfounded claim that Dr. Rothman “skipped over” any term sheet or other “critical documents.” Dr. Rothman relied on multiple term sheets in his expert report. (PX7048 (Rothman, Trial Dep. at 139)). The characterization that the August 19 term sheet in particular was a “critical document” is not supported by the record nor by any evidence cited by Respondents. Although Dr. Rothman could not recall during his trial deposition the exact reasons why he did not rely on the August 19 term sheet specifically, as Dr. Rothman explained, any

document that he did not rely on would not have been a “critical document” for him to reach his opinions. (PX7048 (Rothman, Trial Dep. at 9, 138-40)).

1488. But no explanation is required to see that Dr. Rothman does what no fact-finder would ever be allowed to do—he considers only one side of the evidence, relying solely on exhibits offered by Complaint Counsel. (PX5000 Rothman Report at B-1 to B-15; PX5001 Rothman Rebuttal at A-1 to A-3 (relying on over 800 Complaint Counsel exhibits and zero Respondent exhibits)). Dr. Rothman’s “cherry-picking” of facts and “fail[ure] to adequately account for contrary evidence” makes his factual narration not only inappropriate for an expert, but completely unreliable. (CoL ¶ 121).

### **Response to Finding No. 1488**

The proposed finding should be disregarded because it is argumentative, conclusory, and misleading. Dr. Rothman’s quantitative analysis is consistent with the qualitative evidence in this case. Respondents’ claim that Dr. Rothman “cherry-picked” facts and failed “to adequately account for contrary evidence” is wholly unsupported by the record. (*See* PX7048 (Rothman, Trial Dep. at 215) (“I did not cherry-pick the evidence cited in my expert report.”); *see also* Complaint Counsel’s Response to Respondents’ Proposed COL ¶ 121). Moreover, the claim that Dr. Rothman relied on “over 800 Complaint Counsel exhibits and zero Respondent exhibits” is false and misleading. Dr. Rothman relied on hundreds of ordinary course documents produced by Respondents and third parties, and all testimony taken in this matter. (*See generally* PX5000 at 119-37 (Rothman Expert Report, Appendix B); PX5001 at 052-55 (Rothman Rebuttal Report, Appendix A)). Moreover, under the Court’s Second Revised Scheduling Order, Respondents did not provide Complaint Counsel with their final proposed exhibit list and copies of their exhibits until April 22, 2021, nearly two months *after* Dr. Rothman submitted his expert report on February 15, 2021, and nearly one month *after* Dr. Rothman submitted his rebuttal report on March 26, 2021. (PX5000 at 001 (Rothman Expert Report); PX5001 at 001 (Rothman Rebuttal Report); *see* Second Revised Scheduling Order at 3, dated March 4, 2021). Thus, Dr. Rothman could not possibly cite any of Respondents’ “RX” exhibits in either of his reports.

**2. Dr. Rothman Cannot Say What Would Happen In The But-For World And Improperly Assumes, Without Explanation, That Altria Would Have Been A Significant Competitor**

1489. Dr. Rothman's repeated admissions that he cannot say *how* Altria would have been a substantial competitor in the but-for world further undermine the reliability of his opinion. (*See infra* ¶¶ 1490-500).

**Response to Finding No. 1489**

The proposed finding should be disregarded because it contains no citations to the record and is incomplete, inaccurate, misleading, and argumentative. (*See Responses to RPF* ¶¶ 1490-500). Dr. Rothman's quantitative analysis is consistent with the qualitative evidence in this case.

1490. Although Dr. Rothman opines that Altria "likely would have been a significant competitor" in the but-for world, he testified that *how* Altria would have achieved this is "not knowable." (PX7046 Rothman Dep. at 263-64).

**Response to Finding No. 1490**

The proposed finding is incomplete and misleading. Dr. Rothman's analysis is consistent with the Horizontal Merger Guidelines, which state that "[g]iven [the] inherent need for prediction," it is not necessary to know with certainty how the anticompetitive effects will take place: "Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent . . . that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal." (PX9098 (Horizontal Merger Guidelines) § 1 at 004).

Once Altria withdrew its e-cigarette products and stopped all e-vapor R&D, it became impossible for anyone to predict precisely what would have happened in a hypothetical world in which Altria would have continued to compete in the closed-system e-cigarette market. As Dr. Rothman explained, while it is clear that "[t]he transaction harms competition," exactly "how these products would have evolved over time and what products Altria would have had on the market

and when is inherently unknowable, because Altria . . . exited. You know, this crystal ball doesn't exist. That doesn't mean that the effect of . . . the transaction and Altria's exit from competition can't be valued. Economists evaluate counterfactually by focusing on incentives and ability. Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so." (PX7048 (Rothman, Trial Dep. at 34, 36); *see also* CCFF ¶ 1529).

1491. For example, Dr. Rothman admits that he cannot identify which particular products Altria would have had on the market at any point in time in the but-for world. (PX7046 Rothman Dep. at 185-87, 264-65; PX7048 Rothman Trial Dep. at 155).

#### **Response to Finding No. 1491**

The proposed finding is false, inaccurate, and misleading. Dr. Rothman was able to identify particular products that Altria would have had on the market in 2019-2020: "[T]he products that Altria would have had on the market but for the transaction in 2019 and 2020 would be the MarkTen [cigalike] products, MarkTen Elite, Apex, [and] Green Smoke products." (PX7048 (Rothman, Trial Dep. at 155)). While Altria likely would have sold Elite 2.0, VEEV, and other products it had in development in the but-for world, Dr. Rothman could not say whether those products would have been on the market specifically in 2019 or 2020. (PX7048 (Rothman, Trial Dep. at 48-50, 155); *see also* Response to RPF ¶ 1490). Unlike Dr. Murphy, Dr. Rothman's economic analysis considered "both products that Altria has on the market at a particular point in time, as well as the development initiatives that Altria is working on that don't have products on the market at that point in time." (PX7048 (Rothman, Trial Dep. at 154)).

1492. Similarly, notwithstanding that Dr. Rothman's analysis relies on pipeline products that Altria had in development, (PX5000 Rothman Report ¶ 106; PX5001 Rothman Rebuttal ¶¶ 12-14), he admits that he cannot say what would have happened to any of those products had Altria continued to work on them, (PX7046 Rothman Dep. at 212-13); which (if any) products would have received the FDA approval necessary to reach the market, (PX7046 Rothman Dep. at 201-02); or whether any particular pipeline product would have succeeded, (PX7046 Rothman Dep. at 265-66).

#### **Response to Finding No. 1492**

The proposed finding is inaccurate and misleading. Dr. Rothman did not admit that he could not say what would have happened to any of Altria's pipeline products had Altria continued to work on them. (PX7046 (Rothman, Dep. at 212-13)). On the contrary, Dr. Rothman testified that "The transaction . . . eliminates the competitive initiatives, the product development initiatives that Altria was pushing and would have pushed. This is a loss of innovation competition . . . [and] harm[s] consumers." (PX7048 (Rothman, Trial Dep. at 34-35, 48-50)). But Dr. Rothman added that "one doesn't know if a particular project is going to result in a product on the market at a particular point in time. This is why it's useful to have multiple projects in process." (PX7046 (Rothman, Dep. at 266)).

Dr. Rothman's testimony is consistent with the Horizontal Merger Guidelines, which do not require proof of whether and when a particular pipeline product would have succeeded. Rather, the Horizontal Merger Guidelines state that "The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products." (PX9098 (Horizontal Merger Guidelines) § 6.4 at 026).

1493. Dr. Rothman cannot identify different measures that Altria could have taken to be successful had it stayed on the market. (PX7046 Rothman Dep. at 255-56; PX7048 Rothman Trial Dep. at 176).

#### **Response to Finding No. 1493**

The proposed finding is incomplete and misleading. The citation to Dr. Rothman's trial deposition was in response to a narrow question that asked what Altria could have done differently in 2018 with respect to MarkTen Elite; Dr. Rothman testified that there was not anything that Altria could have done differently in 2018 because "Altria was pushing MarkTen Elite

aggressively.” (PX7048 (Rothman, Trial Dep. at 176)). On the next page of his trial deposition, however, Dr. Rothman noted that Altria introduced a gasket fix and planned to continue expanding distribution of MarkTen Elite in 2019. (PX7048 (Rothman, Trial Dep. at 177)).

1494. Dr. Rothman cannot say what Nu Mark’s overall market share actually would have been if it had remained in the market. (PX7046 Rothman Dep. at 243).

**Response to Finding No. 1494**

Complaint Counsel does not disagree, but notes that this is inherently unknowable because Altria discontinued the sale and development of its e-cigarette products. (See Response to RPF ¶ 1490).

1495. Dr. Rothman cannot say what Elite’s or MarkTen cig-a-likes’ respective market shares would have been. (PX7048 Rothman Trial Dep. at 190; *see also* PX7046 Rothman Dep. at 268 (“I don’t have a prediction about what would have happened to the share of specific products over time and in the but-for world.”)).

**Response to Finding No. 1495**

Complaint Counsel does not disagree, but notes that this is inherently unknowable because Altria discontinued the sale of MarkTen Elite and all of the MarkTen cigalike products. (See Response to RPF ¶ 1490).

1496. And Dr. Rothman cannot identify what JLI or any other competitor would have done differently had Altria remained in the market. (PX7046 Rothman Dep. at 91-92, 109-10; *see also* PX7046 Rothman Dep. at 293 (“In the but-for world, JLI, Reynolds, Njoy would have been competing in the market as they are in the actual world . . .”)).

**Response to Finding No. 1496**

The proposed finding is false and misleading. Although nobody can say precisely what would have transpired in the but-for world, Dr. Rothman testified that “Altria’s exit eliminates a constraint on the firms that Altria is competing against and would have competed against” because “[c]ompetition pushes firms to offer consumers more value.” (PX7048 (Rothman, Trial Dep. at 50); *see also* PX7048 (Rothman, Trial Dep. at 14, 35, 125)).

1497. Although Dr. Rothman predicts that Altria would have been a substantial competitor, he has no response to the fact that 90 percent of Nu Mark’s sales in 2018 were in the declining cig-a-like category. He has no explanation for how Elite, Nu Mark’s pod-based product, could compete against products with nicotine salts when Elite did not have any salts. And he has no response to Altria’s long history of failed innovation, and its implications for Altria’s ability to succeed with any pipeline products. (PX5000 Rothman Report (offering no explanation on these topics); PX5001 Rothman Rebuttal (same)).

### **Response to Finding No. 1497**

The first two sentences of the proposed finding should be disregarded because they contain no citations to the record. With respect to the first claim that “90 percent of Nu Mark’s sales in 2018 were in the declining cig-a-like category,” there is no citation to the record to support this claim. Indeed, Dr. Rothman showed that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

There is also no citation for the statement that “Elite, Nu Mark’s pod-based product, could [not] compete against products with nicotine salts when Elite did not have any salts.” On the contrary, Dr. Rothman cited to evidence showing that Elite was performing well. (PX5000 at 064-66 (¶¶ 114-15) (Rothman Expert Report); PX5001 at 045-46 (¶ 83) (Rothman Rebuttal Report)). Dr. Rothman noted, for example, that Altria’s CEO told investors that MarkTen Elite was “getting traction with consumers” and that JLI recognized that MarkTen Elite had “long-term viability.” (PX5000 at 064-65 (¶ 114) (Rothman Expert Report); PX9047 (Altria) at 009-10; PX2289 (JLI) at 021; *see also* PX5001 at 045-46 (¶ 83) (Rothman Rebuttal Report)).

The statement that Altria had a “long history of failed innovation” is contrary to the weight of the evidence. Although Complaint Counsel does not disagree that some of Altria’s innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think



anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”); *see also* Jupe (Altria) Tr. 2183 (“Q. And knowing that some R&D projects are going to fail, innovation is about placing multiple bets. Would you agree with that statement? A. I couldn’t agree with you more.”)). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space succeeded or that it never introduced a commercially successful e-cigarette product. (*See* Responses to RPF ¶¶ 144, 181).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called “failures.” Altria’s product development team used what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria’s product development team used feedback from consumer research to inform the next round of product development efforts)).

Finally, the proposed finding is incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial

Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

1498. Dr. Rothman’s significant competitor assessment essentially boils down to this: “[W]hat made [Altria] a competitive threat, was its ability to make significant up-front investments to compete for the long run, the long run payoff.” (PX7048 Rothman Trial Dep. at 74). In other words, Altria had the financial resources to lose a significant amount of money investing in e-vapor.

### **Response to Finding No. 1498**

The proposed finding is incomplete, misleading, and incorrect. Dr. Rothman’s opinion that Altria would have been a significant competitor absent the transaction is based on far more than Altria’s ability to make significant upfront investments. As Dr. Rothman explained in both his trial testimony and expert report, he determined that Altria would have been a significant competitor in the closed-system e-cigarette market based on his evaluation of Altria’s incentives to compete and its ability to compete. (PX7048 (Rothman, Trial Dep. at 31) (“Q. . . . How did you evaluate whether Altria would have been a significant competitor if it had not entered into the transaction? A. I evaluated its incentives and I evaluated its ability.”); *see also* PX5000 at 044-53 (¶¶ 93-102) (discussing Altria’s strong incentive to compete absent the transaction), 053-57 (¶¶ 103-07) (discussing Altria’s ability to compete absent the transaction), 075-77 (¶¶ 131-33) (Rothman Expert Report)).

Dr. Rothman concluded that Altria had the incentive to compete in e-cigarettes because “[f]irms have economic incentives to invest in markets that are growing, not shrinking. The closed-system e-cigarette market was growing, but the traditional cigarette market was shrinking. Altria, as well as other tobacco manufacturers, clearly understood this dynamic.” (PX7048 (Rothman, Trial Dep. at 31)). Dr. Rothman also concluded that Altria had the ability to be a significant competitor. According to Dr. Rothman, “To compete in closed-system e-cigarettes, Altria need to combine complementary setup inputs. They need to develop or acquire products. They need

regulatory approval. They need distribution. They need shelf space in retail stores. They need to make, market, and promote their products. I evaluated Altria's capabilities along these dimensions. Altria was very well situated. It has significant resources. It has significant -- significant experience, significant distribution infrastructure, a large sales team. It has valuable shelf space in retail stores, and prior to exiting, it had multiple products in the market and product development initiatives in the pipeline." (PX7048 (Rothman, Trial Dep. at 31-32)).

Dr. Rothman also explained in detail the reasons why Altria would have been a significant competitor if it had not entered into the transaction with JLI: "Q. How did you determine that Altria would have been a significant competitor if it hadn't entered into the transaction? A. Altria was a significant competitor. It . . . had very strong incentives, significant capabilities. Its share in 2018 was third highest behind JLI and Reynolds. Its unit sales and revenues had been increasing between 2017 and 2018. Its unit sales increased about 20 percent. Its revenues were up about 30 percent. In response to JUUL's growth and starting in late 2017, Altria [brought] MarkTen Elite into the market in 2018. By the end of July, Altria's Willard was telling investors that it was getting traction with consumers. Altria was addressing design issues with -- with Elite in October 2018. It introduced a gasket fix to address a leakage issue. Altria was working on developing Elite 2.0 with nicotine salts. In September 2018, Altria introduced the Apex production [sic], a product developed by PMI. Altria was collaborating with PMI more generally and specifically to commercialize PMI's VEEV product in the United States. Overall, Altria had -- was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so." (PX7048 (Rothman, Trial Dep. at 33-34)).

1499. But that is not how competition works. No amount of financial resources to support distribution, product rollout or marketing "can drive adoption of a product if the product isn't good and doesn't deliver on consumers' desires and needs." (PX7014 Baculis Dep. at 62-63). And no amount of investment in PMTA studies can secure approval for a

product that is not appropriate for the protection of public health. (PX7017 Magness Dep. at 279 (“It’s almost irrelevant how good we are as a regulatory team. If the products are unsuccessful at converting adult smokers, they will not succeed through the regulatory pathway.”)).

### **Response to Finding No. 1499**

The proposed finding is inaccurate, incomplete, and misleading. Prior to the transaction, Altria was a significant competitor in closed-system e-cigarettes. (CCFF ¶¶ 411-92; *see also* PX5000 at 067 (Table 5) (Rothman Expert Report) (showing that in the twelve months from October 2017 to September 2018, Altria’s share of closed-system e-cigarettes was the third highest in the United States after JLI and Reynolds)). Altria was also well-positioned to compete in the closed-system e-cigarette market in the future if it had not entered into the transaction with JLI. (CCFF ¶¶ 493-544).

Contrary to the self-serving testimony cited in the proposed finding, Altria’s top executives repeatedly told investors that Altria was well-positioned to achieve its goal of leading the e-cigarette category. Former Nu Mark President & General Manager Jody Begley told investors in November 2017 that Altria’s long-term goal was to lead the U.S. e-vapor category and that Altria “fully expected” to achieve its long-term goal. (Begley (Altria) Tr. 978-79; PX4014 (Altria) at 029 (Nov. 2017 Investor Day slide presentation)). Likewise, Howard Willard told investors in February 2018 that Altria was “well positioned to achieve long-term leadership in the category.” (PX9045 at 007 (2018 CAGNY Conference Remarks by Howard Willard, Feb. 21, 2018) (“Nu Mark has a diverse product portfolio and a pipeline of promising products in development. We believe it is well positioned to achieve long-term leadership in the category, bolstered by our companies’ world-class marketing, sales and distribution and regulatory capabilities.”); PX9045 at 006 (“Nu Mark’s goal is to lead the U.S. e-vapor category . . . .”). And, in December 2018, Willard was quoted in an Altria press release as saying that Altria “remain[s] committed to being

the leader in providing adult smokers innovative alternative products that reduce risk, including e-vapor.” (PX9080 (Altria) at 001).

1500. Instead “form and satisfaction were really the drivers and the product attributes that were required to convert adult smokers.” (Begley (Altria) Tr. 1080). And, as discussed below, none of Altria’s existing products had that combination. (Gardner (Altria) Tr. 2590; PX7031 Willard (Altria) Dep. at 268-69; *see also infra* Part XVI.B). And there is no evidence that Altria could have timely developed or acquired a new product. (*See also infra* Part XVI.C).

### **Response to Finding No. 1500**

The proposed finding is misleading. Altria’s existing products prior to the transaction gave Altria the third-highest market share in the closed-system e-cigarette market, well ahead of other competitors who did not exit the market. (PX5000 at 067 (Table 5) (Rothman Expert Report)). Altria was also developing, had access to, or could acquire other e-cigarette products that would have competed with JLI. (CCFF ¶¶ 493-544, 1527-730; *see also* Responses to RPF Parts XVI.B.-C).

#### **B. Altria’s Existing Products Were Weak Competitors With No Chance Of PMTA Approval**

1501. Complaint Counsel and Dr. Rothman’s assumption that Altria would have been a significant competitor simply because “Altria had multiple closed-system e-cigarette products in the market and multiple closed-system e-cigarette products and collaborations in the pipeline,” (PX5001 Rothman Rebuttal ¶ 13; *see also* CC Pretrial Br. 12-14, 52-53 (similar)), is unsupported by any analysis of those products’ prospects and belied by the record.

### **Response to Finding No. 1501**

The proposed finding that Complaint Counsel’s and Dr. Rothman’s conclusion “is unsupported by any analysis of those products’ prospects and belied by the record” should be disregarded because it contains no citations to the factual record and is false and misleading. (*See* Response to RPF ¶ 1498).

1502. The evidence proves that Nu Mark’s predicate products—i.e., those products that were on the market in some capacity by August 8, 2016, and thus could be sold for a period of time

before obtaining regulatory approval—were not capable of competing successfully in a market shifting toward salt-based pod products. (*See infra* Part XVI.B.1-5).

### **Response to Finding No. 1502**

The proposed finding should be disregarded because it contains no citations to the record and is incomplete, misleading, and contrary to the weight of the evidence. (*See* Responses to RPF Part XVI.B.1-5). The record evidence shows that Altria’s e-cigarettes were profitable and growing prior to their discontinuation. Altria’s gross margins on its cigalike products improved from {█} in 2015 to {█} in 2016, {█} in 2017, and {█} in 2018. (*See* Response to RPF ¶ 1705; PX5000 at 067 (Table 4), 066-67 (¶ 116 n.294), 112 (Exhibit 6) (Rothman Expert Report) (*in camera*); (PX5001 at 48-49 (¶ 91) (Rothman Rebuttal Report)). Indeed, MarkTen was the second-fastest growing e-cigarette brand behind JUUL from July 2017 to July 2018, with the vast majority of the sales growth coming from Altria’s cigalikes and the remainder of the growth coming from Elite despite the lack of nicotine salts. (*See* PX1056 (Altria) at 031 (“Nu Mark Brand Update, MarkTen Elite,” dated Aug. 10, 2018); *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018) (stating that “[MarkTen] volume is the second fastest growing brand in terms of volume behind [JUUL].”); Quigley (Altria) Tr. 1973-74 (discussing PX1008 (Altria) at 001)).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that all e-vapor customers desire a product with nicotine salts or that nicotine salts are the only means to provide a satisfying e-vapor experience. (*See* Response to RPF ¶ 226).

**YTD Change in Volume Sales vs. YAG**  
(IRI MOC – w/e 7/1/18)

<u>Hybrids</u>			<u>Total E-Vapor</u>		
Rank	Brand	Volume Sales Change vs YA	Rank	Brand	Volume Sales Change vs YA
1	Juul	102,449,659	1	Juul	102,449,659
2	Vuse Vibe	4,840,344	2	MarkTen	3,881,654
3	my Blu	3,698,842	3	blu	2,898,358
4	Logic	860,493	4	Vuse	1,088,791
5	MarkTen Elite	413,559	5	NJOY	725,978
6	NJOY Hybrid	380,370	6	Vaporin	293,184
7	PHIX	170,729	7	Space Jam	266,829
8	Cue	104,315	8	Phix	170,729
9	XFIRE	56,235	9	Clean Cig	136,339
10	Bo	47,973	10	Cosmic Fog	125,257
11	Vapin Plus	28,272	11	Cue	104,315
12	Mistic Hybrid	8,389	12	E Tron	69,756
13	The Byrd	2,389	13	Tsunami	64,082
14	Fin	-131,996	14	XFIRE	56,235

**NuMark** Source: IRI MOC Data Week Ending 07/01/18 as of 7/24/2018

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(PX1056 (Altria) at 031).

1503. Nor were these predicate products capable of acquiring the PMTA approval necessary to remain on the market. (PX7031 Willard (Altria) Dep. at 268-69 (“[N]one of the MarkTen products had a reasonable likelihood of future success as measured by adult smoker conversion or profitability or, frankly, even being able to stay on the market . . . .”). As a result, Altria was not going to be able to continue competing with these products in the long term. (Garnick (Altria) Tr. 1690 (explaining that products that do not receive FDA approval need to be pulled from the market)).

**Response to Finding No. 1503**

The proposed finding is incomplete and misleading. Altria’s claim that it exited the closed-system e-cigarette market because its products could not achieve PMTA approval is unsupported and pretextual. (CCFF ¶¶ 1254-352).

**1. MarkTen Cig-A-Like**

1504. *First*, as discussed above, the MarkTen cig-a-like lacked the nicotine formula necessary for conversion. (*See supra* Part V.C.1). MarkTen cig-a-like both lacked nicotine salts and had a nicotine content of only 2.5 and 3.5 percent. (PX4029 (Altria) at 012). In contrast, JUUL came in a 5 percent nicotine by weight strength with 4 percent acid (leading to the creation of nicotine salts). (RX0796 (Altria) at 050; *see also* Jupe (Altria) Tr. 2273-74).

#### **Response to Finding No. 1504**

The proposed finding is incomplete and misleading. As described in Complaint Counsel's proposed findings, cigalikes, products without nicotine salts, and low-nicotine e-cigarettes were preferred by certain consumers. (CCFF ¶¶ 1166-88). Other manufacturers continue to market cigalike products and low-nicotine e-cigarettes today. (CCFF ¶¶ 1173-88). The proposed finding is also misleading because some MarkTen products (e.g., MarkTen Bold) had a higher nicotine strength and nicotine salts. (CCFF ¶¶ 1189-91; *see also* PX9000 (Altria) at 017 (Nov. 2017 Investor Day remarks) (stating that MarkTen Bold "includes 4% nicotine by weight and uses a proprietary recipe for nicotine salts"))).

1505. Although MarkTen Bold had some nicotine salts, "it was the wrong level altogether." (Jupe (Altria) Tr. 2136; *see supra* Part V.C.1; *see also* Jupe (Altria) Tr. 2228-29 (explaining that Bold ultimately "was not satisfying" because it did not have "enough salt")). Bold had 4 percent nicotine by weight and 1 percent acid. (Jupe (Altria) Tr. 2228-29; PX7015 Gogova (Altria) Dep. at 137; RX2036 (Altria) at 005). At that ratio, Bold still was "losing 60 percent of its nicotine into the mouth and throat region, not getting to the lung." (Jupe (Altria) Tr. 2274).

#### **Response to Finding No. 1505**

Complaint Counsel does not disagree that MarkTen Bold had 4 percent nicotine by weight and 1 percent acid. But the proposed finding is otherwise misleading and unreliable because it relies only on the self-serving testimony of Altria executives. On July 26, 2018, Altria's CEO Howard Willard told investors that "Nu Mark grew volume by approximately 16% in the quarter and 23% for the first half, primarily driven by expanded distribution," and that MarkTen Bold (along with MarkTen Elite) were "[t]he drivers of the growth in second quarter and first half" and were "getting traction with consumers." (Willard (Altria) Tr. 1167-68 (discussing PX9047 (Altria)



at 003, 009-10 (Altria’s Q2 2018 Earnings Call))). The proposed finding is also misleading in that it ignores the fact that Altria’s work on MarkTen Bold was used to inform and improve research and development of nicotine salts for future Altria e-cigarette products. (CCFF ¶¶ 461-67; PX7014 (Baculis (Altria), Dep. at 119-20)).

1506. Although Altria was attempting to develop an e-liquid with the appropriate nicotine-to-salts ratio, that process was complex and the outcome uncertain. (Jupe (Altria) Tr. 2139-42; *see also* Jupe (Altria) Dep. at 107-08 (explaining the “huge amount of data that was missing from making [a product with nicotine salts] a reality”)).

#### **Response to Finding No. 1506**

The proposed finding is misleading. Despite the Deeming Rule, other companies launched new products or modified existing products to incorporate nicotine salts. (CCFF ¶¶ 1198-205). Altria was also working on new formulations of MarkTen Elite 2.0 that incorporated nicotine salts with the “appropriate” nicotine-to-salts ratio. (CCFF ¶¶ 1281-94). In addition, Altria had access to PMI’s research on nicotine salt e-liquids, including the VEEV product that was being developed. (CCFF ¶¶ 1614, 1642, 1654, 1664).

1507. In addition, even if Altria had been able to develop an e-liquid with an appropriate nicotine-to-salts ratio, that would have constituted a “new product” under the Tobacco Control Act and thus would have required premarket approval by FDA before the redesigned product could be launched. (Garnick (Altria) Tr. 1691; *see also* Murillo (Altria/JLI) Tr. 3069).

#### **Response to Finding No. 1507**

The proposed finding is incomplete and misleading. Despite the Deeming Rule, other companies launched new products or modified existing products to incorporate nicotine salts and different e-liquid formulations. (CCFF ¶¶ 1198-205). Altria also successfully implemented other material e-cigarette product improvements that did not require a new PMTA filing. (CCFF ¶¶ 1206-36).

1508. As discussed below, new product entries are subject to a higher standard under Section 7. (*See infra* Part XVI.C).

**Response to Finding No. 1508**

The proposed finding should be disregarded because it contains no citations to the record and is not a “finding of fact,” but a legal conclusion regarding the standard of proof under Section 7. (See Responses to RPFf Part XVI.C). Respondents inappropriately state their own argument as a “fact.”

1509. *Second*, MarkTen cig-a-like was in the wrong format—the declining cig-a-like category. (See *supra* Part XII.B).

**Response to Finding No. 1509**

The proposed finding should be disregarded because it contains no citations to the record and is vague and misleading. (See Responses to RPFf Part XII.B). The proposed finding is vague because it does not explain how or why cigalikes are the “wrong format.” In February 2018, Altria’s CEO told investors that its cigalike products had nicotine satisfaction approaching that of cigarettes. (PX2079 (JLI) at 014 (February 2018 Product Roadmap presentation); PX2176 (JLI) at 110 (February 2018 CAGNY Summary)). And, as of August 2018, Altria’s MarkTen cigalike was the second-fastest growing e-vapor brand in the United States behind only JUUL. (PX1008 (Altria) at 001 (email from Nu Mark President & CEO, Brian Quigley, accusing Altria’s senior executives involved in the JLI transaction of providing Altria’s Board of Directors with “only the bad news version” of Nu Mark’s e-vapor products)). Although sales of pod-based products have grown more quickly than cigalikes due to the commercial success of JUUL, (see CCFf ¶¶ 546-48), {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; CCFf ¶¶

1173, 1175-76)).

1510. *Third*, MarkTen lacked dry puff prevention technology, which meant that it generated higher formaldehyde levels compared to other e-vapor products. This imperiled its chances at obtaining regulatory approval and made it unlikely that the product would remain on the market beyond a few years. (PX1890 (Altria) at 001 (“[N]o one thinks we can get a PMTA on current Mark Ten product.”); *see also supra* Parts III.B.1, V.C.2).

#### **Response to Finding No. 1510**

The proposed finding is inaccurate, incomplete, and misleading. Altria developed a replacement battery for MarkTen known as BVR 2.8, which implemented dry puff prevention to address formaldehyde issues. (CCFF ¶¶ 1277-80; *see also* Responses to RPF Parts III.B.1, V.C.2). Altria also would have had access to VEEV, which came with dry puff prevention and other technologies to prevent the formation of formaldehyde. (CCFF ¶¶ 1660-64; *see also* Responses to RPF Parts III.B.1, V.C.2).

1511. Although Altria was working on a solution to the dry-puff problem, that solution was not finalized as of late 2018 and, even if it ultimately were perfected, could not be implemented without first obtaining FDA approval. (*See supra* Part IX.F.2).

#### **Response to Finding No. 1511**

The proposed finding should be disregarded because it contains no citations to the record and is unreliable, incomplete, and misleading. (*See* Responses to RPF ¶¶ 1085-89). Other companies launched new products or modified existing products to incorporate nicotine salts and different e-liquid formulations. (CCFF ¶¶ 1198-205). Altria also successfully implemented other material e-cigarette product improvements that did not require a new PMTA filing. (CCFF ¶¶ 1206-36).

### **2. Elite**

1512. Elite’s competitive and regulatory prospects were hamstrung by a similar set of problems, minus the unfavorable form factor. (*See infra* ¶¶ 1513-16).

#### **Response to Finding No. 1512**

The proposed finding should be disregarded because it contains no citations to the record and is incomplete, misleading, and contrary to the weight of the evidence. (*See Responses to RPF* ¶¶ 1513-16).

1513. Elite lacked salts and did not have a high nicotine content, meaning that it was incapable of providing the nicotine satisfaction necessary to convert adult smokers. (*See supra* Part V.C.1, V.C.6).

#### **Response to Finding No. 1513**

The proposed finding should be disregarded because it contains no citations to the record and is incomplete, misleading, and contrary to the weight of the evidence. (*See Responses to RPF* Parts V.C.1, V.C.6).

1514. The proof was in the numbers: Despite aggressive promotion and significant distribution, Elite never achieved more than 1 percent share of e-cigarette cartridge sales prior to its discontinuation, (RX1217 Murphy Report ¶ 122; *see also supra* Part III.D-E), and it did not show attachment by consumers, (Robbins (JLI) Tr. 3250-51).

#### **Response to Finding No. 1514**

The proposed finding is incomplete and misleading. The fact that Elite achieved approximately a 1 percent share in only the eight months that it was on the market should be considered a success when compared to other market participants. (*See CCF* ¶¶ 1496-523). Even the market leader, JUUL, achieved less than a 1 percent share of the closed-system e-cigarette market in its first year on the market. (PX7048 (Rothman, Trial Dep. at 47); CCF ¶ 1509).

Moreover, Altria touted the success of Elite both internally and externally. On July 15, 2018, Altria's Craig Schwartz wrote Michael Brace, Altria's Senior Director for Vapor Products, that "Mark Ten Elite is already Margin Positive, setting aside one-time investments" in long-term store fixtures. (CCF ¶ 1497; *see also* PX1056 (Altria) at 028 (MarkTen Elite had positive marginal contribution of \$1.5 million through June 2018)). Less than two weeks later, on a July 26, 2018 earnings call, Altria's CEO, Howard Willard, told investors that MarkTen Elite was

driving growth for Nu Mark and “getting traction with consumers.” (CCFF ¶ 1499). And, on August 4, 2018, Craig Schwartz wrote to Altria’s former Chairman that “MarkTen Elite can hunt . . . so again, best yet to come.” (CCFF ¶ 1500).

MarkTen Elite’s average sales per store grew significantly from May 2018 to July 2018 in major retail chains including 7-Eleven, Wawa, Sheetz, Speedway, and Walgreens. (CCFF ¶ 1504; *see also* PX5000 at 066 (¶ 115) (Rothman Expert Report)). And, despite being on the market for only four months, Elite was the fifth-fastest growing pod-based product among all brands from July 1, 2017 to July 1, 2018. (PX1056 (Altria) at 031); *see also* Begley (Altria) Tr. 1059).

1515. There is no reason to think the result would be any different in the but-for world. The only other pod product from a major manufacturer that lacks nicotine salts—JTI’s Logic Pro—in September 2020 had just 0.3 percent device share among pod-based products. (Murphy Tr. 3153).

#### **Response to Finding No. 1515**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported ‘fact.’ (*See* Order on Post-Trial Filings at 3, dated June 28, 2021). The proposed finding is also incorrect, misleading, irrelevant, and incomplete. As an initial matter, the Logic Pro is not a pod-based device. [REDACTED]

[REDACTED] More importantly, there is no reason to believe that the share of JTI’s Logic Pro in September 2020 bears any relevance to the competitiveness of MarkTen Elite in the but-for world.

The proposed finding is incomplete because it incorrectly assumes that Altria would not have any other products in the but-for world. Altria ceased developing next generation e-cigarette products as part of its non-compete agreement with JLI (*See* CCFF ¶¶ 1553-87). The transaction

also foreclosed Altria's collaboration with PMI, including the opportunity to participate in the launch of VEEV, a promising nicotine salt pod device, and PMI's other e-cigarette products and technologies. (See CCFE ¶¶ 1588-716).

1516. And like MarkTen cig-a-like, Elite lacked technology that would prevent dry puffing, which imperiled its PMTA prospects. (See *supra* Parts III.B.2, V.C.2). Thus, it too had only a limited window in which to compete. (Garnick (Altria) Tr. 1690).

### **Response to Finding No. 1516**

The proposed finding is inaccurate, incomplete, and misleading. Altria developed a replacement battery for MarkTen known as BVR 2.8, which implemented dry puff prevention to address formaldehyde issues. (CCFE ¶¶ 1277-80; see also Responses to RPFCE Parts III.B.2, V.C.2). In addition, the cited testimony of Garnick does not state that the lack of dry puff prevention would have disqualified a product from FDA approval. (Garnick (Altria) Tr. 1690).

### **3. Apex**

1517. Apex was a PMI e-vapor product that Altria had a license to sell in the United States. (Begley (Altria) Tr. 983; Murillo (Altria/JLI) Tr. 2958-59; see also { [REDACTED] }).

### **Response to Finding No. 1517**

Complaint Counsel does not disagree.

1518. Apex was sold only in a limited, e-commerce test market, beginning in August 2018. (PX7017 Magness (Altria) Dep. at 288; PX1072 (Altria) at 004).

### **Response to Finding No. 1518**

Complaint Counsel does not disagree, but adds that APEX was only sold for a limited time in select states on MarkTen.com because Altria discontinued the product less than two months after it launched. (See CCFE ¶ 812).

1519. Altria had no plans to pursue Apex long term and had decided not to invest in a PMTA for the product in early 2018, (PX7027 Murillo (Altria/JLI) Dep. at 191-92), meaning it would have needed to exit the market upon the PMTA filing deadline, (Murillo (Altria/JLI) Tr. 2946).

**Response to Finding No. 1519**

The proposed finding is incomplete and misleading to the extent that it makes the assumption that APEX is the only product from PMI that Altria could sell. As described in CCFE Part X.C, Altria had access to VEEV and [REDACTED]. (See CCFE ¶¶ 1588-716).

1520. Apex had “no nicotine salts,” (Begley (Altria) Tr. 1082-83), and low nicotine concentration, (Murillo (Altria/JLI) Tr. 2960), making it “hard to see” how it would be “effective at conversion,” (Murillo (Altria/JLI) Tr. 2960; *see also* PX7023 Fernandez (Altria) Dep. at 197 (explaining that Apex did not “satisf[y] versus the smokers’ requirements”). Indeed, the portfolio assessment group rated it as having “[l]ow” conversion potential due to “minimal nicotine satisfaction.” (RX0532 (Altria) at 011).

**Response to Finding No. 1520**

Complaint Counsel does not disagree with the statement that APEX did not include nicotine salts. But the proposed finding is otherwise misleading. As described in Complaint Counsel’s Proposed Findings of Fact, APEX was considered a promising product. (CCFE ¶¶ 1626-35). Indeed, Altria’s Jody Begley told investors in November 2017, “We’ve received positive results from our initial consumer research.” (PX9000 (Altria) at 018). In August 2018, Altria’s Craig Schwartz wrote that BP had “expressed interest in APEX” and that Altria had “the opportunity to introduce APEX in BP on the West Coast,” which indicates that Altria had plans to expand APEX’s distribution beyond e-commerce. (PX1650 (Altria) at 001-02).

An Altria consumer study showed that “Apex was well received by AS&V [adult smokers and vapers] due to its ease of inhale/exhale experience and good tasting flavors,” as well as its long battery life. (PX4012 (Altria) at 036 (“Nu Mark 2018 Three Year Strategic Plan”). In July 2018, a Nu Mark analysis noted that APEX had a “Potentially favorable device design from [an] FDA perspective,” “strong IP,” and an “[e]ffortless inhale/exhale experience.” (PX1144 (Altria) at 013 (“Combined Assessment e-Vapor Pipeline”). Joe Murillo told Murray Garnick in August

2018 that he expected APEX would do well in terms of product integrity and risk reduction assessment, both of which are relevant to the FDA's PMTA analysis. (PX1600 (Altria) at 001 (email from Murillo to Garnick) (commenting on slide 36 of the draft Board e-vapor update); PX7027 (Murillo (Altria/JLI), Dep. at 191)). Murillo also testified that Altria's regulatory team was of the opinion that APEX could meet the relevant manufacturing requirements for a PMTA submission. (PX7027 (Murillo (Altria/JLI), Dep. at 190); *see also* PX1600 (Altria) at 001 (noting that APEX was designed by PMI "to meet strict CMC requirements"))).

In comments on a draft of the August 2018 e-vapor update to Altria's Board, Murillo pushed back on the draft's poor characterization of APEX. (PX1600 (Altria) at 001 (email from Murillo to Garnick) (commenting on slide 36 of the draft Board e-vapor update, stating that "on the page, it looks like we think [APEX is] a loser. That is not true-it should be good, but we don't know"); *see also* Murillo (Altria/JLI) Tr. 3056 (testifying that APEX "should be good . . . because it is designed by people who . . . know what they're doing"))).

1521. In addition, Nu Mark did not view Apex as a product that appealed to adult cigarette smokers. (Schwartz (Altria) Tr. 1916). Instead, it was "a closed-tank product that . . . [Nu Mark was] thinking about in the context of a product potentially for open-system adult vapers in the event that open-system products couldn't get approval from the FDA." (Begley (Altria) Tr. 1082).

### **Response to Finding No. 1521**

The proposed finding is inaccurate and misleading. The citation to Schwartz's trial testimony does not support the claim that "Nu Mark did not view Apex as a product that appealed to adult cigarette smokers." (*See* Response to RPF ¶ 1520).

1522. For a mainstream audience, Apex's "large," "baton"-like shape was seen as too "[c]lunky." (King (PMI) Tr. 2535; RX0532 (Altria) at 011; *see also* PX7023 Fernandez (Altria) Dep. at 197 (describing Apex as "too big, bulky"))).

### **Response to Finding No. 1522**



The proposed finding is misleading. PMI's Martin King never referred to APEX as clunky.

(King (PMI) Tr. 2535).

1523. Apex's design and nicotine satisfaction deficits were so disabling that PMI "never intended [for Apex] to be successful on its own. [PMI] never really had any idea or plan that it would be anything other than a limited test." (King (PMI) Tr. 2547). From the outset, PMI understood that Apex needed to be "quite a bit smaller" and have a better e-liquid formula. (King (PMI) Tr. 2547; *see also* King (PMI) Tr. 2534 (explaining that when Apex was put on the market, PMI already was "making improvements in the form factor and in various other aspects" for the next generation)). "[W]hen [PMI] put [Apex] on the market in the UK, [it] already had a plan to move to the next generation as soon as possible . . ." (King (PMI) Tr. 2534-35; *see also* PX7017 Magness (Altria) Dep. at 289 (explaining that because PMI "had moved on in [its] development," it was only able to supply Altria's Regulatory Affairs team with a new iteration of the product, which "would not have helped . . . in studying it for PMTA purposes [because] it was not the same product"))).

#### **Response to Finding No. 1523**

The proposed finding is misleading. PMI's Martin King testified that when PMI sold APEX in the U.K., PMI verified that the MESH aerosolization technology worked well and the engine worked successfully. (King (PMI) Tr. 2545-46). King also testified that PMI received good feedback from consumers on how APEX tasted and the way that APEX delivered a very consistent aerosol. (King (PMI) Tr. 2545-46). According to King, the sale of APEX "reassured us that we had something reliable and that we needed to continue with finishing the improvements and get it on the market as soon as possible." (King (PMI) Tr. 2547).

#### **4. Cync**

1524. Unlike the three products previously mentioned, Altria never commercialized Cync and its chances of ever doing so were "[s]lim to none." (Schwartz (Altria) Tr. 1914).

#### **Response to Finding No. 1524**

Complaint Counsel has no specific response.

1525. Shortly after Nu Mark acquired Cync, the scientists did "a brief evaluation of the product" and concluded "that there would be many things to change before [Altria could] even file [a] PMTA." (PX7015 Gogova (Altria) Dep. at 44-45; *see also* PX7017 Magness (Altria) Dep. at 50-51 (similar)).

**Response to Finding No. 1525**

Complaint Counsel has no specific response.

1526. Cync “had many of the same temperature control problems as the other products,” and it also had “a risk of acute chronic nickel poisoning, which is why [Altria] never put it on the market.” (Garnick (Altria) Tr. 1742-43).

**Response to Finding No. 1526**

Complaint Counsel has no specific response.

1527. In addition, Cync consistently performed worse than Elite in consumer testing. For example, in the trio of home use tests Altria conducted in the fall of 2017, Cync had the lowest purchase intent score and the lowest propensity to replace cigarettes. (RX0496 (Altria) at 008 (purchase intent), 019 (propensity to replace); *see also* RX0532 (Altria) at 010 (“HUT results indicated Cync was used primarily in situations where [consumers] couldn’t smoke and was not perceived as enjoyable and satisfying versus Elite[.]”)).

**Response to Finding No. 1527**

The proposed finding is misleading. CYNC’s 1.8% formulation actually had the highest purchase intent after initial trial (ahead of both Elite and JUUL), and was tied with JUUL for purchase intent after three weeks. (RX0496 (Altria) at 008).

The citation to RX0532 is also misleading. The cited slide identifies a number of CYNC’s strengths, including: “Ergonomic mouthpiece well-received;” “device is perceived as durable, high-quality and long-lasting;” “Cigarette-like harshness well-received by some;” “Battery variety;” and “2 pod sizes.” (RX0532 (Altria) at 010).

**5. VIM**

1528. VIM—a product Altria had acquired from a company called KangerTech—also was never commercialized. (PX7018 Schwartz (Altria) Dep. at 164; PX7017 Magness (Altria) Dep. at 288).

**Response to Finding No. 1528**

Complaint Counsel does not disagree.

1529. Schwartz described VIM as “a big . . . honking kind of big thing and just a different proposition, vaping experience proposition.” (PX7018 Schwartz (Altria) Dep at 166-67).

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And “[i]t had a lot of work to do.” (PX7018 Schwartz (Altria) Dep. at 167; *see also* PX7015 Gogova (Altria) Dep. at 43 (“[W]e didn’t really think that . . . [VIM] would even pass the PMTA authorization.”); PX7017 Magness (Altria) Dep. at 49 (“[I]t became very clear that the road ahead for Vim would be very difficult.”)).

### **Response to Finding No. 1529**

The proposed finding is incomplete and misleading to the extent that it characterizes VIM as a complete failure. A Nu Mark presentation from July 2018 characterized VIM as having “Long-Term Conversion Potential.” (PX4563 (Altria) at 022). As of January 2018, Altria {

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1530. Garnick previewed some of that work for the Altria Board in August 2018. (Garnick (Altria) Tr. 1743). As the presentation he gave to the Board explained, VIM had a host of regulatory red flags including, “[a]cute battery hazard,” “[a]cute toxicological risk due to nickel components,” and it “[n]eed[ed] [a] complete product integrity assessment, including consumption data,” given that “[e]ven formulations [were] not approved due to toxicological concerns,” while “others [were] still in review.” (PX4149 (Altria) at 042). VIM also lacked dry puff prevention, just like MarkTen cig-a-like and Elite. (PX4149 (Altria) at 042). Rectifying these issues would require a complete “[r]edesign.” (PX4149 (Altria) at 043).

### **Response to Finding No. 1530**

Complaint Counsel has no specific response, other than to note that Respondents mischaracterize PX4149, which does not state that VIM required a “complete” redesign. (PX4149 (Altria) at 043).

1531. Altria also was unsure if VIM legally could be placed on the market because it was “struggling to get the fundamental documentation” to confirm that VIM was sold as of August 8, 2016. (PX7017 Magness (Altria) Dep. at 50-51; *see also* PX4149 (Altria) at 042 (similar)).

### **Response to Finding No. 1531**

Complaint Counsel has no specific response.

**C. With Respect To Products That Altria Had Not Yet Developed Or Put On The Market, Complaint Counsel Cannot Satisfy The “Actual Potential Competition” Doctrine**

1532. There also is no evidence that Altria would have been a significant competitor with a *new product* not currently in its portfolio. (*See infra* Part XVI.C.1-5).

**Response to Finding No. 1532**

The proposed finding should be disregarded because it contains no citations to the record and is inaccurate, incomplete, and misleading. As explained in Complaint Counsel’s response to RPFf Parts XVI.C.1-5, it is clearly inaccurate to claim that there is no evidence that Altria would have been a significant competitor. (*See* Responses to RPFf Parts XVI.C.1-5; *see also* CCFF Parts VI.C-D, X.B-D).

1533. Complaint Counsel and Dr. Rothman both make much of (1) Altria’s efforts to modify MarkTen and Elite to fix their debilitating design flaws; (2) the company’s pipeline of internally developed products; and (3) its supposed ability to partner with another company to obtain access to a new product. (CC Pretrial Br. 14; PX5001 Rothman Rebuttal ¶¶ 15-16).

**Response to Finding No. 1533**

The proposed finding is inaccurate, incomplete, and misleading. Nowhere in Complaint Counsel’s Pre-Trial Brief nor in Dr. Rothman’s Rebuttal Report is there any reference to “debilitating” design flaws. In addition, Complaint Counsel’s findings of fact are supported by both qualitative and quantitative record evidence. For example, Altria made design changes and improvements to its products on the market, including the MarkTen Elite gasket fix. (CCFF ¶¶ 1206-34).

In addition, Altria had plans to make changes and/or improvements to its current products without needing to file a PMTA. For example, Altria developed a new mouthpiece for APEX and on August 30, 2018 was planning to implement the APEX mouthpiece without a PMTA. (PX1638 (Altria) at 001 (email between Michael Brace and Michelle Baculis discussing new APEX plugs)). On September 27, 2018, Altria’s Mark Bradby wrote in an email that Altria’s Change Management

Team will be recommending moving forward with a request to change MarkTen Elite by adding a “Battery Seal Notch” to the product. (PX1599 (Altria) at 001-02).

Finally, with respect to “supposed ability to partner with another company to obtain access to a new product,” that ability was not speculative. Altria had an existing partnership with PMI that [REDACTED]

[REDACTED] (See CCFE ¶¶ 1588-716).

1534. But to the extent that Complaint Counsel’s anticompetitive effects argument is premised on a prospective product entry that *might occur* at some point in the future, either because the Court finds that Altria’s on-market products were withdrawn for independent business reasons or that those on-market products would not have been significant competitors, Complaint Counsel must satisfy a higher evidentiary standard. Complaint Counsel must establish the “future . . . competitive conditions” of the market into which those products might enter, namely (1) that it will be concentrated; (2) that there is a substantial likelihood that independent entry would produce deconcentration; and (3) that Altria is one of only a few equally likely actual potential entrants. (CoL ¶ 97). In addition, Complaint Counsel must present (4) “clear proof” that, but for the acquisition, independent entry would have occurred within the “*near future*.” (CoL ¶ 98).

#### **Response to Finding No. 1534**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion that misstates the applicable law. (See Complaint Counsel’s Responses to Respondents’ Proposed COL ¶¶ 97-100). Respondents inappropriately state their own arguments as a “fact.”

1535. Complaint Counsel falls short of this standard in at least three respects.

#### **Response to Finding No. 1535**

The proposed finding should be disregarded because it contains no citations to the record and is not a “finding of fact,” but rather a legal conclusion. (See Complaint Counsel’s Responses to Respondents’ Proposed COL ¶¶ 97-100; *see also* Responses to RPF ¶¶ 1536-38). Respondents inappropriately state their own arguments as a “fact.”

1536. *First*, the PMTA approval requirement makes entry into the e-vapor industry a matter of government grace and Complaint Counsel cannot prove, much less *clearly* prove, that any future product would be approved. (*See infra* Part XVI.C.1).

**Response to Finding No. 1536**

The proposed finding should be disregarded because it contains no citations to the record and is vague, incomplete, misleading, and contrary to the weight of the evidence. (*See* Responses to RPF Part XVI.C.1). The proposed finding is vague because it does not define the term “government grace.” Furthermore, the statement that “Complaint Counsel cannot prove, much less *clearly* prove, that any future product would be approved” should be disregarded because it is not a “finding of fact,” but rather a legal conclusion that misstates the applicable standard for proving a violation of Section 7 under the “actual potential competition” doctrine. (*See* Complaint Counsel’s Responses to Respondents’ Proposed COL ¶¶ 97-100). Respondents inappropriately state their own arguments as a “fact.”

1537. *Second*, the lengthy lead time for developing an e-vapor product and receiving FDA approval precluded Altria from entering the market with a new product in the “near future.” (*See infra* Part XVI.C.2).

**Response to Finding No. 1537**

The proposed finding should be disregarded because it contains no citations to the record and is incomplete, misleading, and contrary to the weight of the evidence. (*See* Responses to RPF Part XVI.C.2). Furthermore, the statement that Altria was precluded “from entering the market with a new product in the ‘near future’” should be disregarded because it is not a “finding of fact,” but rather a legal conclusion that misstates the applicable standard for proving a violation of Section 7 under the “actual potential competition” doctrine. (*See* Complaint Counsel’s Responses to Respondents’ Proposed COL ¶¶ 97-100). Respondents inappropriately state their own arguments as a “fact.”

1538. *Third*, Complaint Counsel cannot demonstrate that any of the internal or external products it identified as possible candidates that Altria might have pursued would have been viable competitors. (*See infra* Part XVI.C.3-4).

### **Response to Finding No. 1538**

The proposed finding should be disregarded because it contains no citations to the record and is incomplete, misleading, and contrary to the weight of the evidence. (*See Responses to RPF* Parts XVI.C.3-4).

#### **1. Complaint Counsel Failed To Demonstrate “Clear Proof” Of Future Entry In Light Of The Rigorous PMTA Approval Requirement**

1539. Even assuming Altria had been able to develop a new e-vapor design, which itself is highly uncertain, (*see infra* Part XVI.C.3-4), Complaint Counsel failed to provide clear proof that such a hypothetical product could have obtained the regulatory approval required to reach the market.

### **Response to Finding No. 1539**

The proposed finding should be disregarded because it contains no citations to the record and is inaccurate and misleading. Complaint Counsel has shown that Altria had both the incentive and ability to develop successful e-cigarette products internally, through its partnership with PMI, and/or through acquisition. (*See Responses to RPF* Parts XVI.C.3-4; *see also* CCFF Parts VI.C, X.B-D). The statement that “Complaint Counsel failed to provide clear proof that such a hypothetical product could have obtained the regulatory approval required to reach the market” should be disregarded because it is not a “finding of fact,” but rather a legal conclusion that misstates the applicable standard for proving a violation of Section 7 under the “actual potential competition” doctrine. (*See Complaint Counsel’s Responses to Respondents’ Proposed COL* ¶¶ 97-100). Respondents inappropriately state their own arguments as a “fact.”

1540. As Complaint Counsel emphasizes, the PMTA is a “strenuous requirement” and a “significant hurdle” to entry. (CC Pretrial Br. 67; *see also* PX5000 Rothman Report ¶ 183 (emphasizing that “[o]btaining PMTA approval is also costly and takes multiple years”); Garnick (Altria) Tr. 1685-86 (similar); PX8005 Graham (NJOY) Decl. at 004 ¶ 20 (similar); *supra* Part I.D.3). That barrier, which is product specific, applies to any “new

entrant or current competitor.” (CC Pretrial Br. 67; PX5000 Rothman Report ¶ 181 (similar); *see also* Garnick (Altria) Tr. 1685-86). As a result, the barrier also applies to any hypothetical new product that Altria supposedly would have sought to commercialize in the but-for world. (*See* 21 U.S.C. § 387j).

### **Response to Finding No. 1540**

The proposed finding is incomplete and misleading. Altria was well-positioned with its regulatory expertise to obtain a PMTA. For example, in November 2017, Altria’s then-CEO Marty Barrington told investors that Altria “immediately set out to acquire top talent for best-in-class regulatory and product development capability.” (PX9000 (Altria) at 004 (Nov. 2017 Investor Day remarks); CCFE ¶ 421). By February 2018, Barrington told investors that Altria had “spent years acquiring best-in-class regulatory and product development talent.” (PX9045 (Altria) at 002 (2018 CAGNY Conference Remarks by Marty Barrington, Feb. 21, 2018)). Altria had over 400 scientists, physicians, product developers, engineers, regulatory experts and others dedicated to product research and regulatory sciences. (PX9000 (Altria) at 005, 011 (Nov. 2017 Investor Day remarks); *see also* CCFE ¶¶ 507-14).

1541. In addition, unlike those products that were on the market as of August 8, 2016, products that were commercialized after that date—including (1) hypothetical new versions of MarkTen cig-a-like and Elite with dry puff prevention and more satisfying nicotine formulations, (2) all the internal development projects, and (3) external partnership option that Complaint Counsel contends was available to Altria—would have required FDA approval before *entering* the market. (Garnick (Altria) Tr. 1686; CC Pretrial Br. 67; PX5000 Rothman Report ¶ 181; *see also supra* Part I.D.2).

### **Response to Finding No. 1541**

The proposed finding is unsupported. None of the citations to Garnick’s trial testimony, Complaint Counsel’s Pre-Trial Brief, or Dr. Rothman’s Expert Report support any of the numbered assertions in this proposed finding. (*See* Garnick (Altria) Tr. 1686; CC’s Pre-Trial Br. at 67; PX5000 at 097-98 (¶ 181) (Rothman Expert Report)). Although Complaint Counsel does not disagree that e-cigarette products entering the market after August 8, 2016 must receive PMTA



approval, the evidence shows that Altria and other manufacturers implemented changes to their existing products without filing a new PMTA, such as with Altria's gasket fix. (CCFF ¶¶ 1192-236; *see* Responses to RPF Part I.D.2).

1542. Industry participants understand that the standards for successfully obtaining a PMTA are "rigorous." (Garnick (Altria) Tr. 1686; *see also* PX8009 Garner (Reynolds) Decl. ¶ 37 (same)). "The FDA will grant a PMTA only if the manufacturer meets a very demanding standard." (PX8005 Graham (NJOY) Decl. at 003 ¶ 14; *see also* PX7017 Magness (Altria) Dep. at 89 (describing a PMTA as "a very high bar"))).

#### **Response to Finding No. 1542**

Complaint Counsel does not disagree.

1543. And as even those manufacturers who already have commercialized products and submitted a completed PMTA acknowledge, when it comes to FDA review, the "outcome is uncertain." (PX8005 Graham (NJOY) Decl. at 004 ¶ 23).

#### **Response to Finding No. 1543**

Complaint Counsel does not disagree.

1544. In light of these barriers, Complaint Counsel did not even attempt to establish with "clear proof" that Altria could have obtained the FDA approval necessary for commercialization of any product not on the market as of August 8, 2016. To the contrary, Complaint Counsel's expert Dr. Rothman conceded that he cannot say whether FDA would have approved any particular product. (PX7046 Rothman Dep. at 202 ("What the FDA would have done with respect to any product by 2020 isn't knowable . . .")).

#### **Response to Finding No. 1544**

The proposed finding is incomplete and misleading. The statement that "Complaint Counsel did not even attempt to establish with 'clear proof' that Altria could have obtained the FDA approval necessary for commercialization of any product not on the market as of August 8, 2016" should be disregarded because it is not a "finding of fact," but rather a legal conclusion that misstates the applicable standard for proving a violation of Section 7 under the "actual potential competition" doctrine. (*See* Complaint Counsel's Responses to Respondents' Proposed COL ¶¶ 97-100). Respondents inappropriately state their own arguments as a "fact."

Moreover, Complaint Counsel has shown that Altria had a strong incentive and ability to compete in closed-system e-cigarettes if it had not entered into the transaction with JLI, including through internally developed products, its partnership with PMI, and other potential acquisitions. (CCFF Parts VI.C-D, X.B-D; PX5000 at 041-57 (¶¶ 93-107) (Rothman Expert Report)).

**2. Complaint Counsel Failed To Demonstrate “Clear Proof” That Altria Could Have Launched A Prospective Product In The “Near Future”**

1545. In addition, even if Altria could have (1) engineered dry puff prevention and satisfying nicotine formulations for MarkTen cig-a-like and Elite, (2) developed a new e-vapor product, or (3) partnered with an external company, Complaint Counsel failed to offer clear proof that such a product would have reached the market in the near future. To the contrary, the evidence at trial was that it would take, in a best-case scenario, at least five years to bring a product to market, and potentially 10 years. (Garnick (Altria) Tr. 1661 (agreeing it “would take five to ten years” to develop a product and “then do the necessary studies for a PMTA”); Gifford (Altria) Tr. 2778 (explaining new products likely would take “five to seven years” to bring to market because of the Deeming Rule); Murillo (Altria/JLI) Tr. 2936 (taking a product “from scratch . . . all the way to a market order” would take “five to ten years, you know, maybe seven on average”)).

**Response to Finding No. 1545**

The proposed finding is incomplete, misleading, and unreliable. The statement that “Complaint Counsel failed to offer clear proof that such a product would have reached the market in the near future” should be disregarded because it is not a “finding of fact,” but rather a legal conclusion that misstates the applicable standard for proving a violation of Section 7 under the “actual potential competition” doctrine. (*See* Complaint Counsel’s Responses to Respondents’ Proposed COL ¶¶ 97-100). Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is also incomplete and misleading because in the trial testimony of Murray Garnick cited by Respondents, Garnick admits that Altria would have continued to compete in e-cigarettes by funding growth teams and developing new “leapfrog” products if Altria had not entered into the transaction with JLI. (Garnick (Altria) Tr. 1660-61).

Furthermore, the statement that “it would take, in a best-case scenario, at least five years to bring a product to market, and potentially 10 years” is unreliable because it relies only on the self-serving testimony of an Altria executive. Even if one were to credit Garnick’s five or ten year estimate for bringing a product to market, that time period would have started in 2018 when Altria funded the growth teams, and there is unquestionably a loss of competition because Altria is no longer developing and funding the “leapfrog” products that Garnick claimed Altria would have developed. (Garnick (Altria) Tr. 1660-61).

Finally, the proposed finding is incomplete and misleading because it ignores other evidence in the record that Altria could improve existing products or introduce new products after the Deeming Date. As shown in Complaint Counsel’s Proposed Findings of Fact, Altria and other companies were able to implement improvements to existing products and launch new products notwithstanding the Deeming Rule. (CCFF ¶¶ 1195-236, 1527-31, 1538-87, 1638-730). Altria also had access to PMI’s VEEV product, which PMI’s Martin King believed would have sped up the commercialization of VEEV because of Altria’s regulatory capabilities, footprint, salesforce, access to retail shops, and other supporting abilities. (CCFF ¶¶ 1692-93).

1546. As a threshold matter, Altria first would need to complete the design of the new product or any product fixes. According to Jupe, the product development phase takes two years, in a best-case scenario. (PX7016 Jupe (Altria) Dep. at 340-41 (explaining that a product development cycle, “at minimum, if you’re lucky, is two years”); PX7016 Jupe (Altria) Dep. at 24 (similar); *see also* PX2016 (JLI) at 017 (“[P]roduct design cycles in the space have been relatively slow given the significant complexity and engineering required to deliver a consistently compelling consumer experience and nicotine satisfaction.”); RX0450 (Altria) at 069 (projecting, in June 2018, that product development work on Elite 2.0 would continue well into 2020)).

#### **Response to Finding No. 1546**

The proposed finding is incomplete and misleading. Prior to the transaction, Altria had already conducted years of R&D on a variety of products, including Elite 2.0. (CCFF ¶¶ 1281-300). Altria expected designs for Elite 2.0 to be locked by the second quarter of 2020. (PX1316

(Altria) at 030 (Sept. 22, 2018 draft [Reduced Harm Products] presentation) (showing “Elite 2.0 development timeline — 2Q ’18 to 2Q ‘20”).

Importantly, prior to the transaction and non-compete with JLI, Altria had a “bridge plan” that would have allowed Altria to compete with its existing deemed products while waiting for PMTA approval for its next generation “leapfrog” products. (CCFF ¶¶ 1295-300; PX1011 (Altria) at 020 (MarkTen Regulatory Strategy Update, Aug. 10, 2018) (“Transitioning application from BVR 2.3 to BVR 2.8 will be accomplished primarily by bridging.”)). Dr. Gardner explained, “Bridging is an approach that’s allowed” because “[t]he FDA accepts it in the pharmaceutical industry and has mentioned it’s appropriate for use in tobacco products, too -- also.” (Gardner (Altria) Tr. 2572). According to Dr. Gardner, “bridging is literally bridging -- building a bridge from the prior data to a new product. So for this application [the MarkTen cigalike], it would be using the existing data for BVR 2.3, the cigalike product that was in the market, and then bridge it to the new product. So we would -- we wouldn’t have to repeat every single study that we had already completed. So we would be able to use existing science, but not all of it.” (Gardner (Altria) Tr. 2572).

Nu Mark’s former President and General Manager, Brian Quigley, testified that Altria had developed a “bridge plan” to address the risk relating to the PMTA process for MarkTen Elite: “So as part of the bridge plain, to keep Elite on the market . . . we had to submit just the base PMTA to stay on the market. . . . So at the same time we would have to develop a new PMTA for an Elite product that was called 2.0 and hope that Elite 2.0 would get authorized before Elite 1.0 got turned down by FDA.” (Quigley (Altria) Tr. 2065)).

With regard to Altria’s PMTA plans for MarkTen Elite, Joe Murillo testified: “Well, the idea of the strategy was to -- assuming we could cobble together a PMTA for Elite and we -- we

were allowed to continue selling Elite, we would file for Elite 1.0, continue preparing 2.0, and quickly follow. Hopefully, by the time they were adjudicating what would be some very thorny issues, at least by this time, with respect to Elite 1.0, we would have amended with 2.0 and said, We hear you, and please let us pursue this improvement and let us, you know, explain to you what we've done.” (PX7027 (Murillo (Altria/JLI), Dep. at 161)).

In other words, filing a PMTA for MarkTen Elite 1.0 could buy time, or be the bridge, for the FDA to review and approve MarkTen Elite 2.0's PMTA. (PX7016 (Jupe (Altria), Dep. at 116-17) (“At this point in time, Elite 1.0 also had to go through the application process . . . because we didn't think we could sequence things in a timely manner in accordance with the requirements to get Elite 2.0 into the agency and out of the agency. We thought we would run into a period of time where we would have no product on the market.”)).

1547. Indeed, Complaint Counsel acknowledged as much in its pretrial brief, stating that e-vapor “[p]roduct development . . . takes *multiple* years.” (CC Pretrial Br. 67 (emphasis added)). Complaint Counsel elaborated that “the timeline for product development is slow given the engineering complexity of e-cigarette products.” (CC Pretrial Br. 67).

#### **Response to Finding No. 1547**

The proposed finding should be disregarded because it contains no citations to the record. It is also misleading because the citation to Complaint Counsel's Pre-Trial Brief refers to *de novo* entry. (CC's Pre-Trial Brief at 67). Altria would not be entering *de novo* since it already had a number of deemed products, had conducted years of e-cigarette R&D prior to the transaction, and had a partnership with PMI. (CCFF Parts VI.C-D, X.B-D; PX5000 at 041-57 (¶¶ 93-107) (Rothman Expert Report)).

1548. Once Altria had locked down a design, Altria still would need to prepare the PMTA and FDA would have to approve the PMTA before the product could be commercialized. (Garnick (Altria) Tr. 1661-62; PX7016 Jupe (Altria) Dep. at 340-41).

#### **Response to Finding No. 1548**

Complaint Counsel has no specific response.

1549. Complaint Counsel has conceded that “the timeline for submitting a PMTA and receiving FDA approval can take more than three years.” (CC Pretrial Br. 67).

**Response to Finding No. 1549**

Complaint Counsel does not disagree, but notes that the timeline for submitting a PMTA and receiving FDA approval can also take less than three years. (*See, e.g.*, PX8010 at 002 (¶ 8) (Folmar (Fontem), Decl.) (stating that it could take 18 months to 2 years to prepare a PMTA for a new product); PX8009 at 015 (¶ 45) (Garner (Reynolds), Decl.) (stating that a PMTA can take from 1-3 years to complete)).

1550. The record evidence is consistent with Complaint Counsel’s concession. Multiple witnesses testified that it takes “approximately two years from design lock to filing a PMTA,” (Murillo (Altria/JLI) Tr. 2924; *see also* Quigley (Altria) Tr. 2038 (similar)), and 18 months to two years for FDA review, (Jupe (Altria) Tr. 2301; *see also* King (PMI) Tr. 2525 (explaining that IQOS PMTA review took two years); *supra* Part I.D.3, I.D.6).

**Response to Finding No. 1550**

The first sentence of the proposed finding is vague and argumentative. Otherwise, Complaint Counsel does not disagree.

1551. Altria has no pending PMTAs for e-vapor products before FDA. (Garnick (Altria) Tr. 1609; Murillo (Altria/JLI) Tr. 3024).

**Response to Finding No. 1551**

The proposed finding is incomplete and misleading. Complaint Counsel does not disagree that Altria currently has no pending PMTAs for e-vapor products before the FDA, but adds that the reason why is because Altria abandoned all of its efforts to commercialize and compete when it entered into the non-compete agreement with JLI. (*See* CCFE ¶¶ 1353-407, 1694-96; PX3106 (PMI) at 001-02 (*in camera*)).

Prior to the transaction with JLI, Altria had plans to file PMTAs for MarkTen e-cigarette products that were already on the market. (CCFE ¶¶ 1258-74). Altria made numerous statements

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to investors and the public updating its plans and progress for filing PMTAs for MarkTen cigalike products. (PX1129 (Altria) at 018 (“[W]e plan to file PMTAs for our *MarkTen* products in 2018 with MRTP applications to follow.”); (PX9044 (Altria) at 044 (noting that Altria planned “to file PMTAs in 2018” for its MarkTen cigalike products “with MRTPAs to follow”); (PX9045 (Altria) at 006 (“We plan to file PMTAs for *MarkTen* this year, with MRTP applications to follow. In those applications, we expect to submit robust scientific evidence to demonstrate *MarkTen*’s harm reduction potential compared to cigarettes.”)). In 2018, prior to the transaction with JLI, Altria also thought that MarkTen Elite could achieve PMTA approval. (CCFF ¶¶ 1267-74).

}; see also PX7003 (Quigley (Altria), IHT at 30-31)). Dr. Gardner testified that Altria continued to work on PMTAs for its MarkTen cigalike products until Altria announced that it would discontinue the products in December 2018. (Gardner (Altria) Tr. 2685).

Prior to the transaction with JLI, Altria was also planning to submit PMTAs for improved versions of its existing products, including as MarkTen Elite 2.0. (CCFF ¶¶ 1295-300).

Pursuant to a Joint Research, Development, and Technology Sharing Agreement (“JRDTA”) between Altria and PMI, Altria was { } PMI started selling VEEV internationally in 2020, (CCFF ¶ 1647), and { }

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1552. As the sections below will demonstrate, (*see infra* Part XVI.C.3-4), none of Altria’s internal development projects or the fixes for its existing products were anywhere near design lock, nor were several of the external opportunities posited by Complaint Counsel. Thus, each of those products was likely *five or more* years from reaching the market. (*See infra* Part XVI.C.3-4). This is well beyond the “near future.”

### **Response to Finding No. 1552**

The proposed finding should be disregarded because it contains no citations to the record and is speculative, incomplete, misleading, and contrary to the weight of the evidence. (*See* Responses to RPF Part XVI.C.3-4). The statement that “This is well beyond the ‘near future’” should be disregarded because it is not a “finding of fact,” but rather a legal conclusion that misstates the applicable standard for proving a violation of Section 7 under the “actual potential competition” doctrine. (*See* Complaint Counsel’s Responses to Respondents’ Proposed COL ¶¶ 97-100). Respondents inappropriately state their own arguments as a “fact.”

### **3. Altria Lacked The Capabilities To Innovate And None Of Its Pipeline Projects Were Close To Design Lock**

1553. Even setting aside the regulatory barrier to entry and the temporal constraints, Complaint Counsel has not proven that Altria was capable of introducing an internally developed product. (*See infra* ¶¶ 1553-611).

### **Response to Finding No. 1553**

The proposed finding should be disregarded because it is conclusory, contains no citations to the record, and is contrary to the weight of the evidence. Complaint Counsel has shown that Altria had the incentive and ability to compete with existing and new products, whether internally



developed, acquired, or jointly developed with a partner. (See CCFE ¶¶ 411-544, 1527-730; Responses to RPF ¶¶ 1553-611).

The proposed finding is incomplete and misleading. Although Complaint Counsel does not disagree that some of Altria's innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFE ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) ("Well, look, it's been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.")). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple "bets." (CCFE ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) ("And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You've got to have a lot of different bets.)); *see also* Jupé (Altria) Tr. 2183 ("Q. And knowing that some R&D projects are going to fail, innovation is about placing multiple bets. Would you agree with that statement? A. I couldn't agree with you more.)). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria's "bets" in the e-vapor space succeeded or that it never introduced a commercially successful e-cigarette product. (See Responses to RPF ¶¶ 144, 181).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce "internally developed" products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED]; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands

also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

1554. To the extent that Complaint Counsel and Dr. Rothman address Altria’s capabilities, they focus on marketing, distribution, shelf-space, and funding. (CC Pretrial Br. 15 (arguing Altria was “well-positioned” to achieve leadership in e-vapor because of its “world-class marketing, sales, and distribution[,] and regulatory capabilities” (alteration in original) (internal quotation mark omitted) (quoting PX9045 (Altria) at 007)); PX5000 Rothman Report ¶¶ 104-05 & nn.228-31 (similar)). Nowhere do they show that Altria had demonstrated any ability to develop innovative products. The most that they can say is that “Altria had *plans*—and was executing on its plans—to put substantial resources into developing e-cigarette products . . . .” (PX5000 Rothman Report ¶ 132 (emphasis added); *see also* CC Pretrial Br. 53 (nearly identical)).

#### **Response to Finding No. 1554**

The proposed finding is argumentative, conclusory, inaccurate, and misleading. In the proposed finding, Respondents highlight Altria’s significant capabilities and plans, which clearly demonstrate that Altria had the ability to compete through its own products, its partnership with PMI, or other acquisitions of technologies. (CCFF ¶¶ 409-544, 1527-730). After all, if Altria had no ability to compete in e-cigarettes, JLI would have had no reason to demand a non-compete as a condition to the transaction. (CCFF ¶¶ 867-1015).

The proposed finding is inaccurate and misleading to the extent that it suggests that Altria lacked the ability to innovate. Altria was ranked second in terms of high-quality e-cigarette patents, and had the fourth largest overall patent portfolio in the industry. (CCFF ¶¶ 1837-41). Altria invested in and developed many new flavors. (CCFF ¶¶ 1466-71). Altria also developed other innovative features, such as magnetic pods for MarkTen Elite. (CCFF ¶¶ 1477-81). In addition, Altria demonstrated the ability to implement improvements to its existing products, including the gasket fix for MarkTen Elite that stopped leaking and reduced formaldehyde generation. (CCFF ¶¶ 1206-34). The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space

succeeded or that it never introduced a commercially successful e-cigarette product. (*See Responses to RPF* ¶¶ 144, 181).

JLI, for its part, feared Altria’s ability to innovate in e-cigarettes. Using its “Competitive Analysis Framework,” JLI concluded that MarkTen Elite (along with a PMI e-cigarette product) were two of only four products (besides JUUL) that had “Long-Term Viability.” (CCFF ¶ 1522). JLI’s competitive assessment took into account “Innovation Sustainability,” and scored Altria’s products based on the “Quality of current talent,” the “Ability to recruit high-quality talent,” and “Ownership of IP building blocks.” (PX2289 (JLI) at 021).

1555. But plans and resources are not enough. Altria had invested over \$2 billion in developing reduced-risk products before it founded Nu Mark; every single one was a commercial bust. (*See supra* Part II.A.1.b). It then invested hundreds of millions of dollars in Nu Mark’s internal development initiatives; none came to fruition. (*See supra* Part II.A.1.d).

#### **Response to Finding No. 1555**

The proposed finding should be disregarded because it contains no citations to the record and is inaccurate and misleading. As explained in Complaint Counsel’s responses to RPF Part II.A.1.b., most of the products that Respondents describe are not e-cigarettes and are thus irrelevant. (*See Responses to RPF Part II.A.1.b*). Complaint Counsel adds that none of Altria’s investments in Nu Mark “came to fruition” because Altria exited the e-cigarette business because of the transaction and non-compete with JLI. (*See Responses to RPF Part II.A.1.d*).

1556. Innovation is difficult and is “going to fail the lion’s share of the time.” (Jupe (Altria) Tr. 2182-83).

#### **Response to Finding No. 1556**

Complaint Counsel does not disagree, but adds that so-called innovation “failures” are neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that

fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”); *see also* Jupé (Altria) Tr. 2183 (“Q. And knowing that some R&D projects are going to fail, innovation is about placing multiple bets. Would you agree with that statement? A. I couldn’t agree with you more.”)). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space succeeded or that it never introduced a commercially successful e-cigarette product. (*See* Responses to RPF ¶¶ 144, 181).

1557. As Dr. Rothman acknowledged, with product development, “there’s no certainty.” “[O]ne doesn’t know if a particular project is going to result in a product on the market at a particular point in time.” (PX7046 Rothman Dep. at 265-66).

#### **Response to Finding No. 1557**

Complaint Counsel does not disagree.

1558. And the evidence presented at trial uniformly shows that product innovation is not a “core competency” of Altria’s. (Schwartz (Altria) Tr. 1913).

#### **Response to Finding No. 1558**

The proposed finding is argumentative, inaccurate, and misleading. There is no support for the statement that “the evidence presented at trial uniformly shows” that product innovation is not a “core competency” of Altria’s. It should therefore be disregarded. As described in detail in Complaint Counsel’s Proposed Findings of Fact, the evidence at trial does not “uniformly” support Schwartz’s purported belief that innovation is not a core competency of Altria’s. (CCFF ¶¶ 507-14, 1538-87).

In November 2017, Altria’s Chief Innovation Officer, Jim Dillard, told investors that with respect to reduced harm products, “We have the top talent we need, recruited from around the

world. They include nearly 195 PhDs and 75 engineers across multiple disciplines. They represent 16 different countries and speak 32 different languages, all working together under one roof and laser focused on advancing Altria's harm reduction aspiration. Over the past 10 years these employees received over 660 patents and published research in nearly 225 publications." (PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)).

In November 2017, Altria's CEO touted Altria's innovative capabilities to investors: "This year we're celebrating the 10th anniversary of our \$350 million Center for Research and Technology, which is just miles from here. We built it to house our team of more than 400 scientists, physicians, product developers, engineers, regulatory experts and others who are developing innovative products, pursuing their regulatory authorization and constructively engaging with the FDA on policy." (PX9000 (Altria) at 005 (Nov. 2017 Investor Day remarks)).

Altria built the 450,000-square-foot Center for Research and Technology to house its team of over 400 scientists, physicians, product developers, engineers, regulatory experts and others. (PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)). Altria "designed the [Center for Research and Technology] for functionality, collaboration, and flexibility to meet evolving needs. The end result is a truly world-class facility. It has nearly 150,000 square feet of purpose-designed lab space and the leading equipment which enables us to design new products from start to finish." (PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)).

Altria continued to supplement the Center for Research and Technology staff of over 400 experts and scientists with numerous additional experts. (Murillo (Altria/JLI) Tr. 2921-22 ("Yeah. We were -- I mean, we were hiring people precisely for these things. Some of the folks we hired very specifically because they had unique expertise in these areas. We were constantly looking for more."); PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)).

Although Complaint Counsel does not disagree that some of Altria’s innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”); *see also* Jupe (Altria) Tr. 2183 (“Q. And knowing that some R&D projects are going to fail, innovation is about placing multiple bets. Would you agree with that statement? A. I couldn’t agree with you more.”)). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space succeeded or that it never introduced a commercially successful e-cigarette product. (*See* Responses to RPF ¶¶ 144, 181).

1559. Every product Nu Mark launched was an acquisition from another company. (PX7018 Schwartz (Altria) Dep. at 163-64; *see also supra* Part II.A.1.e).

### **Response to Finding No. 1559**

The proposed finding is incomplete and misleading. Other e-cigarette products { [REDACTED] } were also acquired from other manufacturers. { [REDACTED] } [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

1560. And every internal development project that Nu Mark pursued over the course of five years failed to “[bear] fruit.” (Murillo (Altria/JLI) Tr. 2940-41).

**Response to Finding No. 1560**

The proposed finding is incomplete, inaccurate, and misleading. The full quote that Respondents cite from Joe Murillo’s trial testimony is as follows: “So some of these projects went back years and still had not yielded fruit.” (Murillo (Altria/JLI) Tr. 2940-41). Murillo was referencing two particular projects—Hudson and Panama. (Murillo (Altria/JLI) Tr. 2940-41). Respondents have not provided any evidentiary support for the claim that “every internal development project that Nu Mark pursued over the course of five years failed to ‘bear fruit,’” and it should therefore be rejected.

Although Complaint Counsel does not disagree that some of Altria’s innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”); *see also* Jupé (Altria) Tr. 2183 (“Q. And knowing that some R&D projects are going to fail, innovation is about placing multiple bets. Would you agree with that statement? A. I couldn’t agree with you more.”)). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space succeeded or that it never introduced a commercially successful e-cigarette product. (*See Responses to RPF ¶¶ 144, 181*).

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The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] } [REDACTED] [REDACTED] [REDACTED] [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

1561. As Jupe summarized, “we make very good cigarettes, . . . but to significantly reduce the risk, I would say we have not had that innovation success.” (Jupe (Altria) Tr. 2213; *see also* PX7034 Mountjoy (Altria) Dep. at 98 (explaining Altria “wasn’t set up for innovation”; instead, it was “a company that’s strength lies in maintaining existing big brands”)).

### **Response to Finding No. 1561**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. Although Complaint Counsel does not disagree that some of Altria’s innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”))). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space



succeeded or that it never introduced a commercially successful e-cigarette product. (See Responses to RPF 144, 181).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called innovation “failures.” Altria’s product development team used what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria used feedback from consumer research to inform the next round of product development efforts)).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] }  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

1562. PMI, which had been sharing R&D in e-vapor with Altria since 2015, took a dim view of Altria’s internal development efforts. PMI was “disappointed in the results of the joint research coming from Altria.” (PX7020 King (PMI) Dep. at 222; *see also* King (PMI) Tr. 2529). PMI agreed that Altria’s contributions to the collaboration were “quite limited.” (King (PMI) Tr. 2529). One of PMI’s frustrations was that, while PMI tended to build technology, test it, and then refine, Altria’s approach was to buy products and, if necessary, try to improve them. (PX7020 King (PMI) Dep. at 213-14; *see also* { [REDACTED] } ). As King, formerly the CEO of PMI America, summarized, PMI “had not seen a lot of success coming from Altria’s innovation in really any of the reduced-risk product areas.” (PX7020 King (PMI) Dep. at 209, 222).

### **Response to Finding No. 1562**

The first sentence of the proposed finding is unsupported and should be disregarded. As a whole, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence. Although Complaint Counsel does not disagree that some of Altria's innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”))). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria's “bets” in the e-vapor space succeeded or that it never introduced a commercially successful e-cigarette product. (*See* Responses to RPF ¶¶ 144, 181).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called innovation “failures.” Altria's product development team used what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria used feedback from consumer research to inform the next round of product development efforts)).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] }

[REDACTED]; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

1563. Altria was not “structured” to innovate. It “approached product development like a cigarette company” and “needed to think more like a technology company and have different capabilities and different processes.” (Quigley (Altria) Tr. 2025; *see also* PX7023 Fernandez (Altria) Dep. at 227 (“[Altria’s] culture was not conducive to innovation.”)).

### **Response to Finding No. 1563**

The proposed finding is incorrect, misleading, contrary to the weight of the evidence, and unreliable as it relies solely on the self-serving testimony of current and former Altria executives. In fact, in an interview with the *Wall Street Journal* in March 2019, former Altria CEO Howard Willard touted Altria’s innovation success, stating that Altria “developed very satisfying [e-vapor] products that early on were converting adult cigarette smokers.” (PX1172 (Altria) at 003). The finding also contradicts statements made by Altria’s former CEO and other executives in November 2017 when Altria celebrated the 10th anniversary of its \$350 million, 450,000 square foot Center for Research and Technology with more than 400 scientists, physicians, product developers, engineers, regulatory experts and others whom Altria touted as developing innovative products. (CCFF ¶ 452; PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks); *see* Response to RPF ¶ 1558).

The proposed finding also ignores the fact that Altria implemented a major restructuring in May 2018 designed to realize “its aspiration to be the U.S. leader in authorized, non-combustible, reduced-risk products.” (PX9042 (Altria) at 001). The new structure included the creation of a Chief Growth Officer position that was filled by (current JLI CEO) K.C. Crosthwaite and that

reported directly to the CEO. (PX9042 (Altria) at 001; PX2003 (JLI) at 001). JLI's current Chief Growth Officer, Bob Robbins, believed that "There are very clear executional advantages" to Altria's new structure, and JLI's Alex Cantwell wrote that Altria's "core tobacco division will report into CFO . . . while the CGO reports to the CEO. . . . I'd say overall this is a big move. . . . Just based on JUUL experience alone, it's very easy to imagine the organizational alignment & incentive improvements this will enable." (PX2003 (JLI) at 001).

1564. One of Altria's major limitations was talent, particularly in electronics. As Willard explained, an "electronic e-vapor product is dramatically different than a cigarette, which is essentially tobacco wrapped in paper that you light." (Willard (Altria) Tr. 1396). Early on in his tenure, Quigley highlighted the talent gaps at Altria, particularly the need to bring in "external talent that had more experience innovating and that had experience with electronic products." (Willard (Altria) Tr. 1396). In that area, Altria had major "skill gaps," including "Design Thinking Specialists, Electrical and Mechanical Engineering, [and] Industrial Designers." (RX0585 (Altria) at 055).

#### **Response to Finding No. 1564**

The first sentence of the proposed finding is unsupported and should be disregarded. As a whole, the proposed finding is incomplete, misleading, and contrary to the weight of the evidence. In November 2017, Altria's Chief Innovation Officer, Jim Dillard, told investors that, with respect to reduced harm products, "We have the top talent we need, recruited from around the world. They include nearly 195 PhDs and 75 engineers across multiple disciplines. They represent 16 different countries and speak 32 different languages, all working together under one roof and laser focused on advancing Altria's harm reduction aspiration. Over the past 10 years these employees received over 660 patents and published research in nearly 225 publications." (PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)). Altria's then-CEO, Marty Barrington, similarly touted Altria's innovative capabilities to investors: "This year we're celebrating the 10th anniversary of our \$350 million Center for Research and Technology, which is just miles from here. We built it to house our team of more than 400 scientists, physicians, product developers, engineers, regulatory experts

and others who are developing innovative products, pursuing their regulatory authorization and constructively engaging with the FDA on policy.” (PX9000 (Altria) at 005 (Nov. 2017 Investor Day remarks)). In March 2019, Altria’s then-CEO Howard Willard again touted Altria’s innovation success, stating in an interview with the *Wall Street Journal* that Altria “developed very satisfying [e-vapor] products that early on were converting adult cigarette smokers.” (PX1172 (Altria) at 003).

Indeed, Altria was ranked second in terms of high-quality e-cigarette patents, and had the fourth largest overall patent portfolio in the industry. (CCFF ¶¶ 1837-41). Altria product development team developed new flavors, (CCFF ¶¶ 1467-68), as well as other innovative features, including magnetic pods for MarkTen Elite. (CCFF ¶¶ 1477-80). In addition, Altria’s product development team demonstrated its ability to improve Altria’s existing products, including the new gasket for Elite that stopped leaking and reduced formaldehyde generation. (CCFF ¶¶ 1206-34, 1489-92).

JLI, for its part, feared Altria’s ability to innovate in e-cigarettes. Using its “Competitive Analysis Framework,” JLI concluded that MarkTen Elite (along with a PMI e-cigarette product) were two of only four products (besides JUUL) that had “Long-Term Viability.” (CCFF ¶ 1522). JLI’s competitive assessment took into account “Innovation Sustainability,” and scored Altria’s products based on the “Quality of current talent,” the “Ability to recruit high-quality talent,” and “Ownership of IP building blocks.” (PX2289 (JLI) at 021).

The third sentence of the proposed finding—which cites Willard’s testimony on Quigley’s alleged views on Altria’s purported “talent gaps”—is unreliable and should be disregarded because it is hearsay. (Willard (Altria) Tr. 1396).

1565. Altria also was “not good at predicting what the consumers wanted, adult smokers want[ed] in three to five years.” (PX7026 Gardner (Altria) Dep. at 22). It “tend[ed] to kind of chase”

the e-vapor marketplace rather than anticipate where it was going. (PX7016 Jupe (Altria) Dep. at 176; *see also* PX7026 Gardner (Altria) Dep. at 23 (highlighting that the products that Altria had launched in the e-vapor space “were similar to the category at the time”)).

### **Response to Finding No. 1565**

The proposed finding is incomplete, misleading, contrary to the weight of the evidence, and unreliable as it relies solely on the self-serving testimony of a current Altria executive. In an interview with the *Wall Street Journal* in March 2019, former Altria CEO Howard Willard touted Altria’s innovation success, stating that Altria “developed very satisfying [e-vapor] products that early on were converting adult cigarette smokers.” (PX1172 (Altria) at 003). As a result, in 2017,

{ [REDACTED]

[REDACTED] Although JUUL surpassed MarkTen in late 2017 and then Vuse in 2018 to become the market leader, Altria still had the third-highest share in the closed-system e-cigarette market when it exited the e-cigarette business. (*See* CCFF ¶ 1510 (showing shares of closed-system e-cigarettes in the twelve months from October 2017 to September 2018) (citing PX5000 at 067 (Table 5) (Rothman Expert Report); CCFF ¶ 136 (*in camera*)).

1566. Altria’s longtime preoccupation with cig-a-likes illustrates its difficulty in predicting consumer preferences. Even though Altria had, in the absence of knowing “where consumer preferences were going to land,” attempted to “plac[e] multiple bets,” it had clustered those bets on cig-a-likes. (Begley (Altria) Tr. 1108). But “[i]t turn[ed] out that the bet you really needed to make was a satisfying product that didn’t look like a cigarette.” (Begley (Altria) Tr. 1108).

### **Response to Finding No. 1566**

The first sentence of the proposed finding is unsupported and should be disregarded. The second sentence of the proposed finding is inaccurate because Begley did not testify that Altria “clustered those bets on cig-a-likes.” (Begley (Altria) Tr. 1108). As Respondents acknowledge, (*see* RPF ¶ 569), Altria “thought placing multiple bets was appropriate,” and it therefore developed, acquired, and sold a range of closed-system e-cigarette products, including both

cigalikes and pod-based products, that offered tobacco and flavored e-liquids with and without nicotine salts. (*See* CCFE ¶¶ 409-544).

The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are obsolete in the marketplace. { [REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFE ¶¶ 1173, 1175-76).

1567. As Michelle Baculis, who managed product development at Nu Mark, summarized, product development is a “hard and lengthy” and “iterative process.” (PX7014 Baculis (Altria) Dep. at 151). It is “very cyclical” and “ha[s] a lot of dependencies. So when one thing [goes] wrong . . . [you] ha[ve] to start the cycle again.” (PX7014 Baculis (Altria) Dep. at 48). Baculis was “not sure” Altria’s product development goals “were achievable, based on [her] experience.” (PX7014 Baculis (Altria) Dep. at 49).

#### **Response to Finding No. 1567**

The proposed finding is incomplete and misleading. During the same line of questioning at her deposition, Baculis testified that she continued to work on her product development goals “[b]ecause I believed in what I was doing, and I believed with the right combination of things, we could get it done.” (PX7014 (Baculis (Altria), Dep. at 50); *see also* PX7014 (Baculis (Altria), Dep. at 50-51 (“Q. And you led a team of people working on these pipeline development products because you all believed you could bring them to market? A. We all believed we could do that at one day.”)). Furthermore, Baculis also testified that she did not tell anybody that she was “not sure” that Altria’s product development goals were achievable. (PX7014 (Baculis (Altria), Dep. at 49-50) (“Q. Did you tell anybody that your goals were not achievable? A. Well, no.”)).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called innovation “failures.” Altria’s product development

team used what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria used feedback from consumer research to inform the next round of product development efforts)).

1568. As a result, as discussed below, none of the Altria internal development efforts underway by the end of 2018 had even reached a final design, let alone a design that could be successful on the market. (*See infra* ¶¶ 1569-611).

### **Response to Finding No. 1568**

The proposed finding should be disregarded because it contains no citations to the record and is incomplete, misleading, and contrary to the weight of the evidence. (*See Responses to RPF* ¶¶ 1569-611).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] } [REDACTED] [REDACTED] [REDACTED] [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

The proposed finding is further incomplete and misleading because Altria exited the e-cigarette business before many of its ongoing product development efforts in e-vapor could be completed. Before it abruptly exited the e-cigarette business in December 2018, Altria was not only working to develop and commercialize the next-generation of e-vapor products, including Elite 2.0 with nicotine salts and PMI’s pod-based product, VEEV, with its MESH technology, but also researching other innovations, including flavor development incorporating “sensomics,” ways



to incorporate Bluetooth technology into e-cigarettes, and so-called “Smart-Pod” technology. (CCFF ¶¶ 1555, 1571-74).

**a. Project Lake**

1569. Project Lake was a cig-a-like concept that neither Complaint Counsel nor Dr. Rothman claim was a viable product. (*See* CC Pretrial Br.; PX5000 Rothman Report; PX5001 Rothman Rebuttal).

**Response to Finding No. 1569**

The proposed finding is incorrect, incomplete, and misleading. As an initial matter, Project Lake was not “a cig-a-like concept,” but rather a pod-focused development project. (Jupe (Altria) Tr. 2158-59 (“Q. And Project Panama and Project Lake were prior R&D projects relating to the development of pod-based products, correct? A. That’s correct. I mean, Panama and Lake were both seen as pod products.”)). Moreover, Altria incorporated the work from Project Lake into its development of Elite 2.0 and 3.0. (PX1086 (Altria) at 001 (email from Richard Jupe to K.C. Crosthwaite dated June 9, 2018) (“I have a plan for Elite 2.0 (design for PMTA), and currently scoping - what comes after that in Elite 3.0 (leapfrog). I think of Elite as the internally developed named platform for small pod devices consuming prior projects like Panama and Lake.”); *see also* Jupe (Altria) Tr. 2158-59). The proposed finding is also vague in that the term “viable product” is undefined.

1570. The initial concept of Project Lake was to build a cig-a-like device with single-use cartridges so that users could enjoy “fresh flavor every time.” (PX1135 (Altria) at 020, 054).

**Response to Finding No. 1570**

The proposed finding is incorrect, incomplete, and misleading. Project Lake was not a “cig-a-like device,” but rather a pod-focused development project. (Jupe (Altria) Tr. 2158-59 (“Q. And Project Panama and Project Lake were prior R&D projects relating to the development of pod-based products, correct? A. That’s correct. I mean, Panama and Lake were both seen as pod

products.”)). The cited exhibit states that Project Lake was “Designed to *compete with cig-a-likes*,” (PX1135 (Altria) at 020) (emphasis added)), but makes clear that the project was pod-based. (PX1135 (Altria) at 054 (identifying as one of its features “Single-use pods provide for familiar smoking occasion and fresh flavor every time”)).

1571. Over time, the concept was updated to focus on a hybrid form factor, but such changes brought delays and the first engineering prototypes were not completed until December 2017, two years after the project was initiated. (*Compare* PX1135 (Altria) at 016, 054 (showing project began by July 2015), *with* PX1930 (Altria) at 035 (showing engineering work began in December 2017)).

### **Response to Finding No. 1571**

The proposed finding is incorrect, incomplete, and misleading to the extent that it suggests that Project Lake was a cigalike project. (Jupe (Altria) Tr. 2158-59 (“Q. And Project Panama and Project Lake were prior R&D projects relating to the development of pod-based products, correct? A. That’s correct. I mean, Panama and Lake were both seen as pod products.”)). The first cited exhibit states that Project Lake was “Designed to *compete with cig-a-likes*,” (PX1135 (Altria) at 020) (emphasis added)), but makes clear that the project was pod-based. (PX1135 (Altria) at 054 (identifying as one of its features “Single-use pods provide for familiar smoking occasion and fresh flavor every time”)).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called innovation “failures.” Altria’s product development team used what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria used feedback from consumer research to inform the next round of product development efforts)).

1572. By April 2018, Lake was “returned to [the] concepting group”—in other words, sent back to the drawing board. (PX1930 (Altria) at 035; *see also* PX1139 (Altria) at 001 (explaining that Project Lake had “been put on hold” and was going “back into concepting phase”)).

### **Response to Finding No. 1572**

The proposed finding is incorrect, incomplete, and misleading. The cited evidence does not support that Project Lake was “sent back to the drawing board.” On the contrary, Baculis wrote that Project Lake “generated good learnings and conversations that I’m sure will be valuable as we proceed.” (PX1139 (Altria) (email from Baculis on Project Lake dated April 12, 2018)). Indeed, just two months later, Altria’s Richard Jupe wrote that he had a plan to incorporate the work done on Project Lake into Elite 2.0 and 3.0. (PX1086 (Altria) at 001 (email from Richard Jupe to K.C. Crosthwaite dated June 9, 2018) (“I have a plan for Elite 2.0 (design for PMTA), and currently scoping - what comes after that in Elite 3.0 (leapfrog). I think of Elite as the internally developed named platform for small pod devices consuming prior projects like Panama and Lake.”); *see also* Jupe (Altria) Tr. 2158-59).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called innovation “failures.” Altria’s product development team used what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria used feedback from consumer research to inform the next round of product development efforts)).

1573. Jupe testified that part of the reason for halting work on Lake was a recognition that Altria needed to “stop getting wrapped up in projects that were kind of focused on following the competition” and instead, refocus on “where we anticipate the consumer to be in the future.” (Jupe (Altria) Tr. 2159).

### **Response to Finding No. 1573**

The proposed finding is incomplete and misleading. Jupe testified that Altria incorporated what it learned from Project Lake into Altria’s ongoing work to develop new e-vapor products, including Elite 3.0. (Jupe (Altria) Tr. 2158-59 (“Q. And, Mr. Jupe, Elite 3.0 was consuming the work that had been done on [Project Panama and Project Lake], correct? A. Yeah. I mean -- yes, in general, we’re thinking of changing the vernacular a little bit here and basically identifying what

are those horizons, what are those versions, based on what the consumers want and need, and so stop getting wrapped up in projects that were kind of focused on following the competition, but instead refocus to where the competitor – excuse me, where the consumer is and where we anticipate the consumer to be in the future.”); *see also* PX7016 (Jupe), Dep. at 253-54; PX1086 (Altria) at 001 (email from Jupe to K.C. Crosthwaite dated June 9, 2018) (“I have a plan for Elite 2.0 (design for PMTA), and currently scoping - what comes after that in Elite 3.0 (leapfrog). I think of Elite as the internally developed named platform for small pod devices consuming prior projects like Panama and Lake.”)).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called innovation “failures.” Altria’s product development team used what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria used feedback from consumer research to inform the next round of product development efforts)).

#### **b. Project Laguna**

1574. Project Laguna also did not merit mention by Complaint Counsel or Dr. Rothman at trial. (*See* CC Pretrial Br.; PX5000 Rothman Report; PX5001 Rothman Rebuttal).

#### **Response to Finding No. 1574**

The proposed finding is argumentative and irrelevant, and should be disregarded. Complaint Counsel does not dispute that Dr. Rothman did not discuss Project Laguna in his expert reports.

1575. Laguna was a closed-tank system intended to appeal to open-system users that Altria began working on in 2015. (RX1292 (Altria) at 048; PX1135 (Altria) at 046). Three years later, in 2018, it was nowhere near completed. (RX0585 (Altria) at 045).

#### **Response to Finding No. 1575**

The statement in the second sentence of the proposed finding that Project Laguna “was nowhere near completed” in 2018 is unsupported by the cited evidence. RX0585 states that Project Laguna was “Stopped due to PTMA [sic] implications on timing/cost,” but does not include any discussion about where the project stood at the time it was discontinued or how much progress had been made on the project in recent years. (RX0585 (Altria) at 045). Otherwise, Complaint Counsel has no specific response.

1576. And ultimately Laguna was a victim of resource prioritization and market trends. In early 2018, Altria, recognizing that it could not pursue all of its bets at once, and that Laguna was out of step with where the market was heading, stopped work on Laguna so that “resources [could be] allocated to other projects.” (RX0496 (Altria) at 040).

### **Response to Finding No. 1576**

The first sentence of the proposed finding is unsupported and should be disregarded. The second sentence of the proposed finding is incomplete and misleading. Although RX0496 states that Project Laguna’s resources were “allocated to other projects,” it also states that the “Project is in HOLD status *until resources free up*,” indicating that Altria intended to restart work on the project in the future. (RX0496 (Altria) at 040 (emphasis added)).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called innovation “failures.” Altria’s product development team used what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria used feedback from consumer research to inform the next round of product development efforts)).

1577. As Jupe explained, “in any organization, you have got to make tradeoffs as far as where your resources, your technical talent, your skills are being applied.” (Jupe (Altria) Tr. 2243). Pursuing multiple internal development projects “necessitate[d] a great deal of resources allocated against each initiative.” (Jupe (Altria) Tr. 2243-44 (reviewing PX1292 (Altria) at 055)). Even so, “[r]esources [were] constrained” and “spread across all Nu Mark initiatives” as well as “impacted by other operating companies.” (RX1292 (Altria) at 055). The solution was “[r]uthless prioritization where and when necessary.” (RX1292 (Altria)

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at 056; *see also* PX7007 Murillo (Altria/JLI) IHT at 33-34, 127 (discussing the need to prioritize resources across different PMTAs)).

**Response to Finding No. 1577**

The proposed finding is incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] } [REDACTED] [REDACTED] [REDACTED] [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

**c. Project Panama**

1578. Project Panama is touted as a potential competitive product by both Complaint Counsel and Dr. Rothman. (CC Pretrial Br. 14; PX5000 Rothman Report ¶ 106). But, like Lake and Laguna, Panama was stopped in early 2018, a fact that neither Complaint Counsel nor Dr. Rothman mention. (PX5000 Rothman Report ¶ 106 n.242 (citing a February 2018 document as saying Panama was “on track”)).

**Response to Finding No. 1578**

The proposed finding is argumentative, incorrect, incomplete, and misleading. First, Project Panama was touted as a potential competitive product by Altria—not by Complaint Counsel. For example, Altria’s Michelle Baculis testified that the purpose of Project Panama “was to leapfrog everything that was already in the marketplace.” (PX7014 (Baculis (Altria), Dep. at 100). Nu Mark’s goal for Project Panama was to “achieve a product that delivered on the vast majority of consumer desires in [the] vapor category” and fulfill consumers’ unmet needs in a way that none of the existing closed system e-cigarette products in the market were doing. (PX7014

(Baculis (Altria), Dep. at 100-01)). Likewise, an Altria document detailing the company's plans to invest \$39 million in the project from 2018 to 2020 described Panama as "the next generation product for the fastest growing segment of the e-vapor category." (PX1605 (Altria) at 013 ("2018 Prelim OB Business Case Detail").

Second, the proposed finding falsely states that Complaint Counsel never mentioned that work on Project Panama stopped in 2018. On the contrary, Complaint Counsel questioned Altria's Richard Jupe on how the work done on Project Panama was incorporated into Altria's development of new e-vapor products, including Elite 3.0. (Jupe (Altria) Tr. 2158-59 ("Q. And Project Panama and Project Lake were prior R&D projects relating to the development of pod-based products, correct? A. That's correct. I mean, Panama and Lake were both seen as pod products. Q. And, Mr. Jupe, Elite 3.0 was consuming the work that had been done on [Project Panama and Project Lake], correct? A. Yeah. I mean -- yes, in general, we're thinking of changing the vernacular a little bit here and basically identifying what are those horizons, what are those versions, based on what the consumers want and need, and so stop getting wrapped up in projects that were kind of focused on following the competition, but instead refocus to where the competitor -- excuse me, where the consumer is and where we anticipate the consumer to be in the future.")); *see also* PX7016 (Jupe), Dep. at 253-54; PX1086 (Altria) at 001 (email from Jupe to Crosthwaite dated June 9, 2018) ("I have a plan for Elite 2.0 (design for PMTA), and currently scoping - what comes after that in Elite 3.0 (leapfrog). I think of Elite as the internally developed named platform for small pod devices consuming prior projects like Panama and Lake.")).

1579. Work on Panama had begun in 2017, with the goal of developing a "small closed-tank device that [would] effectively compete with JUUL for [adult smokers and vapers] seeking a 'smoking experience.'" (PX1754 (Altria) at 002; *see also* Murillo (Altria/JLI) Tr. 2939-40).

### **Response to Finding No. 1579**

Complaint Counsel has no specific response.

1580. But Panama “never really got out of the idea stage.” (PX7014 Baculis (Altria) Dep. at 111).

**Response to Finding No. 1580**

The proposed finding is incomplete and misleading. Altria’s Richard Jupe testified that Altria incorporated what it learned from Project Panama into Altria’s ongoing work to develop new e-vapor products, including Elite 3.0. (Jupe (Altria) Tr. 2158-59 (“Q. And, Mr. Jupe, Elite 3.0 was consuming the work that had been done on [Project Panama and Project Lake], correct? A. Yeah. I mean -- yes, in general, we’re thinking of changing the vernacular a little bit here and basically identifying what are those horizons, what are those versions, based on what the consumers want and need, and so stop getting wrapped up in projects that were kind of focused on following the competition, but instead refocus to where the competitor – excuse me, where the consumer is and where we anticipate the consumer to be in the future.”); PX1130 (Altria) at 009 (“Panama & Elite Update”) (recommending that Altria “Continue with Panama research plan & apply learnings to Elite.”); *see also* PX7016 (Jupe), Dep. at 253-54; PX1086 (Altria) at 001 (email from Jupe to K.C. Crosthwaite dated June 9, 2018) (“I have a plan for Elite 2.0 (design for PMTA), and currently scoping - what comes after that in Elite 3.0 (leapfrog). I think of Elite as the internally developed named platform for small pod devices consuming prior projects like Panama and Lake.”)).

1581. In fact, “many” at Altria, including Joe Murillo, “thought that [Altria] just didn’t have the bandwidth and knowledge base to develop that sort of product on [its] own.” (Murillo (Altria/JLI) Tr. 2940).

**Response to Finding No. 1581**

The proposed finding is vague, incomplete, misleading, contrary to the weight of the evidence, and unreliable as it relies solely on the self-serving testimony of a former Altria (and



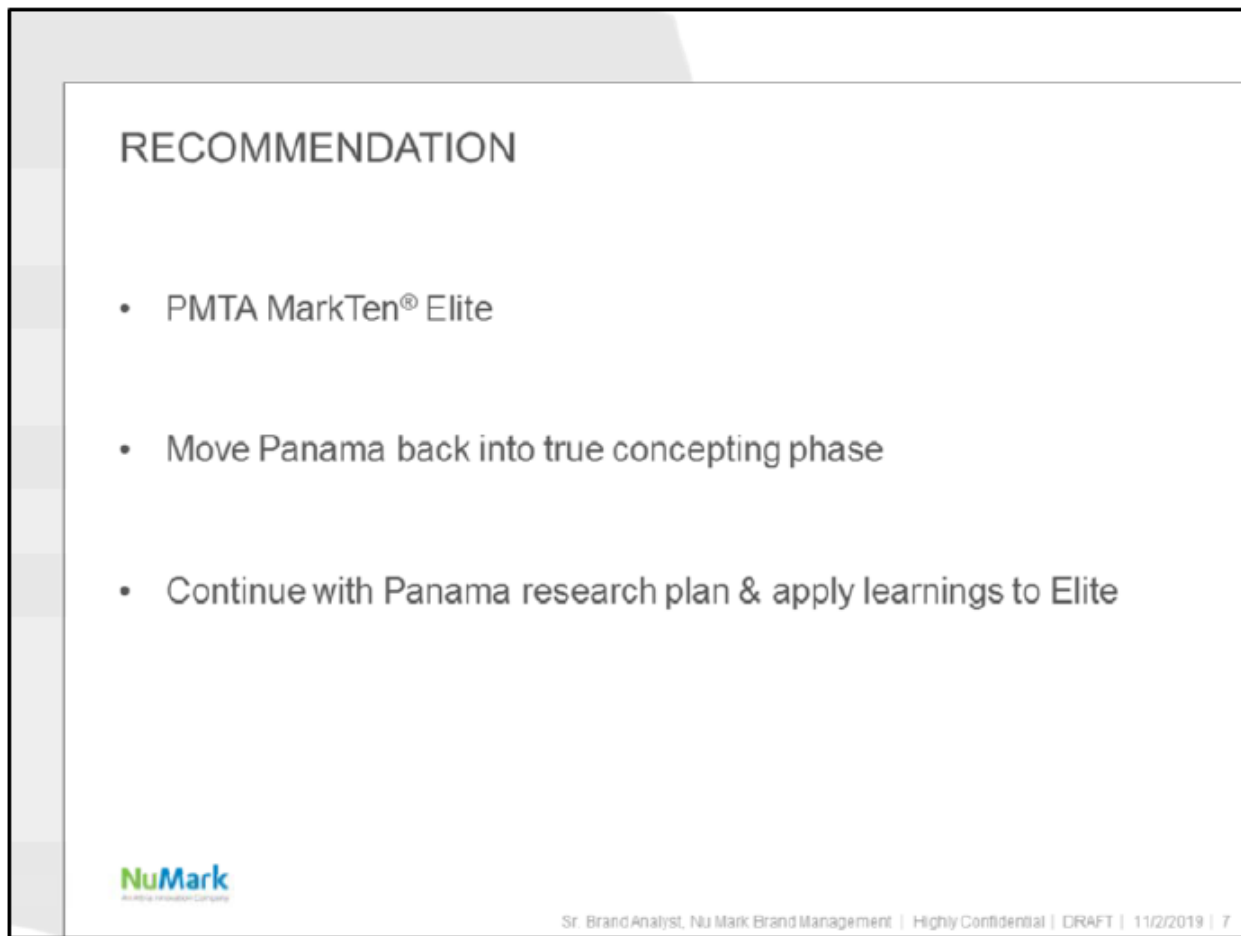
current JLI) executive. The proposed finding is vague because the cited testimony does not identify the “many” people at Altria who purportedly thought that Altria could not develop an e-cigarette product on its own. The proposed finding is also vague because the phrase “that sort of product” is undefined and unexplained.

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence. In November 2017, Altria’s Chief Innovation Officer, Jim Dillard, told investors that, with respect to reduced harm products, “We have the top talent we need, recruited from around the world. They include nearly 195 PhDs and 75 engineers across multiple disciplines. They represent 16 different countries and speak 32 different languages, all working together under one roof and laser focused on advancing Altria's harm reduction aspiration. Over the past 10 years these employees received over 660 patents and published research in nearly 225 publications.” (PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)). Altria’s then-CEO, Marty Barrington, similarly touted Altria’s innovative capabilities to investors: “This year we’re celebrating the 10th anniversary of our \$350 million Center for Research and Technology, which is just miles from here. We built it to house our team of more than 400 scientists, physicians, product developers, engineers, regulatory experts and others who are developing innovative products, pursuing their regulatory authorization and constructively engaging with the FDA on policy.” (PX9000 (Altria) at 005 (Nov. 2017 Investor Day remarks)). In March 2019, Altria’s then-CEO Howard Willard again touted Altria’s innovation success, stating in an interview with the *Wall Street Journal* that Altria “developed very satisfying [e-vapor] products that early on were converting adult cigarette smokers.” (PX1172 (Altria) at 003).

1582. By March 2018, following the launch of Elite, the Nu Mark team responsible for overseeing the company’s project development recommended putting Panama on hold and instead focusing resources on improving Elite. (PX1130 (Altria) at 009).

**Response to Finding No. 1582**

The proposed finding is incomplete and misleading. As illustrated below, PX1130 makes three recommendations: (1) to seek a “PMTA [for] MarkTen® Elite;” (2) to “Move Panama back into true concepting phase;” and (3) to “Continue with Panama research plan & apply learnings to Elite.” (PX1130 (Altria) at 009).



(PX1130 (Altria) at 009).

The evidence shows that Altria continued with its “Panama research plan” and incorporated what it learned from Project Panama into Altria’s ongoing work to develop new e-vapor products, including Elite 3.0. (PX1130 (Altria) at 009; Jupe (Altria) Tr. 2158-59 (“Q. And, Mr. Jupe, Elite 3.0 was consuming the work that had been done on [Project Panama and Project Lake], correct? A. Yeah. I mean -- yes, in general, we’re thinking of changing the vernacular a little bit here and

basically identifying what are those horizons, what are those versions, based on what the consumers want and need, and so stop getting wrapped up in projects that were kind of focused on following the competition, but instead refocus to where the competitor – excuse me, where the consumer is and where we anticipate the consumer to be in the future.”); *see also* PX7016 (Jupe), Dep. at 253-54; PX1086 (Altria) at 001 (email from Jupe to K.C. Crosthwaite dated June 9, 2018) (“I have a plan for Elite 2.0 (design for PMTA), and currently scoping - what comes after that in Elite 3.0 (leapfrog). I think of Elite as the internally developed named platform for small pod devices consuming prior projects like Panama and Lake.”)).

1583. And that is exactly what happened later that month. (RX0630 (Altria) at 010 (“Status: Discontinued work”); *see also* Garnick (Altria) Tr. 1703 (“Panama was an e-vapor product that was under consideration that was dropped.”); PX7016 Jupe (Altria) Dep. at 59-60 (explaining that Project Panama was cancelled as a result of technical issues); PX1139 (Altria) at 001 (explaining that Project Panama had “been put on hold”); RX0585 (Altria) at 045 (“Stopped due to PMTA implications on timing/cost”)).

### **Response to Finding No. 1583**

The proposed finding is vague, incomplete, and misleading. The proposed finding is vague because it does not specify “what happened” to Project Panama. Indeed, the cited evidence provides inconsistent explanations.

The proposed finding is also incomplete and misleading. The evidence shows that in March 2018 Altria recommended that it “Continue with Panama research plan & apply learnings to Elite.” (PX1130 (Altria) at 009 (“Panama & Elite Update”). At trial, Jupe confirmed that Altria adhered to this plan; Altria incorporated what it learned from Project Panama into its ongoing work to develop new e-vapor products, including Elite 3.0. (Jupe (Altria) Tr. 2158-59 (“Q. And, Mr. Jupe, Elite 3.0 was consuming the work that had been done on [Project Panama and Project Lake], correct? A. Yeah. I mean -- yes, in general, we’re thinking of changing the vernacular a little bit here and basically identifying what are those horizons, what are those versions, based on what the

consumers want and need, and so stop getting wrapped up in projects that were kind of focused on following the competition, but instead refocus to where the competitor – excuse me, where the consumer is and where we anticipate the consumer to be in the future.”); *see also* PX7016 (Jupe), Dep. at 253-54; PX1086 (Altria) at 001 (email from Jupe to K.C. Crosthwaite dated June 9, 2018) (“I have a plan for Elite 2.0 (design for PMTA), and currently scoping - what comes after that in Elite 3.0 (leapfrog). I think of Elite as the internally developed named platform for small pod devices consuming prior projects like Panama and Lake.”).

1584. Jupe explained that this decision was motivated by the same rationale as the pause on Lake—Panama was chasing the competition rather than anticipating it. (Jupe (Altria) Tr. 2158-59).

#### **Response to Finding No. 1584**

The proposed finding is vague, incomplete, and misleading. The proposed finding is vague because it does not explain the “decision” with any specificity nor does it explain what “chasing the competition” means in this context.

The proposed finding is also incomplete and misleading. The evidence shows that in March 2018 Altria recommended that it “Continue with Panama research plan & apply learnings to Elite.” (PX1130 (Altria) at 009 (“Panama & Elite Update”). At trial, Jupe confirmed that Altria adhered to this plan; Altria incorporated what it learned from Project Panama into its ongoing work to develop new e-vapor products, including Elite 3.0. (Jupe (Altria) Tr. 2158-59 (“Q. And, Mr. Jupe, Elite 3.0 was consuming the work that had been done on [Project Panama and Project Lake], correct? A. Yeah. I mean -- yes, in general, we’re thinking of changing the vernacular a little bit here and basically identifying what are those horizons, what are those versions, based on what the consumers want and need, and so stop getting wrapped up in projects that were kind of focused on following the competition, but instead refocus to where the competitor – excuse me, where the consumer is and where we anticipate the consumer to be in the future.”); *see also* PX7016 (Jupe),

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Dep. at 253-54; PX1086 (Altria) at 001 (email from Jupe to K.C. Crosthwaite dated June 9, 2018) (“I have a plan for Elite 2.0 (design for PMTA), and currently scoping - what comes after that in Elite 3.0 (leapfrog). I think of Elite as the internally developed named platform for small pod devices consuming prior projects like Panama and Lake.”)).

**d. Project Hudson**

1585. Project Hudson is another initiative that is highlighted by Complaint Counsel and Dr. Rothman without any meaningful context regarding where it stood when Altria withdrew its e-vapor products and shut down Nu Mark in late 2018. (CC Pretrial Br. 14; PX5000 Rothman Report ¶ 106).

**Response to Finding No. 1585**

The proposed finding is vague, conclusory, and irrelevant, and should be disregarded. The proposed finding neither defines nor explains what it means by the statement that Complaint Counsel and Dr. Rothman “highlighted” Project Hudson “without any meaningful context regarding where it stood when Altria withdrew its e-vapor products and shut down Nu Mark in late 2018.”

1586. The concept for Project Hudson was to develop a pod-based device with customized heat settings to correspond to different e-liquids. (RX1292 (Altria) at 047).

**Response to Finding No. 1586**

Complaint Counsel has no specific response.

1587. Although Project Hudson had started by 2015, (PX1135 (Altria) at 049), in 2018 it was still languishing at the design phase, (PX4149 (Altria) at 044).

**Response to Finding No. 1587**

The proposed finding is incomplete, misleading, and unsupported by the cited evidence. PX4149 hardly supports the claim that Project Hudson was “languishing at the design phase.” In fact, the cited slide of PX4149 notes that Project Hudson’s design was scheduled to be completed

in September 2018.” (PX4149 (Altria) at 044 (“E-Vapor Update” presentation for Altria’s Board dated August 2018)).

1588. As Dr. Maria Gogova, one of Altria’s lead scientists explained, Hudson “was really only [a] concept coming from product development . . . . There were early prototypes which product development was playing with, but there was no concrete product . . . ready for PMTA filing.” (PX7015 Gogova (Altria) Dep. at 32).

### **Response to Finding No. 1588**

The proposed finding is vague, incomplete, misleading, contrary to the weight of the evidence, and unreliable as it relies solely on the self-serving testimony of a current Altria executive. The proposed finding is vague because the statement that Project Hudson “was really only [a] concept” is undefined. In fact, this statement is contradicted by the very next sentence, which states that there were “early prototypes” of Project Hudson. Indeed, Altria had identified several strengths of Project Hudson, including: “Companion app is a differentiator and increases overall quality perception;” “Formula requirements designed to deliver against both nicotine satisfaction and enjoyment (10+ variants);” “Strong IP;” and “Differential Product Format – Smart Pod.” (RX0532 (Altria) at 013). The proposed finding is also incomplete and misleading because, as of August 2018, Project Hudson’s design was scheduled to be completed in September 2018. (PX4149 (Altria) at 044 (“E-Vapor Update” presentation for Altria’s Board dated August 2018)).

1589. Jupe, the head of product development, was equally candid about the lack of progress. Hudson “wasn’t really much of a product so much as it was a platform for all the technologies you could feasibly throw at things. And we found that there was a lot of problems with that platform. It took us years and years and [we] never got the platform to a point where we thought we would commercialize it.” (PX7016 Jupe (Altria) Dep. at 60; *see also* Murillo (Altria/JLI) Tr. 2941 (recalling Project Hudson never got to “design freeze, let alone design lock”; there were some “prototypes at some point in [2018], but it didn’t get very far”)).

### **Response to Finding No. 1589**

The first sentence of the proposed finding is unsupported and should be disregarded. As a whole, the proposed finding is vague, incomplete, misleading, and unreliable as it relies solely on

the self-serving testimony of current and former Altria executives. The proposed finding is vague because the statement that Project Hudson “wasn’t really much of a product so much as it was a platform” is unexplained. The proposed finding is also incomplete and misleading because it ignores Project Hudson’s many strengths, including: “Companion app is a differentiator and increases overall quality perception;” “Formula requirements designed to deliver against both nicotine satisfaction and enjoyment (10+ variants);” “Strong IP; ” and “Differential Product Format – Smart Pod.” (RX0532 (Altria) at 013). The proposed finding is further incomplete and misleading because, as of August 2018, Project Hudson’s design was scheduled to be complete in September 2018. (PX4149 (Altria) at 044 (“E-Vapor Update” presentation for Altria’s Board dated August 2018)).

1590. In the summer of 2018, the portfolio assessment team rated the project’s long-term potential as “low-medium.” Among the various considerations they flagged were, “[c]omplex PMTA (e.g., temperature levels, app)” and “[a]bility to deliver variety of flavors and nic levels . . . limited by cost of PMTA.” (RX0532 (Altria) at 013).

#### **Response to Finding No. 1590**

While Complaint Counsel does not disagree that in July 2018 Altria’s portfolio assessment team rated Project Hudson’s long-term likelihood to achieve its objective as “low-medium,” the proposed finding is incomplete and misleading because it ignores the various strengths of Project Hudson identified by the team. These include: “Customization features well-received by open-system consumers;” “Companion app is a differentiator and increases overall quality perception;” “Formula requirements designed to deliver against both nicotine satisfaction and enjoyment (10+ variants);” “Strong IP; ” and “Differential Product Format – Smart Pod.” (RX0532 (Altria) at 013).

1591. Beyond the regulatory problems, the platform also raised fundamental questions about consumer appeal. Hudson’s shortcomings included a flavor intensity that was “too low for [a] vaping audience,” a large size in a category that was “trending toward smaller devices,” and “user complexity.” (RX0532 (Altria) at 013).

#### **Response to Finding No. 1591**

The first sentence of the proposed finding is unsupported and should be disregarded. The first sentence is also vague because the phrase “fundamental questions about consumer appeal” is undefined and unexplained. The second sentence of the proposed finding is incomplete and misleading because it ignores the many strengths of Project Hudson identified by the portfolio assessment team. These include: “Customization features well-received by open-system consumers;” “Companion app is a differentiator and increases overall quality perception;” “Formula requirements designed to deliver against both nicotine satisfaction and enjoyment (10+ variants);” and “Differential Product Format – Smart Pod.” (RX0532 (Altria) at 013).

1592. By August 2018, Altria’s leadership informed its Board that, while Hudson was Nu Mark’s most developed internal project, the company likely was a year away from finishing pre-PMTA testing and locking the product’s design and would not make a decision about whether to pursue a PMTA until that point. (PX4149 (Altria) at 044).

#### **Response to Finding No. 1592**

The proposed finding is inaccurate, misleading, and unsupported by the cited evidence. PX4149 indicates that pre-PMTA testing for Project Hudson would be completed in November 2018—not August 2019—and that “Product Lock” and a PMTA decision would take place in June 2019. (PX4149 (Altria) at 044 (“E-Vapor Update” presentation for Altria’s Board dated August 2018)).

1593. And, even if design lock were achieved, the PMTA would take a particularly long time because Hudson “had a lot more variables to it than some of the simpler products [Altria] had seen.” (PX7017 Magness (Altria) Dep. at 47-48).

#### **Response to Finding No. 1593**

The proposed finding is incomplete and misleading. Although Altria’s Magness testified that the PMTA “scoping” process for Project Hudson would take years, this was because “it had a lot more technology to it.” (PX7017 Magness (Altria) Dep. at 47). In fact, in the cited testimony, Magness elaborated on Project Hudson’s more advanced technology. (PX7017 (Magness (Altria)



Dep. at 48) (“Q. You mentioned it had some technology advances. What were the technology advances that were particular to Hudson? A. I don’t remember precisely. I remember it was going to have some bluetooth capability, I remember they wanted it to interact with your cell phone and maybe tell you when the device was going to be running out of battery or needing more liquid. It was going to give you a bunch of signals. So it had a lot more variables to it than some of the simpler products we had seen.”)).

1594. Dr. Rothman, again citing a February 2018 document, claims that Hudson was “on track” for a PMTA filing in the first quarter of 2021. (PX5000 Rothman Report ¶ 106 & n.242 (citing PX1000 (Altria) at 012, which estimates PMTA filing date in Q1 2021)). He ignores evidence that, by August of 2018, the PMTA timeline had been delayed by six months and that Altria had not yet determined whether Hudson would merit a PMTA. (PX4149 (Altria) at 044 (indicating PMTA decision would be made in June 2019 and, if filing was pursued, the filing date would be in September 2021)).

#### **Response to Finding No. 1594**

The proposed finding is inaccurate, incomplete, misleading, and should be disregarded. In his report, Dr. Rothman wrote that, “As of February 2018, Altria expected . . . Project Hudson to be on the market in the first quarter of 2022.” (PX5000 at 055 (¶ 106) (Rothman Expert Report)). This sentence is supported by the document cited by Dr. Rothman. (*See* PX1000 (Altria) at 012 (“Altria Innovation Aspiration Framework, Long Term Strategic Planning Meeting” dated February 5-7, 2018) (noting that Project Hudson’s “Anticipated In-Market” date was “Q1 2022”). In a footnote to the above-quoted sentence, Dr. Rothman included a parenthetical that noted—correctly—that PX1000 indicated that Project Hudson expected to have a “PMTA/MRTP Filing” in “Q1 2021.” (PX5000 at 055 (¶ 106, n.242) (Rothman Expert Report) (quoting PX1000 (Altria) at 012)). Although Complaint Counsel does not disagree that, by August 2018, Altria had pushed back Project Hudson’s timeline by approximately six months, the claim that Dr. Rothman “ignores evidence” is entirely unfounded. In fact, Dr. Rothman expressly relied on the exhibit cited by

Respondents—PX4149—in preparing his report. (See PX5000 at 131 (Appendix B) (Rothman Expert Report) (listing PX4149)).

1595. When asked about Hudson during his deposition, Dr. Rothman acknowledged that with product development, “there’s no certainty” and no telling “if a particular project is going to result in a product on the market at a particular point in time.” (PX7046 Rothman Dep. at 265-66).

### **Response to Finding No. 1595**

The proposed finding is incomplete and misleading. As an initial matter, Dr. Rothman was asked multiple questions—each eliciting a form objection—at the cited pages, and it is unclear whether he was actually referencing Project Hudson in his response. (See PX7046 (Rothman, Dep. at 265-66) (“Q. Well, we know some would fail, right? MR. LOVINGER: Objection to form. BY MS. WILKINSON: Q. Or can you not even say that? You think every one would be a commercial success? A. I’m not saying either of those things. MR. LOVINGER: Objection to form. Q. Or not? You tell me. I’m asking you an open-ended question. Can you tell me -- or do you believe that, regardless of which ones, that there would be some failures if Altria had stayed in the market? In other words, they couldn’t develop an Elite 2.0 formula that worked or they couldn’t develop, you know, Hudson or one of those projects you put in your report? MR. LOVINGER: Objection to form. A. This goes back to Mr. Jupe’s testimony that -- to -- to understand Altria’s competitive significance, it’s -- because over -- product development, there’s no certainty. Altria -- one doesn’t know if a particular project is going to result in a product on the market at a particular point in time. This is why it’s useful to have multiple projects in process.”)).

The proposed finding also mischaracterizes Dr. Rothman’s testimony because it quotes only a snippet that misses the ultimate point that Dr. Rothman was making. Dr. Rothman testified that the lack of certainty with respect to any particular developmental project “is why it’s useful to have multiple projects in process.” (PX7046 (Rothman, Dep. at 265-66)). Dr. Rothman further

explained that “Altria would have continued to compete in the closed system e-cigarette market absent the transaction, which means the products it had on the market and the competitive initiatives, more generally, that it had been in process in 2018 would have continued. Now, exactly which competitive processes would have resulted in a product at a particular point in time, that’s -- that question -- that’s not knowable. We’re in – we’re talking again about this counterfactual world.” (PX7046 (Rothman, Dep. at 264-65)).

1596. By October 2018, all internal development work, including on Hudson, had stopped to free up resources for the Growth Teams. (Jupe (Altria) Tr. 2312; RX0319 (Altria) at 001).

### **Response to Finding No. 1596**

The proposed finding is incorrect, incomplete, misleading, and contrary to the weight of the evidence. Altria did not stop *all* internal development work in October 2018. Rather, the evidence shows that, in October 2018, Altria’s senior leadership announced that all current efforts on e-vapor product development—including work on Project Hudson—would stop, *excluding* the MarkTen PMTA program. (CCFF ¶ 1375).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that the “Growth Teams” did not have access to or the ability to build upon the work that had been done on Project Hudson and other internal development projects. On the contrary, the weight of the evidence indicates that Altria’s Growth Teams had the authority to do just that. (Jupe (Altria) Tr. 2312 (“Q. And did the growth teams have the authority to look back at some of that other work, like things that had been done for potentially the Elite 2.0? A. Sure. Absolutely they did. They could look back and they could get access to anything they wanted.”); *see also* CCFF ¶¶ 1541, 1578).

The proposed finding is also incorrect, incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria stopped its development work “to free up

resources for the Growth Teams.” As Complaint Counsel demonstrated in its Proposed Findings of Fact, Altria’s justifications for discontinuing Elite and Elite 2.0 are pretextual and inconsistent with the evidence and Altria’s incentives if it had not entered into the transaction with JLI. (*See* CCFE ¶¶ 1034-407).

**e. Elite 2.0**

1597. The only other internal development project underway as of August 2018 was Elite 2.0, which was a “notionally upgraded version [of Elite 1.0]. In other words, it -- it didn’t exist. . . . [T]he idea [was] that . . . [Altria] would create a version of Elite that would be better in any number of ways, [although Altria] didn’t even know all the ways that it had to be better yet because [it was] still assessing Elite.” (Murillo (Altria/JLI) Tr. 3050).

**Response to Finding No. 1597**

The proposed finding is inaccurate, incomplete, and misleading. First, it is incorrect that “The only other internal development project underway as of August 2018 was Elite 2.0” because Altria had already begun planning for Elite 3.0. As early as June 2018, Richard Jupe wrote that he was “currently scoping – what comes after [Elite 2.0] in Elite 3.0 (leapfrog).” (PX1086 (Altria) at 001) (email from Jupe to K.C. Crosthwaite dated June 9, 2018)). In fact, an Altria presentation from August 2018 provided an “Elite 3.0 Product Overview” with “Design Freeze 9/2019” and listed the following features: “Additional Flavor Systems for Flavor Variety,” “Improved Industrial Design,” “New Heater/Wick Design,” and “Automation of Assembly for improved manufacturing costs/ complexity.” (PX1671 (Altria) at 007). In August 2018, Nu Mark employees were actively planning for Elite 3.0, including working with outside consultants from Bressler Group. (PX4561 (Altria) at 001-03).

Second, it is inaccurate to describe Elite 2.0 as a “notionally upgraded version of [Elite 1.0]” that “didn’t exist.” (*See* CCFE ¶¶ 1281-300). Altria had prototype Elite 2.0 devices that it tested with consumers in October 2018. (PX4512 (Altria) at 004, 006 (consumer research protocol for Elite 2.0)). Moreover, design lock for Elite 2.0 was projected for March 2020, (PX1323 (Altria)

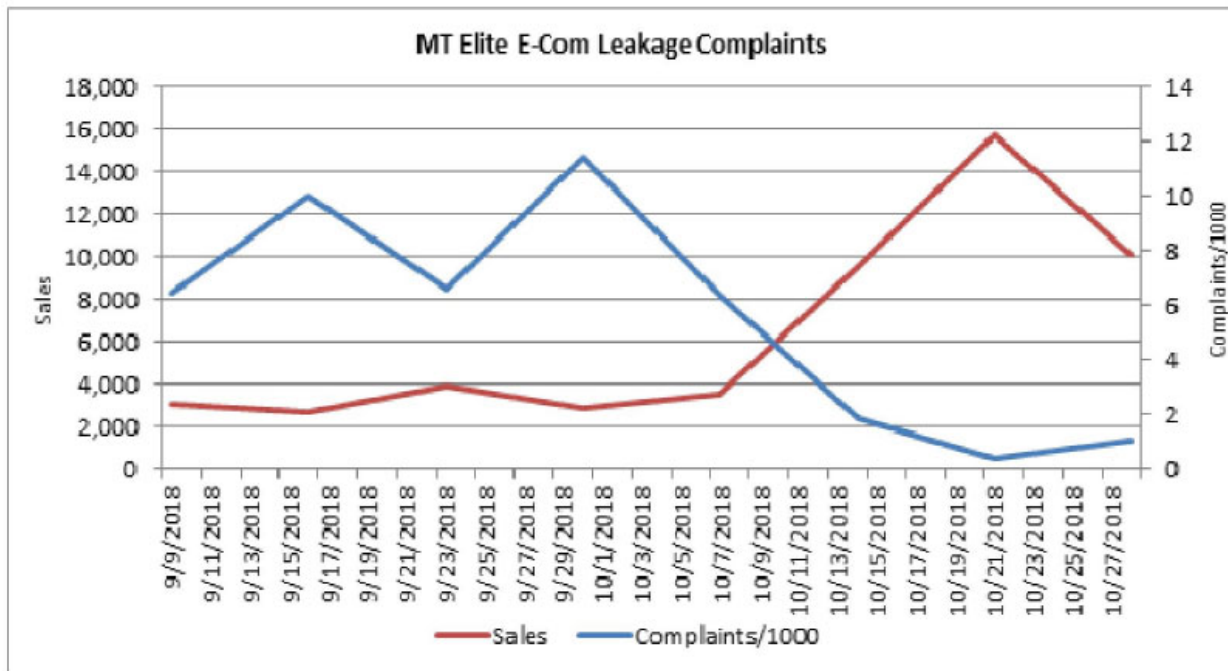
at 016 (“Innovative Products Game Plan Input, Altria Game Plan” dated September 25-27, 2018)), and, as of August 30, 2018, Altria had planned to submit a PMTA for Elite 2.0 in January 2022. (PX4318 (Altria) at 015 (“Nu Mark NPC Meeting”)).

Finally, the proposed finding is incomplete and misleading because it ignores the fact that Elite had only been on the market for five-to-six months as of August 2018, which is not enough time to fully evaluate a product. (CCFF ¶¶ 1144-62). Indeed, the proposed finding acknowledges that Altria was “still assessing Elite” as of August 2018.

1598. Some of the “must have” fixes included “[a]pproved pod materials,” “[r]educed pod leakage,” “[d]ry puff prevention,” and “[f]ormulas with higher nicotine and salts.” (RX0496 (Altria) at 022; Jupe (Altria) Tr. 2254-56; Murillo (Altria/JLI) Tr. 2942).

#### **Response to Finding No. 1598**

The proposed finding is incomplete and misleading to the extent that it implies that Altria had not already developed ways to address these issues. For example, prior to discontinuing MarkTen Elite, Altria successfully implemented a gasket fix notwithstanding the FDA’s Deeming Rule. (CCFF ¶¶ 1206-36). The gasket fix that Altria implemented for Elite succeeded in reducing pod leakage. (CCFF ¶¶ 1219-27). The gasket fix also reduced formaldehyde production, (CCFF ¶¶ 1228-31), and Altria was actively developing a new battery (BVR 2.8) with dry puff prevention. (CCFF ¶¶ 1275-80). In October 2018, after Altria implemented the gasket fix, e-commerce leakage complaints for MarkTen Elite plummeted at the same time that MarkTen Elite e-commerce sales grew significantly from about 3,000 per day on October 1, 2018 to over 10,000 per day on October 25, 2018 when Altria announced the discontinuation of Elite. (CCFF ¶ 1221).



(PX1970 (Altria) at 002).

Altria also had formulas with higher nicotine and salts that it sold under the MarkTen Bold brand name. Prior to the transaction, Altria had developed new nicotine salt formulations with different acids, and was already trialing them with consumers. (See CCFF ¶¶ 1544-48). Altria’s Jupe testified that Altria had developed an e-liquid with the right ratio of nicotine and acids that “will give you . . . the best satisfaction, closest to a cigarette.” (PX7016 (Jupe (Altria), Dep. at 138 (discussing PX1941 (Altria) at 001)); see also Jupe (Altria) Tr. 2149; CCFF ¶¶ 1290-92).

1599. Complaint Counsel and Dr. Rothman make much of Altria’s work on developing Elite 2.0. (CC Pretrial Br. 13; PX5000 Rothman Report ¶¶ 98, 106, 112; PX5001 Rothman Rebuttal ¶¶ 5, 16, 52, 83).

**Response to Finding No. 1599**

The proposed finding is vague and argumentative because the phrase “make much of” is undefined and unexplained. But Complaint Counsel does not disagree that through the first half of 2018, Altria was developing an improved version of MarkTen Elite that it called Elite 2.0. (See CCFF ¶¶ 1281-94).

1600. But Elite 2.0 was no more than “a series of concepts on pieces of paper.” Those concepts “never made it to design lock let alone product lock.” (PX7027 Murillo (Altria/JLI) Dep. at 158-59).

### **Response to Finding No. 1600**

The proposed finding is incorrect, incomplete, and misleading. The evidence shows that Elite 2.0 was much more than “a series of concepts on pieces of paper.” On the contrary, Altria was actively developing Elite 2.0 and even tested prototypes with consumers in October 2018. (PX4512 (Altria) at 004, 006 (consumer research protocol for Elite 2.0)). Altria had also developed new e-liquids for Elite 2.0 that Richard Jupe testified “was the ratio that our sensory and flavorists would say this will give you, if you will, the best satisfaction, closest to a cigarette.” (PX7016 (Jupe (Altria), Dep. at 138 (discussing PX1941 (Altria) at 001)); *see also* Jupe (Altria) Tr. 2149 (“Q. So consumers would actually have the opportunity to sample these ratios of Sweet Original flavor here, in this example, with these reformulated acid formulas and provide feedback. Is that correct? A. That was the plan.”)).

1601. Dr. Rothman admits that he “do[es]n’t have an opinion that Altria could have had Elite [2.0] on the market in 2020, given where it was in 2018 and given the time required to complete a PMTA and to submit it and get it approved.” “The product wasn’t finished. They hadn’t submitted a PMTA.” (PX7048 Rothman Trial Dep. at 190-91).

### **Response to Finding No. 1601**

The proposed finding is incomplete and misleading. As an initial matter, the proposed finding omits a relevant portion of Dr. Rothman’s answer in the second quote from his trial deposition. Dr. Rothman testified: “Elite 2.0, my understanding is that Altria was working on Elite 2.0 in 2018. The product wasn’t finished. They hadn’t submitted a PMTA.” (PX7048 (Rothman, Trial Dep. at 190)).

The proposed finding is also incomplete and misleading because it takes Dr. Rothman’s trial deposition testimony out of context. Dr. Rothman testified that in October 2018, “Altria was

working on developing Elite 2.0 with nicotine salts,” and that “Altria’s exit deprives the market of those efforts. It – it deprives the market of that innovation competition.” (PX7048 (Rothman, Trial Dep. at 34-35). While it “is inherently unknowable” how Elite 2.0 would have evolved over time and when exactly it would have been on the market, “That doesn’t mean that the effect . . . of the transaction and Altria’s exit from competition can’t be valued. Economists evaluate counterfactually by focusing on incentives and ability. Altria was pushing a number of competitive initiatives, and it has strong incentives and significant ability to continue doing so.” (PX7048 (Rothman, Trial Dep. at 35-36).

Dr. Rothman further explained why it was not necessary to know exactly when Elite 2.0 would have been on the market. “It’s not necessary to know exactly which products Altria would have had on the market and when to evaluate if Altria would have been a significant competitor. One can think about this from the perspective of a rival of Altria. The rival doesn’t need to know exactly which products Altria had on the market and when to understand that Altria is a competitive threat, given Altria’s incentives to invest and to compete in e-cigarettes and its capabilities to do so.” (PX7048 (Rothman, Trial Dep. at 38)).

1602. As of August 2018, Nu Mark’s “most optimistic plan” estimated that it would take until the first quarter of 2022 to file a PMTA on Elite 2.0. (Jupe (Altria) Tr. 2298-300 (discussing PX1673 (Altria) at 013)). But, in Jupe’s many years of experience, “[e]very single time,” the projected schedule would “go backwards.” (Jupe (Altria) Tr. 2299). Realistically, he believes that given the time necessary for product development, as well as PMTA preparation and review, Elite 2.0 was five to six years away from being introduced into the market. (Jupe (Altria) Tr. 2156).

### **Response to Finding No. 1602**

The proposed finding is incomplete, misleading, and unreliable as it relies solely on the self-serving testimony of an Altria executive. The evidence shows that, as of August 2018, Altria planned to submit a PMTA for Elite 2.0 in January 2022. (PX1673 (Altria) at 013; *see also* PX4318 (Altria) at 015 (“Nu Mark NPC Meeting”)). Nothing in Altria’s ordinary course documents



corroborates Jupe's testimony that the timeline presented in August 2018 was Nu Mark's "most optimistic plan" or that Elite 2.0 was "five to six years away from being introduced into the market."

The proposed finding is also incomplete and misleading because it takes Jupe's testimony out of context. When Jupe stated that Elite 2.0 was "five to six years away" from coming to market, he was describing the significant investments that Altria was planning to make in Elite 2.0 prior to the transaction with JLI. (*See* Jupe (Altria) Tr. 2156) (discussing PX1086 (Altria) at 001) ("Q. And you're signaling here to Mr. Crosthwaite that you are continuing to invest in the platform of Elite 2.0. Is that correct, Mr. Jupe? A. That's exactly right. I mean, as far as product development was, we were -- we were full out looking at Elite 2.0 to not only remedy all the problems that we have gone through already today, but also to incorporate the appropriate nicotine salts in order to make it satisfying, and then obviously and ultimately put it in front of the agency with a battery of science to support its application, and then ultimately get the product into the market, which our estimate at that point in time was five to six years away.")).

1603. And, as with Hudson, by early October 2018, Altria had stopped all work on Elite and Elite 2.0 so the Growth Teams could decide what projects to pursue. (Quigley (Altria) Tr. 2069-71 (discussing RX0319 (Altria) at 001); Gardner (Altria) Tr. 3088). It was not "a serious idea" that the Growth Teams would choose to pursue Elite 2.0, because "it was hardly a leapfrog product." (Garnick (Altria) Tr. 1662).

### **Response to Finding No. 1603**

Complaint Counsel does not disagree that, in October 2018, Altria's senior leadership announced that all current efforts on e-vapor product development—including work on Elite and Elite 2.0—would stop, excluding the MarkTen PMTA program. (CCFF ¶ 1375). But the proposed finding is incorrect, incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria stopped its work on Elite and Elite 2.0 "so the Growth Teams could decide what projects to pursue." As Complaint Counsel demonstrated in its Proposed

Findings of Fact, Altria's justifications for discontinuing Elite and Elite 2.0 are pretextual and inconsistent with the evidence and Altria's incentives if it had not entered into the transaction with JLI. (*See* CCFF ¶¶ 1034-407).

The second sentence of the proposed finding is incomplete, misleading, contrary to the weight of the evidence, and unreliable because it relies solely on the self-serving testimony of an Altria executive. No Altria ordinary course documents corroborate Garnick's testimony that it was not "a serious idea" for the "Growth Teams" to build upon the work done for Elite 2.0. On the contrary, the weight of the evidence indicates that Altria's Growth Teams had the authority to do just that. (Jupe (Altria) Tr. 2312 ("Q. And did the growth teams have the authority to look back at some of that other work, like things that had been done for potentially the Elite 2.0? A. Sure. Absolutely they did. They could look back and they could get access to anything they wanted."); *see also* CCFF ¶¶ 1541, 1578).

#### f. Growth Teams

1604. That Altria had no viable product ready in its internal development pipeline is further confirmed by its pivot to the Growth Teams in October 2018. (*See supra* Part IX.A, IX.C.1).

#### **Response to Finding No. 1604**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. Although Complaint Counsel does not disagree that some of Altria's innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) ("Well, look, it's been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.")). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple "bets." (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) ("And, you know, the stories, Thomas

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Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”))). The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space succeeded or that it never introduced a commercially successful e-cigarette product. (*See Responses to RPF* ¶¶ 144, 181).

The proposed finding is also misleading to the extent that it suggests that Altria did not learn and ultimately benefit from its so-called innovation “failures.” Altria’s product development team used what it learned from failed R&D efforts to inform future product research. (CCFF ¶ 1563; *see also* CCFF ¶ 1557 (Altria used feedback from consumer research to inform the next round of product development efforts)). Indeed, the “Growth Teams” had the authority and freedom to incorporate into their efforts the work that had been done on any of Altria’s existing or discontinued products. (Jupe (Altria) Tr. 2312 (“Q. And did the growth teams have the authority to look back at some of that other work, like things that had been done for potentially the Elite 2.0? A. Sure. Absolutely they did. They could look back and they could get access to anything they wanted.”); *see also* CCFF ¶¶ 1541, 1578).

The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] }  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands

also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

Finally, the proposed finding is also vague in that the term “viable product” is undefined.

1605. Thus, far from having “a lot of different bets,” (CC Pretrial Br. 17 (quoting PX7016 (Jupe (Altria) Dep. at 215); PX5000 Rothman Report ¶ 106 (same)), by October 2018, Altria had just one—a Hail Mary attempt to develop a leapfrog product through the Growth Teams, (Willard (Altria) Tr. 1275).

### **Response to Finding No. 1605**

The proposed finding is argumentative, incorrect, incomplete, misleading, and contrary to the weight of the evidence. It is simply not true that by October 2018 Altria had “just one” bet, “a Hail Mary attempt” with the “Growth Teams.” As explained in Complaint Counsel’s Proposed Findings of Fact, (*see* CCFF ¶¶ 1408-730), and as Altria’s Richard Jupe readily acknowledged, (PX7016 (Jupe (Altria), Dep. at 215-16)), Altria had “a lot of different bets” prior to the transaction, including:

- **Altria’s existing e-cigarette products**, (CCFF ¶¶ 1493-526), including MarkTen, MarkTen Bold, and MarkTen Elite, which were margin positive, (CCFF ¶¶ 1497-98), “getting traction with consumers” (CCFF ¶ 1499), were the second fastest growing e-cigarette products behind JUUL in 2018, (CCFF ¶¶ 1507-08), and had the third-highest overall share in the U.S. closed-system e-cigarette market in 2018. (CCFF ¶ 1510).
- **Efforts to improve its existing e-cigarette products**, (CCFF ¶¶ 1538-52), including Elite 2.0, (CCFF ¶¶ 1281-94), and BVR 2.8. (CCFF ¶¶ 1275-80).
- **Development of next generation e-cigarette products**, (CCFF ¶¶ 1553-87), including Elite 3.0, (CCFF ¶¶ 1564-66), and two independent growth teams. (CCFF ¶¶ 1577-85).

- **Partnership with PMI**, (CCFF ¶¶ 1588-716), including U.S. rights to VEEV, (CCFF ¶¶ 1638-93), APEX, (CCFF ¶¶ 1620-37), PMI's MESH technology, (CCFF ¶¶ 1651-53, 1674-86, 1689), and [REDACTED], (CCFF ¶¶ 1598, 1644-46, 1691).
- **Collaborations with other e-cigarette companies and technologies**, (CCFF ¶¶ 1717-30).

1606. Complaint Counsel did not demonstrate that the Growth Teams would be capable of developing a new product that could be commercialized in the near future. By the time the Growth Teams were disbanded in December 2018, they “didn’t even have a product concept in mind, let alone a leapfrog concept.” (Garnick (Altria) Tr. 1661-62; *see also* PX7000 Garnick (Altria) IHT at 132 (“It was a bunch of people in a room saying, okay, think of something.”)).

#### **Response to Finding No. 1606**

The proposed finding is incomplete, misleading, contrary to the weight of the evidence, and unreliable as it relies solely on the testimony of an Altria executive. *First*, the record contains substantial evidence that the “Growth Teams” would have been likely to develop competitively significant products. (CCFF ¶¶ 438, 453, 1577-87). In October 2018, Altria formed two independent Growth Teams to develop next-generation e-cigarette products. (Quigley (Altria) Tr. 1979-80; PX4010 (Altria) at 010 (Willard memo re: “Growth Strategy Update: Innovative Products”). Altria staffed the Growth Teams with its “top performers across the various functions,” including science, regulatory affairs, finance, and marketing. (PX7010 (Gifford (Altria), IHT at 189-90)). Altria’s Magness testified that “whoever assigned the [growth] teams placed some very smart and capable and committed people.” (PX7017 (Magness (Altria), Dep. at 202)).

Moreover, Altria was prepared to “fully support” its e-vapor growth teams,” (Garnick (Altria) Tr. 1657-58), even if it meant spending another \$100 million (PX7000 (Garnick (Altria), IHT at 130 (“But if they came back and could justify a budget of \$100 million and convince us

that it was a legitimate need, we certainly would have done that.”)). Altria’s current CEO, Billy Gifford, told the Growth Teams that budget would not be a constraint, and that they could retain any third parties or hire any new talent that they needed to develop new e-cigarette products. (PX7010 (Gifford (Altria), IHT at 192-93) (“I met with each of the growth teams and told them do not let the budget be a constraint on any of your efforts.”)). Indeed, Altria assumed that its Growth Teams would have a new product ready by 2020, and acknowledged the possibility that a new platform or acquired products could be in place in 2019. (PX7015 (Gogova (Altria), Dep. at 263-65); PX1989 (Altria) at 001 (internal Altria email dated December 2018 attaching “3 Year Estimated Spend” spreadsheet)).

Based on an analysis of Altria’s incentive and ability to compete in e-cigarettes, Dr. Rothman concluded that, absent the transaction, Altria would have continued to invest in e-cigarette innovation and compete in closed-system e-cigarettes for the long-run. (PX5000 at 053-57 (¶¶ 103-07); (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 48-49)).

*Second*, the proposed finding is misleading and disingenuous in its claim that “By the time the Growth Teams were disbanded in December 2018, they ‘didn’t even have a product concept in mind, let alone a leapfrog concept.’” (Garnick (Altria) Tr. 1661-62). This conveniently ignores the fact that the Growth Teams were disbanded in December 2018 only when Altria entered into the transaction and non-compete agreement with JLI. (PX7026 (Gardner (Altria), Dep. at 175-76)); PX7010 (Gifford (Altria), IHT at 216) { [REDACTED] [REDACTED] [REDACTED] } Since the Growth Teams were only formed in October 2018, (Quigley (Altria) Tr. 1979-80; PX4010 (Altria) at 010 (Willard memo re: “Growth Strategy Update: Innovative Products”), it would have

been impossible for Altria—or any other company—to develop new “leapfrog products” in a two-month period. Altria should not be rewarded because it eliminated serious competitive initiatives before they had a chance to get off the ground.

The proposed finding is also incomplete and misleading to the extent that it implies that the Growth Teams were the only option that Altria was pursuing prior to transaction to develop a new closed-system e-cigarette product. Through its partnership with PMI, Altria also had access to all of PMI’s current and future e-cigarette products including VEEV, which had all the features that Altria claims were “must have” features in RPF ¶ 1598. (CCFF ¶¶ 1651-86). [REDACTED]

1607. The Growth Teams were at what Jupe called the “discovery or definition phase. . . . They were still defining what they thought the consumer product would look like.” (PX7016 Jupe (Altria) Dep. at 339).

**Response to Finding No. 1607**

The proposed finding is incomplete and misleading. To the extent that the “Growth Teams” were in their “discovery or definition phase,” it is only because Altria disbanded them two months after they were first formed when Altria entered into the transaction and non-compete agreement with JLI. (*See* Response to RPF ¶ 1606; PX7026 (Gardner (Altria), Dep. at 175-76)); PX7010 (Gifford (Altria), IHT at 216) (*in camera*)).

1608. The undisputed evidence shows that it “would have taken five to ten years” before any product developed by the Growth Teams could have received FDA approval and been placed on the market. (Garnick (Altria) Tr. 1662).

**Response to Finding No. 1608**

The proposed finding is incorrect, incomplete, and misleading. The “undisputed evidence” does not show that “it ‘would have taken five to ten years’ before any product developed by the

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Growth Teams” could have been sold. Altria’s CEO, Billy Gifford, for example, testified that the Growth Teams were likely to bring products to market within 4-5 years. (PX7010 (Gifford (Altria), IHT at 191 (“So we wanted these [growth] teams to really think about, okay, start with the consumer but be thinking four to five years out, because that’s when we felt like we would have likelihood of bringing those products to market.”)); *see also* PX5000 at 076 (¶ 132) (Rothman Expert Report) [REDACTED]

The proposed finding is also incomplete and misleading to the extent that it implies that the Growth Teams were the only option that Altria was pursuing prior to transaction to develop a new closed-system e-cigarette product. Through its partnership with PMI, Altria also had access to all of PMI’s current and future e-cigarette products including VEEV, which had all the features that Altria claims were “must have” features in RPF ¶ 1598. (CCFF ¶¶ 1651-86). [REDACTED]

1609. Jupe, who was tasked with overseeing the Growth Teams, outlined what lay ahead: The Growth Teams would need to finish the definition phase, then go to the development phase, where they would engineer the product. After that, they would go to the commercial phase, where they would write all the manufacturing specifications, after which they would lock down the design. All of that “product development cycle” would take two years, “if you’re lucky.” And only after design lock could the Growth Teams begin gathering scientific evidence, which would take approximately two years. Then they would wait during FDA review, which could easily be 18 months. “So [Altria was] five to six years away from a potential product.” (PX7016 Jupe (Altria) Dep. at 340-41; *see also* PX5000 Rothman Report ¶ 132 (saying that the “time horizon [for the Growth Teams was] four to five years”)).

**Response to Finding No. 1609**



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The proposed finding is incomplete and misleading to the extent that it implies that the Growth Teams were the only option that Altria was pursuing prior to transaction to develop a new closed-system e-cigarette product. Through its partnership with PMI, Altria also had access to all of PMI's current and future e-cigarette products including VEEV, which had all the features that Altria claims were "must have" features in RPF 1598. (CCFF ¶¶ 1651-86). [REDACTED]

[REDACTED] } The proposed finding is also incomplete and misleading to the extent that it relies on the self-serving testimony of a single Altria executive.

1610. Moreover, there was substantial skepticism that the Growth Teams would have been able to design a viable product. As Jupe explained, you cannot turn "a knob" and "all of a sudden you're an innovative company." (PX7016 Jupe (Altria) Dep. at 212).

#### **Response to Finding No. 1610**

The first sentence of the proposed finding is unsupported and should be disregarded. The first sentence of the proposed finding is also vague because the term "viable product" is undefined.

The second sentence of the proposed finding is incomplete and misleading. Rather than expressing skepticism about the Growth Teams, Jupe appeared to be expressing optimism. As an initial matter, in the cited testimony, Jupe was discussing PX1673, a document from August 2018, before the Growth Teams were created. (PX1673 (Altria) at 003). Discussing Altria's prior developmental efforts, Jupe testified: "We were reminding [sic] that don't lose patience. We're going to make more mistakes than victories, but it's a journey, not a knob you turn and all of a sudden you're an innovative company." (PX7016 (Jupe (Altria), Dep. at 212)). In the very next question, when Jupe was asked whether past mistakes "would inform the next steps you take in innovation," Jupe agreed: "I would certainly hope they would inform, yes. I mean, that was always the intent of learning from failures, isn't it?" (PX7016 (Jupe (Altria), Dep. at 212)). Thus, in Jupe's

view, Altria would have learned from its past mistakes to inform future development that the Growth Teams would have pursued had Altria not exited the e-vapor business.

1611. Altria still faced the talent and innovation gaps discussed above. (*See supra* Parts II.A.1, VII.A, IX.A). Most significantly, Altria “lacked . . . certain areas of expertise that would have been really important in developing devices.” (PX7017 Magness (Altria) Dep. at 202). The Growth Team’s assignment was “a huge task for such a small team with everybody who really ha[d] no proven track record[] of innovation and bringing new product[s] into the marketplace.” (PX7015 Gogova (Altria) Dep. at 317-19).

### **Response to Finding No. 1611**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence. First, the proposed finding omits an important qualifier from Magness’s quoted deposition testimony. Magness actually stated: “*What they may have lacked were* certain areas of expertise that would have been really important in developing devices.” (PX7017 (Magness (Altria), Dep. at 202) (emphasis added)). Moreover, the statement in the third sentence that “The Growth Team’s assignment was ‘a huge task for such a small team with everybody who really ha[d] no proven track record[] of innovation and bringing new product[s] into the marketplace’” is misleading and contrary to the weight of the evidence. In fact, on the same page of the Magness deposition cited above, Magness testified that “whoever assigned the [growth] teams placed some very smart and capable and committed people.” (PX7017 (Magness (Altria), Dep. at 202)). Altria’s current CEO Gifford also testified that Altria staffed the growth teams with its “top performers across the various functions,” including science, regulatory affairs, finance, and marketing. (PX7010 (Gifford (Altria), IHT at 189-90)).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that Altria lacked the talent to develop innovative e-cigarette products. In November 2017, Altria’s Chief Innovation Officer, Jim Dillard, told investors that, with respect to reduced harm products, “We have the top talent we need, recruited from around

the world. They include nearly 195 PhDs and 75 engineers across multiple disciplines. They represent 16 different countries and speak 32 different languages, all working together under one roof and laser focused on advancing Altria's harm reduction aspiration. Over the past 10 years these employees received over 660 patents and published research in nearly 225 publications.” (PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)). Altria’s then-CEO, Marty Barrington, similarly touted Altria’s innovative capabilities to investors: “This year we’re celebrating the 10th anniversary of our \$350 million Center for Research and Technology, which is just miles from here. We built it to house our team of more than 400 scientists, physicians, product developers, engineers, regulatory experts and others who are developing innovative products, pursuing their regulatory authorization and constructively engaging with the FDA on policy.” (PX9000 (Altria) at 005 (Nov. 2017 Investor Day remarks)). In March 2019, Altria’s then-CEO Howard Willard again touted Altria’s innovation success, stating in an interview with the *Wall Street Journal* that Altria “developed very satisfying [e-vapor] products that early on were converting adult cigarette smokers.” (PX1172 (Altria) at 003).

Indeed, Altria was ranked second in terms of high-quality e-cigarette patents, and had the fourth largest overall patent portfolio in the industry. (CCFF ¶¶ 1837-41). Altria product development team developed new flavors, (CCFF ¶¶ 1467-68), as well as other innovative features, including magnetic pods for MarkTen Elite. (CCFF ¶¶ 1477-80). In addition, Altria’s product development team demonstrated its ability to improve Altria’s existing products, including the new gasket for Elite that stopped leaking and reduced formaldehyde generation. (CCFF ¶¶ 1206-34, 1489-92).

JLI, for its part, feared Altria’s ability to innovate in e-cigarettes. Using its “Competitive Analysis Framework,” JLI concluded that MarkTen Elite (along with a PMI e-cigarette product)

were two of only four products (besides JUUL) that had “Long-Term Viability.” (CCFF ¶ 1522). JLI’s competitive assessment took into account “Innovation Sustainability,” and scored Altria’s products based on the “Quality of current talent,” the “Ability to recruit high-quality talent,” and “Ownership of IP building blocks.” (PX2289 (JLI) at 021).

**4. Complaint Counsel Failed To Demonstrate “Clear Proof” That Altria Could Have Partnered With PMI To Introduce A Competitive Product In The “Near Future”**

1612. The possibility that Altria could have acquired the right to sell a new product from another company is no more promising, and no less speculative. (*See infra* ¶¶ 1613-32).

**Response to Finding No. 1612**

The proposed finding should be disregarded because it contains no citations to the record and is argumentative, incorrect, incomplete, and contrary to the weight of the evidence. (*See Responses to RPF ¶¶ 1613-32*).

1613. The only potential partnership that Complaint Counsel addressed at trial was a potential collaboration on PMI’s “Mesh” product. (*See King (PMI) Tr. 2344; see also O’Hara (JLI) Tr. 610; Begley (Altria) Tr. 983*).

**Response to Finding No. 1613**

The proposed finding is incorrect, incomplete, and misleading. As an initial matter, “MESH” is PMI’s proprietary technology that is used in its e-cigarette products, including VEEV. (King (PMI) Tr. 2344; PX7020 (King (PMI), Dep. at 17). More importantly, Altria’s partnership with PMI encompassed much more than the { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The proposed finding also ignores other potential collaborations and partnerships with e-cigarette companies that were foreclosed by the transaction with JLI and discussed throughout the record in this case. (*See* CCFE ¶¶ 1717-30).

1614. “Mesh” is a technology that has been used in at least three generations of PMI e-cigarettes. The name “Mesh” refers to the mesh heater that PMI uses in its products, rather than the standard wick and coil. (King (PMI) Tr. 2350). It is “like a fine-wire screen, in effect, where you pass electricity through the screen, and that creates the aerosol.” (King (PMI) Tr. 2350).

#### **Response to Finding No. 1614**

The first sentence of the proposed finding is unsupported and should be disregarded. Otherwise, Complaint Counsel does not disagree with the proposed finding.

1615. The first generation, branded Nicocig Mesh, was introduced into the U.S. market before August 8, 2016. Altria commercialized the product two years later, in mid-2018, under the brand name Apex—the baton-shaped, saltless, tank product discussed above. (*See supra* Part XVI.B.3; *see also* King (PMI) Tr. 2535 (“It was . . . similar to the shape of a baton . . . .”); PX7033 O’Hara (JLI) Dep. at 118-19 (explaining that the product “branded Nicocig Mesh . . . was the version that they had introduced into the US as Apex”)).

#### **Response to Finding No. 1615**

The proposed finding is incorrect, vague, and misleading. First, as is clear from the picture below, APEX was not “baton-shaped.” (*See* PX4014 (Altria) at 044 (2017 Investor Day slide deck)). When PMI’s King referred to APEX as a “baton,” it was his way of saying he viewed the device to be too large. (*See* PX7020 (King (PMI), Dep. at 154) (“It was just too big. I referred to it as a baton.”)).



(PX4014 (Altria) at 044 ).

Second, the proposed finding is incorrect, vague, and misleading in its reference to APEX as a “tank” product. APEX was a closed-system, pod-based e-cigarette. (See, e.g., Willard (Altria) Tr. 1240; PX2022 (Altria) at 002 (letter to FDA Commissioner Gottlieb); CCF ¶ 143)).

1616. As demonstrated above, Apex was not a viable contender in the U.S. market. (See supra Part XVI.B.3).

**Response to Finding No. 1616**

The proposed finding should be disregarded because it contains no citations to the record. The proposed finding is also vague because the term “viable contender” is undefined. (See Responses to RPF Part XVI.B.3).

1617. [REDACTED]

The purpose of that test was to “verif[y] that the engine worked successfully.” (King (PMI) Tr. 2546; see also O’Hara (JLI) Tr. 616-20 (discussing the quality of IQOS Mesh’s componentry)). [REDACTED]

[REDACTED], it was also a baton-shaped, { [REDACTED] } tank

product, (PX1471 (Altria) at 032 (depicting IQOS Mesh); { [REDACTED] }  
 [REDACTED] ; King (PMI) Tr. 2542 (acknowledging that in 2018 PMI was “still  
 investigating . . . the right formulation” for countries without a nicotine cap)).

**Response to Finding No. 1617**

The proposed finding is incorrect, vague, incomplete, and misleading.

The statement that PMI’s Martin King acknowledged that { [REDACTED] }  
 [REDACTED] } is false and unsupported by the cited evidence. The  
 proposed finding cites to testimony from King about a document that was not admitted into  
 evidence that purports to show the { [REDACTED] }  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] }

The statement that PMI’s { [REDACTED] } “baton-  
 shaped” is also false and unsupported by the cited evidence. First, the cited testimony from King  
 concerned APEX, not { [REDACTED] } (King (PMI) Tr. 2535). Moreover, when King referred to  
 APEX as a “baton,” it was his way of saying he viewed the device to be too large. (PX7020 (King  
 (PMI), Dep. at 154) (“It was just too big. I referred to it as a baton.”)). Finally, as is clear from the  
 picture below, { [REDACTED] } was not “baton-shaped.” (PX1471 (Altria) at 032 { [REDACTED] }  
 [REDACTED]

[REDACTED]

1618. Complaint Counsel does not appear to argue that this product would have been a significant competitor in the United States. Nor could it. As a post-August 8, 2016 product, it was not eligible for immediate market entry under the Deeming Rule. (Garnick (Altria) Tr. 1699 (explaining that new products could not be introduced after August 8, 2016 without prior FDA approval)). And there is no evidence that the second-generation product was any more viable than the first.

[REDACTED]}. Indeed, IQOS Mesh is no longer on the market today. (O'Hara (JLI) Tr. 644-45).

### **Response to Finding No. 1618**

The proposed finding is argumentative, incorrect, incomplete, and misleading. The first two sentences of the proposed finding should be disregarded because they contain no citations to the record and are argumentative. The proposed finding is also incomplete and misleading because it fails to acknowledge that Altria had the ability and incentive to compete in the closed-system e-cigarette market but for the transaction. (See CCFE ¶¶ 1410-16; *see also* CCFE ¶¶ 1408-730).



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The statement that “there is no evidence that the second-generation product was any more viable than the first” is inaccurate, incomplete, and misleading. (*See* CCFE ¶¶ 1626-37). Indeed, the evidence shows that Altria considered PMI’s first-generation APEX product to be viable. In November 2017, Altria’s Begley told investors that “We’ve received positive results from our initial consumer research, and as a result, we plan to further test [PMI’s MESH technology] – called APEX in the U.S. – as a line extension under the MarkTen brand.” (PX9000 (Altria) at 018 (Nov. 2017 Investor Day remarks)). { [REDACTED]

[REDACTED] } And in August 2018, Altria’s Joe Murillo told his colleague Murray Garnick that he expected APEX would do well in terms of product integrity and risk reduction assessment, both of which are relevant to the FDA’s PMTA analysis. (PX1600 (Altria) at 001 (email from Murillo to Garnick dated August 14, 2018) (commenting on slide 36 of the draft e-vapor update); *see also* PX7027 (Murillo (Altria/JLI), Dep. at 191)).

Moreover, at trial, PMI’s Martin King testified that when PMI sold a product similar to APEX in the U.K., PMI verified that the MESH aerosolization technology worked well and that the engine worked successfully. (King (PMI) Tr. 2545-46). King also testified that PMI received good feedback from consumers on how the flavors tasted and the way that the device delivered a very consistent aerosol. (King (PMI) Tr. 2545-46).

The statement that { [REDACTED] } is also incomplete and misleading. [REDACTED] } In 2018, JUUL became the dominant e-cigarette brand. (*See* CCFE ¶¶ 158-61). However, Altria was quickly able to figure out the “appropriate ratio of salt to nicotine” (Jupe (Altria) Tr. 2137-38,

2144-45; *see also* PX7016 (Jupe (Altria), Dep. at 138); PX1941 (Altria) at 001). PMI was also able to develop e-liquids for VEEV with nicotine salts that provide nicotine satisfaction and are able to convert cigarette smokers. (CCFF ¶¶ 1654-59).

Finally, the statement that “IQOS Mesh is no longer on the market today” is also incomplete and misleading. IQOS MESH is no longer on the market because it has been replaced by VEEV, a superior product. (*See* CCFF ¶¶ 1638-93). Complaint Counsel does not disagree that IQOS MESH was not introduced in the United States before August 8, 2016.

1619. The third-generation product, which PMI actively is working on today, is now shaped more like the pod products that dominate the U.S. market but uses the same “mesh engine” as the earlier iterations. (King (PMI) Tr. 2536-37). It is called IQOS VEEV. (King (PMI) Tr. 2344; O’Hara (JLI) Tr. 644).

#### **Response to Finding No. 1619**

The proposed finding is incomplete and misleading to the extent that it implies that VEEV is still in development. PMI started selling VEEV internationally in 2020, and is committed to selling VEEV in twenty countries by the end of 2021. (CCFF ¶¶ 1647-48, 1650). Otherwise, Complaint Counsel has no specific response.

1620. Complaint Counsel argues that, at the time of the transaction, Altria was not “many years” away from introducing a new e-vapor product because it could have partnered with PMI to commercialize successfully VEEV in the United States. (CC Pretrial Br. 28). The record evidence contradicts this assertion.

#### **Response to Finding No. 1620**

The proposed finding should be disregarded because it contains no citations to the factual record and is not a “finding of fact,” but rather a legal conclusion about the sufficiency of the evidence offered by Complaint Counsel. Respondents inappropriately state their own argument as a “fact.” Moreover, the statement is contrary to the weight of the evidence. Altria and PMI had planned for § [REDACTED]

[REDACTED]

[REDACTED] }; *see also* Response to RPF ¶ 1551).

1621. [REDACTED] }

**Response to Finding No. 1621**

The proposed finding is incomplete and misleading. If Altria had not entered into the transaction with JLI, VEEV could have been commercialized in the U.S. much sooner. (*See* PX1475 (Altria) at 004 { [REDACTED] }; *see also* Response to RPF ¶ 1551). Martin King testified that PMI entered into the Joint Research, Development and Technology Sharing Agreement (“JRDTA”) with Altria because Altria would help speed up the commercialization of VEEV and improve its likelihood of commercial success. (PX7020 (King (PMI), Dep. at 47-48) (“[We] felt that with Altria’s footprint, outstanding sales force, access to retail shops, all of their other supporting abilities, including government affairs, etcetera, would help commercialization of both IQOS heat not burn and [VEEV], and it would speed the commercialization and make the success much more likely and faster.”)).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

1622.

[REDACTED]  
}; *see also* PX7020 King (PMI) Dep. at 184-86; [REDACTED]

**Response to Finding No. 1622**

The proposed finding is incomplete and misleading. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]};

*see also* Response to RPF ¶ 1551).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

1623. {

[REDACTED]

**Response to Finding No. 1623**

The proposed finding is incomplete and misleading. At trial, Martin King testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

1624. {

[REDACTED] }

**Response to Finding No. 1624**

The proposed finding is incomplete and misleading. As explained in response to ¶ 1621, if Altria had not entered into the transaction with JLI and instead continued its partnership with PMI to commercialize VEEV in the U.S., King believed that it “would [have] spe[]d [up] the commercialization and make the success [of VEEV] much more likely and faster.” (See Response to RPF ¶ 1621).

1625. *Second*, there is no evidence that VEEV contains an e-liquid formula capable of offering sufficient nicotine satisfaction so that the product could be competitive in the U.S. market. The only evidence Complaint Counsel offers is Martin King’s assertion that consumers have given VEEV “good feedback” and are “switching from smoking.” (King (PMI) Tr. 2347).

**Response to Finding No. 1625**

The proposed finding is incorrect, incomplete, misleading, and contrary to the weight of the evidence. To begin with, the statement that “there is no evidence that VEEV contains an e-liquid formula capable of offering sufficient nicotine satisfaction” is false. Indeed, the proposed finding contradicts itself in the very next sentence when it cites to the trial testimony of Martin King—the CEO of PMI America—that “consumers have given VEEV ‘good feedback’ and are ‘switching from smoking.’” (King (PMI) Tr. 2347).

As King explained at trial, PMI conducted consumer testing panels and has real-life consumer data from the sale of VEEV in other countries. (King (PMI) Tr. 2347). Based on this data, King testified that “consumers have given [VEEV] good feedback, and these are consumers that are people switching from smoking, and one of the essential elements of getting somebody to fully convert from smoking is that they be able to appreciate the satisfaction of the product you’re

switching them to, and one aspect to that is being able to deliver nicotine in a way similar to cigarettes or as similar as possible given the restrictions of an e-cigarette.” (King (PMI) Tr. 2347).

VEEV has also “performed well” with respect to flavor and enjoyment. According to King, “We’ve found that the consumers find [VEEV] to be equal or superior to other e-cigarette products and that they are able to convert to them from smoking, although different consumers have different preferences.” (King (PMI) Tr. 2348-49).

The evidence shows that VEEV contains an e-liquid formula capable of offering sufficient nicotine satisfaction so that the product could be competitive in the U.S. market. (See CCFF ¶¶ 1658-59; King (PMI) Tr. 2347-49). For example, PMI incorporated nicotine salts into VEEV’s e-liquid pods. (King (PMI) Tr. 2346). In addition, VEEV’s flavors are primarily “tobacco-based flavors and menthol” and PMI does not “use flavors other than menthol or tobacco unless it exists already on the e-cigarette side with current resellers.” (King (PMI) Tr. 2346-47). PMI is therefore confident that VEEV will be competitive in the U.S. market. (See CCFF ¶¶ 1670-75).

Ordinary course documents show that Altria agrees with PMI’s assessment of VEEV. {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1626. But how VEEV is perceived abroad is a poor proxy for how it will perform in the United States. According to King, VEEV first was rolled out in the United Kingdom, New Zealand, Finland, and Italy. (King (PMI) Tr. 2354). [REDACTED] } By contrast, JUUL has a nicotine level of up to 5 percent. (RX0796 (Altria) at 050).

**Response to Finding No. 1626**

The proposed finding is unsupported, incomplete, misleading, and against the weight of evidence. The statement that “how VEEV is perceived abroad is a poor proxy for how it will perform in the United States” is unsupported and should be disregarded. In fact, the weight of the evidence indicates that the opposite is true. According to King, [REDACTED]

[REDACTED]

The proposed finding is also misleading to the extent that it suggests that all U.S. e-vapor customers are looking for similar nicotine content specifically or a similar experience generally. Wade Huckabee of Reynolds testified that there are “a range of consumers with a range of desired product attributes” and “consumers prefer different nicotine levels as well.” (Huckabee (Reynolds) Tr. 395). Likewise, Altria’s Dr. Gardner conceded that some consumers prefer e-vapor products with lower levels of nicotine. (Gardner (Altria) Tr. 2673-74).

1627. [REDACTED] There is no evidence about whether a new formula ever was introduced into



New Zealand, how it performed there, or any other evidence that speaks to VEEV's conversion potential in a market without a nicotine cap.

**Response to Finding No. 1627**

The proposed finding is unsupported by the cited evidence, incorrect, incomplete, and misleading, and should be disregarded. As an initial matter, the statement that { [REDACTED]

[REDACTED] } On the contrary, the evidence shows that VEEV has performed well in New Zealand. When discussing the introduction of VEEV in New Zealand, PMI's Martin King testified that the launch was "an affirmation of the updated product." (PX7020 (King (PMI), Dep. at 188 ("Q. . . . You mentioned before how there was some in-market testing. Is this the kind of testing you were referencing? A. Yes and no. New Zealand was more of a test of the verification system for adults versus the actual product; although, it was also an affirmation of the updated product.")). King also testified at trial that in the countries in which VEEV has been released—New Zealand, United Kingdom, Finland, and Italy—"the consumer feedback has been very good, and we've been encouraged by the results and, therefore, continue with the expansion as we had planned." (King (PMI) Tr. 2356); *see also* (King (PMI) Tr. 2354)). In addition, King testified that international consumers so far have been "very happy with" VEEV. (PX7020 (King (PMI), Dep. at 78-79)). Nowhere did King—or anyone else—testify that VEEV was performing poorly or any differently in New Zealand.

The statement that { [REDACTED] } is similarly unsupported and misleading. The cited deposition testimony concerns a document that has not been admitted into evidence and which King had never seen before. (PX7020 (King (PMI), Dep.

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at 187 (“This is DX 1062”), 189 (“A. No. I don’t believe I received quite that same message. I’m trying to remember whether I’ve seen this e-mail before. I’m not sure I have. Q. I’m not saying you have.”)). In this document, an unknown individual named Williams writes, { [REDACTED]

[REDACTED] } King testified that he never received any such “message” with respect to VEEV’s introduction in New Zealand. (PX7020 (King (PMI), Dep. at 189) (“Did that message come to you as one of the senior leadership at PMI? A. No. I don’t believe I received quite that same message.”)). In any event, this “message” referred to { [REDACTED]

[REDACTED] } This statement does not apply to the United States, which restricts all non-tobacco and non-menthol e-cigarette flavors. (*See* CCFF ¶ 207; PX9016 (FDA) at 001).

The proposed finding is also incorrect, incomplete, and misleading to the extent that it suggests that { [REDACTED] } King testified that the main focus of VEEV’s introduction in New Zealand was to test a new age verification system. (PX7020 (King (PMI), Dep. at 188) (Q. . . . You mentioned before how there was some in-market testing. Is this the kind of testing you were referencing? A. Yes and no. New Zealand was more of a test of the verification system for adults versus the actual product; although, it was also an affirmation of the updated product. The U.K. was more the test for the technology, the hardware. New Zealand was really the first market where we started having a device activation only after adult smokers verified their age through submitting either a driver’s license or other government document, and there was a technology to then activate the device. So it was a different type of test.”); *see also* King (PMI) Tr. 2482 { [REDACTED]

[REDACTED]

The statement that there is no “other evidence that speaks to VEEV’s conversion potential in a market without a nicotine cap” is unsupported and contrary to the weight of the evidence. King testified that VEEV is a “very competitive product, superior product” to other closed-system e-cigarettes sold in the U.S., which is a market without a nicotine cap. (King (PMI) Tr. 2352). King also believes that VEEV “will compete well with JUUL,” which is an e-cigarette product with no nicotine cap. (King (PMI) Tr. 2354). [REDACTED]

[REDACTED]

[REDACTED] } PMI conducted consumer testing, which showed that consumers are able to convert to VEEV from smoking, and that VEEV performs well in terms of nicotine satisfaction and conversion. (See CCFF ¶¶ 1658-59, 1670 (*in camera*)).

Ordinary course documents show that Altria agrees with PMI’s assessment of VEEV. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1628. *Third*, even assuming that PMI (1) had { [REDACTED] }, and (2) eventually obtained FDA approval for the product, whether Altria would have been the company that launched VEEV in the United States is inherently speculative.

#### **Response to Finding No. 1628**

The proposed finding should be disregarded because it contains no citations to the factual record and is not a “finding of fact,” but rather a legal conclusion about the sufficiency of the evidence offered by Complaint Counsel. Respondents inappropriately state their own argument as a “fact.”

Furthermore, the proposed finding suggests the wrong burden for assessing harm from the Transaction. As Dr. Rothman explained, it is impossible to know with absolute certainty what would happen in the but-for world absent the transaction, but economists commonly evaluate such counterfactuals by focusing on incentives and ability. (*See* CCF ¶ 1529). With respect to VEEV, the evidence indicates that, absent the transaction with JLI, Altria would have had the ability and incentive and to commercialize VEEV in the U.S. (*See* CCF ¶¶ 1596-602, 1644-46, 1651-93, 1704-10; *see also* Response to RPF ¶ 1530).

In addition, as explained in the Horizontal Merger Guidelines, “certainty” is “not required” when analyzing the anticompetitive effects of a merger: “Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared

to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent . . . that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.” (PX9098 (Horizontal Merger Guidelines) § 1 at 004; *see also* Response to RPF ¶ 1490).

The evidence shows that, but for the transaction, Altria would be competing in the relevant market, and VEEV was a strong and available avenue for that to occur. (*See* CCF ¶¶ 1408-730)). As a result, the transaction harms competition.

1629. [REDACTED] ; *see also* PX7020 King (PMI) Dep. at 200 (“There would have to be additional discussions before the commercialization could take place.”)).

**Response to Finding No. 1629**

The proposed finding is unsupported by the cited evidence, incorrect, incomplete, and misleading, and should be disregarded. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }; PX7020 (King (PMI), Dep.

at 68)). { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

The proposed finding also mischaracterizes King’s deposition testimony that “There would have to be additional discussions before the commercialization could take place.” (PX7020 (King (PMI), Dep. at 200)). When King made that statement, it was in response to questions about provisions of the Amended and Restated Master Relationship Agreement by and between PMI and Altria, which carved out e-cigarette products. (PX7020 (King (PMI), Dep. at 199-200); RX1039 (Altria/PMI) at 012-13) (*in camera*)). [REDACTED]

[REDACTED]

[REDACTED]; PX7020 (King (PMI), Dep. at 68)).

1630. [REDACTED] As King summarized, “[o]f course it’s possible that we would not reach terms.” (PX7020 King (PMI) Dep. at 200-01).

**Response to Finding No. 1630**

The proposed finding is incomplete, misleading, and irrelevant. As Dr. Rothman explained, it is impossible to know with absolute certainty which future products Altria would have developed

or commercialized in the but-for world absent the transaction, but economists commonly evaluate such counterfactuals by focusing on incentives and ability. (CCFF ¶ 1529). With respect to VEEV, the evidence indicates that absent the transaction with JLI, Altria would have had the ability and incentive and to commercialize VEEV in the U.S. (See CCFF ¶¶ 1596-602, 1644-46, 1651-93, 1704-10).

With respect to ability, Complaint Counsel's response to RPF ¶ 1629 shows that Altria clearly had U.S. rights to commercialize PMI's e-cigarette products in the U.S., including VEEV. (See Response to RPF ¶ 1629; CCFF ¶¶ 1598, 1600, 1602, 1604; RX0873 (Altria) at 019-20 (*in camera*); King (PMI) Tr. 2514 (*in camera*); PX7020 (King (PMI), Dep. at 68)). { [REDACTED]

[REDACTED] }, King testified that he expected the two parties could have come to an agreement to commercialize VEEV in the U.S. if Altria had not entered into the transaction with JLI. (King (PMI) Tr. 2357 ("Q. How was PMI planning to commercialize VEEV in the U.S. prior to Altria's transaction with JLI? A. Well, the idea would be that Altria would take the lead on it, and we would assist in every way possible, similar to what has happened with IQOS heat-not-burn."); see also King (PMI) Tr. 2359-60 ("Q. Just to make sure I understood, was it PMI's intention to work -- to have Altria commercialize VEEV in the U.S. . . . ? A. Yes, that was the original intent, was that PMI would work on the markets outside the U.S. with whatever technologies and products were developed, and that Altria would commercialize those products in the U.S."); King (PMI) Tr. 2514-15 (*in camera*)).

The evidence also indicates that there is a high likelihood that Altria could have obtained a PMTA and successfully commercialized VEEV in the U.S. (See King (PMI) Tr. 2360-61 ("Q. Why did PMI intend to work with Altria to commercialize VEEV in the U.S.? A. Well, Altria



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brings a great wealth of resources, knowledge. They have the best sales force in the space. They have a very good regulatory experience and excellent regulatory group. They have, you know, all sorts of infrastructure in the U.S. that would make commercialization of any product much more effective.”); King (PMI) Tr. 2501-02 {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

With respect to incentives, the evidence indicates that VEEV was a high-quality e-cigarette product that was successful at converting smokers, so Altria would have likely decided that it was in its interest to commercialize VEEV absent the transaction. (*See* CCFE ¶¶ 1651-91). Based on evidence from consumer test panels and the sale of VEEV abroad, King testified that VEEV is “able to convert” adult smokers and is “equal or superior to other e-cigarette products.” (King (PMI) Tr. 2348-49 (“We’ve found that the consumers find [VEEV] to be equal or superior to other e-cigarette products and that they are able to convert to them from smoking, although different consumers have different preferences.”); *see also* Response to RPF ¶ 1625; King (PMI) Tr. 2347) (“consumers have given [VEEV] good feedback, and these are consumers that are people switching from smoking”).

VEEV checks all the boxes when it comes to product characteristics that Respondents claim are important for a successful e-cigarette product. (*See* CCFE ¶¶ 1638, 1651-69). VEEV is a pod-based closed-system e-cigarette product. (CCFE ¶¶ 1638, 1672). VEEV incorporated nicotine salts in its e-liquid pods. (CCFE ¶ 1654). VEEV had built-in dry-puff prevention

technology to prevent overheating and formaldehyde formation. (CCFF ¶¶ 1660-64). And VEEV had an appealing form-factor, high-quality finish, long battery life, and other innovative features. (CCFF ¶¶ 1665-69).

[REDACTED]

1631. [REDACTED]

**Response to Finding No. 1631**

The proposed finding is incomplete, misleading, and irrelevant. As explained in Complaint Counsel’s response to RPF 1629, {

\_\_\_\_\_ }

(See Response to RPF 1629).

{ \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ } it is unclear why

that is relevant to Altria’s ability and incentive to commercialize VEEV absent the transaction with JLI.

1632. Finally, none of this matters to the competitive nature of the e-vapor industry. As PMI has made clear, and as its witness reiterated at trial, it “intend[s] to move forward and have VEEV commercialized in the U.S. as soon as [it] can,” (King (PMI) Tr. 2369), { \_\_\_\_\_ } \_\_\_\_\_ }

**Response to Finding No. 1632**

The proposed finding is incomplete and misleading. Potential entry by PMI will not replace the competition that was lost when Altria entered into the transaction with JLI. (See CCFF 1847-70). As explained in Complaint Counsel’s Proposed Findings of Fact, (see CCFF 1847-70)),

{ \_\_\_\_\_  
\_\_\_\_\_ }

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* PX7040 (Gifford (Altria), Dep. at 179-180);

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see also* CCFF ¶¶ 1864-70). “Altria’s footprint, outstanding sales force, access to retail shops, all of their other supporting abilities, including government affairs, etcetera, would [have] help[ed with the] commercialization of [VEEV], and it would speed the commercialization and make the success much more likely and faster.” (PX7020 (King (PMI), Dep. at 47-48)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; PX7020 (King (PMI), Dep. at 63-64) (“Altria has had

a number of different solutions to the FDA under the tobacco area, and they have a great deal of expertise on what it would take to get authorization for e-cigarettes. . . . PMI has now a great deal of expertise on the heat not burn area . . . However, in other areas, other products like e-cigarettes, Altria has more experience than PMI.”)).

Finally, the statement that PMI { [REDACTED] } is misleading. Indeed, King disputed that claim at the hearing: { [REDACTED]

[REDACTED]

{ [REDACTED] } At his deposition, King explained why Altria’s transaction with JLI was not a significant factor in PMI’s efforts to commercialize VEEV: “Q. Was one response to the Altria investment in JLI to accelerate and put focus on version 2.0 of P4? MR. LOVINGER: Object to form. A. I wouldn’t say it was just a response to the Altria investment in JUUL. I think even absent that investment, JUUL was already coming internationally. And we knew we needed to have, even absent JUUL, frankly, we needed to have

a viable e-cigarette product. And so it was more of a reaction to the overall market situation rather than any specific move by Altria . . . .” (PX7020 (King (PMI), Dep. at 165)).

**5. Dr. Rothman Makes No Attempt To Predict The Conditions Of The Market Into Which A New Product Might Enter Several Years Hence, Nor Could He**

1633. Complaint Counsel also has made no attempt to establish the future competitive conditions, (CoL ¶¶ 97-100), of the market into which these hypothetical future products might enter.

**Response to Finding No. 1633**

The proposed finding should be disregarded because it contains no citations to the factual record and is not a “finding of fact,” but rather a legal conclusion about the sufficiency of the evidence offered by Complaint Counsel. Respondents inappropriately state their own argument as a “fact.”

Furthermore, the proposed finding suggests the wrong burden for assessing harm from the transaction. As Dr. Rothman explained, it is impossible to know with absolute certainty what would happen in the but-for world absent the transaction, but economists commonly evaluate such counterfactuals by focusing on incentives and ability. (*See* CCFF ¶ 1529). In addition, as explained in the Horizontal Merger Guidelines, “certainty” is “not required” when analyzing the anticompetitive effects of a merger: “Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent . . . that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.” (PX9098 (Horizontal Merger Guidelines) § 1 at 004; *see also* Response to RPF ¶ 1490). The evidence shows that, but for the transaction, Altria would be competing in the relevant market. (*See* CCFF ¶¶ 1408-730). As a result, the transaction harms competition.

1634. Complaint Counsel’s expert, Dr. Rothman, admits that he did not look at any data postdating the December 2018 transaction when conducting his analysis, (PX7048



Rothman Trial Dep. at 93-95), meaning he has made no attempt to analyze the competitive conditions of the market as it exists today, much less what it will look like several years hence.

### **Response to Finding No. 1634**

The proposed finding is incorrect, incomplete, and misleading. The statement that Dr. Rothman “made no attempt to analyze the competitive conditions of the market as it exists today, much less what it will look like several years hence” is conclusory and unsupported, and should be disregarded.

The proposed finding is also directly contradicted by Dr. Rothman’s testimony. As Dr. Rothman explained: “I don’t disagree with -- that the market has continued to evolve over time, that new products have been introduced, that sales have -- overall have gone up, that prices have fallen. I disagree -- I very much disagree with the assertion that because the market has evolved - - continued to evolve over time after Altria’s exit, that Altria’s exit didn’t harm competition. That assertion is wrong.” (PX7048 (Rothman, Trial Dep. at 39)).

Dr. Rothman provided a detailed explanation for why competitive conditions as the market exists today (i.e., after Altria’s transaction with JLI) do not change his opinion that Altria’s transaction with JLI harmed competition. First, using data from the market as it exists today “ignores confounding factors” and confuses “correlation and causation.” (PX7048 (Rothman, Trial Dep. at 40)). Dr. Rothman points out that “Respondents, Dr. Murphy claim the market has become more competitive over time,” but “They are not asserting, nor have they shown, that the – Altria’s exit caused the market to become more competitive over time. So to the extent that the market has become more competitive over time, it’s due to other factors, but if that’s the case, the evolution of the market over time doesn’t indicate anything about the effects of Altria’s exit from competition.” (PX7048 (Rothman, Trial Dep. at 40)).

Second, Dr. Rothman pointed out that because the closed-system e-cigarette market “is a dynamic market,” it means that “[c]ompetition plays out over time.” (PX7048 (Rothman, Trial Dep. at 40); *see also* (PX5000 at 083 (¶ 145) (Rothman Expert Report) [REDACTED]). In other words, “Competitive outcomes in 2019, 2020, etcetera, reflect competitive initiatives from prior to 2019 when Altria was still competing. So the evolution of the market over time, it reflects competition from Altria” prior to Altria’s exit. (PX7048 (Rothman, Trial Dep. at 40-41)).

As Dr. Rothman explained, Respondents’ simple “before and after analysis . . . might be fine in a static market, but it doesn’t work in a dynamic market in which competition plays out over time.” (PX7048 (Rothman, Trial Dep. at 41)). Dr. Rothman further explained that looking at post-transaction data without accounting for the transaction and other confounding variables “effectively assumes that Altria’s competitive initiatives in 2018 that weren’t reflected in 2018 market outcomes, as well as competitive initiatives that Altria would have undertaken after 2018, would have failed.” (PX7048 (Rothman, Trial Dep. at 41)). As explained in Complaint Counsel’s Proposed Findings of Fact, this is an inappropriate assumption to make. (*See* CCFF ¶¶ 1408-730).

Finally, Dr. Rothman did attempt to analyze the competitive effects of the transaction. For example, Dr. Rothman was able to calculate market shares and HHIs after the transaction by reallocating Altria’s share to the remaining competitors in proportion to their shares. (PX5000 at 042-43 (¶¶ 85-90) (Rothman Expert Report)). Dr. Rothman concluded that “Under the thresholds in the Guidelines, the transaction is presumed to be likely to enhance market power.” (PX5001 at 040 (¶ 70) (Rothman Rebuttal Report)). Dr. Rothman calculated that the expected harm from the transaction would be approximately \$33.6 million per year when assuming that Altria would have

maintained its share if it had not entered into the transaction. (PX5000 at 082-83 (¶¶ 143-45) (Rothman Expert Report)).

1635. And Dr. Rothman cannot say “with certainty that anything would or wouldn’t have happened” in the but-for world. (PX7046 Rothman Dep. at 259-60).

### **Response to Finding No. 1635**

The proposed finding is incomplete and misleading. As Dr. Rothman explained, it is impossible to know with absolute certainty what would happen in the but-for world absent the transaction, but economists commonly evaluate such counterfactuals by focusing on incentives and ability. (CCFF ¶ 1529). In addition, as explained in the Horizontal Merger Guidelines, “certainty” is “not required” when analyzing competitive effects of merger: “Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent . . . that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.” (PX9098 (Horizontal Merger Guidelines) § 1 at 004; *see also* Response to RPF ¶ 1490).

1636. Thus, there is no evidence that the future market into any speculative new product might have entered (1) will be concentrated; (2) that independent entry would be substantially likely to produce deconcentration; or (3) that Altria is one of only a few equally likely actual potential entrants. (CoL ¶ 97).

### **Response to Finding No. 1636**

The proposed finding should be disregarded because it contains no citations to the factual record and is not a “finding of fact,” but rather a legal conclusion about the sufficiency of the evidence offered by Complaint Counsel. Respondents inappropriately state their own argument as a “fact.”

Furthermore, the proposed finding suggests the wrong burden for assessing harm from the transaction. As Dr. Rothman explained, it is impossible to know with absolute certainty what

would happen in the but-for world absent the transaction, but economists commonly evaluate such counterfactuals by focusing on incentives and ability. (*See* CCF ¶ 1529). The evidence indicates that absent the transaction with JLI, Altria would have had the ability and incentive and to commercialize VEEV in the U.S. (*See* CCF ¶¶ 1596-602, 1644-46, 1651-93, 1704-10; *see also* Response to RPF ¶ 1530).

In addition, as explained in the Horizontal Merger Guidelines, “certainty” is “not required” when analyzing the anticompetitive effects of a merger: “Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not. Given this inherent need for prediction, these Guidelines reflect the congressional intent . . . that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.” (PX9098 (Horizontal Merger Guidelines) § 1 at 004; *see also* Response to RPF ¶ 1490). The evidence shows that, but for the transaction, Altria would be competing in the relevant market. (*See* CCF ¶¶ 1408-730). As a result, the transaction harms competition.

## **XVII. COMPLAINT COUNSEL ALSO CANNOT DEMONSTRATE ANY ANTICOMPETITIVE EFFECTS WITH RESPECT TO PRICE, INNOVATION, OR SHELF SPACE**

1637. Complaint Counsel cannot “bolster” its prima facie case, (CC Pretrial Br. 64), with other evidence of competitive harm. (*See infra* Part XVII.A-C).

### **Response to Finding No. 1637**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the appropriate legal standard under Section 7 and the sufficiency of the evidence. Respondents inappropriately state their own arguments as a “fact.” The proposed finding is also incomplete and misleading to the extent that it suggests that there was no competitive harm from the transaction. The weight of the evidence demonstrates that the

transaction and Altria's exit from the closed-system e-cigarette market has harmed competition. (CCFF ¶¶ 1408-730; *see also* Responses to RPF Part XVII.A-C).

1638. Contrary to Complaint Counsel's contention, there is no evidence that Altria's exit "deprived consumers of the future benefit of meaningful price, innovation, and shelf space competition." (CC Pretrial Br. 65).

### **Response to Finding No. 1638**

The proposed finding should be disregarded because it contains no citations to the record and is not a "finding of fact," but rather a legal conclusion regarding the sufficiency of the evidence. Respondents inappropriately state their own arguments as a "fact." As Complaint Counsel demonstrated in its Proposed Findings of Fact, there is substantial evidence that Altria's exit deprived consumers of the future benefit of meaningful price, innovation, and shelf space competition. (*See* CCFF ¶¶ 1408-587).

#### **A. The Record Shows That Altria's Products Did Not Constrain Price**

1639. Complaint Counsel has identified no evidence that Altria's products constrained price. As discussed above, Dr. Rothman admits that he did not even analyze whether JLI changed price in response to the introduction or removal of Elite. (PX7048 Rothman Trial Dep. at 171-72).

### **Response to Finding No. 1639**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record and is incorrect, incomplete, and misleading. The weight of the evidence demonstrates that Altria's e-cigarette products constrained price. (*See* CCFF ¶¶ 1418-40; *see also* PX5000 at 077-78 (¶¶ 134-36) (Rothman Expert Report)). In fact, the evidence shows that Altria's e-cigarette products were priced lower than JLI and other competitors, giving consumers lower priced options that were lost as a result of the transaction. (*See* PX2252 (JLI) at 006 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }

The second sentence of the proposed finding is incorrect to the extent that it suggests that Dr. Rothman did not analyze evidence demonstrating that JLI dropped its price in response to Altria's MarkTen Elite. In the cited testimony, Dr. Rothman testified that he reviewed a document discussing how JLI "dropped their price \$20 in response to Elite's launch." (PX7048 (Rothman, Trial Dep. at 171-72) (discussing the exhibit cited in CCF ¶ 1434)). Dr. Rothman also concluded that "Altria was providing -- was a competitive constraint in the market in 2018. Altria was a significant competitor in 2018." (PX7048 (Rothman, Trial Dep. at 172)). Furthermore, the second sentence of the proposed finding is incomplete and misleading to the extent that it suggests that there is no evidence that JLI changed its price in response to Altria Elite's introduction or exit. On the contrary, the weight of the evidence demonstrates that JLI engaged in head-to-head price competition with Altria. (CCFF ¶¶ 1432-40).

1640. By contrast, the evidence analyzed by Professor Murphy and the testimony of witnesses establishes that JLI neither lowered its price as a response to Elite's entry nor increased its price in response to the withdrawal of Altria's e-cigarettes, demonstrating that Altria was not a competitive constraint on JLI's pricing. (RX1217 Murphy Report ¶¶ 86, 89).

#### **Response to Finding No. 1640**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported "fact." (*See* Order on Post-Trial Filings at 3, dated June 28, 2021). Furthermore, the proposed finding should be disregarded because it is unsupported. The cited paragraphs of Dr. Murphy's report contain no support for Dr. Murphy's claims. Paragraphs 86 and 89 of Dr. Murphy's report contain no citations to witness testimony, data, or other record evidence. The proposed finding is also incomplete and misleading because it ignores evidence showing that JLI engaged in both price and non-price competition with Altria in the closed-system e-cigarette

market. (CCFF ¶¶ 1432-40, 1449-51). Moreover, Dr. Murphy admits that he did not attempt to calculate what the average price of pod-based cartridges would have been had Altria stayed in the closed-system e-cigarette market, (CCFF ¶ 2106), nor did he analyze whether cigalike cartridge prices rose or fell after Altria exited the e-vapor business. (CCFF ¶ 2095).

Finally, the proposed finding is also incomplete and misleading because it ignores evidence that JLI viewed Altria as a significant long-term competitive threat in the closed-system e-cigarette market. (PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”); CCFF ¶¶ 504-06 (discussing PX2005 (JLI) at 003, 004, 016 (“Altria Threat Competitive Response – May 2018”)); CCFF ¶¶ 1517-22 (discussing PX2289 (JLI) at 021 (“US Landscape: Competitive Analysis Framework”) (reflecting JLI’s conclusion in May 2018 that Elite was one of only four products besides JUUL with “long-term viability”))).

1641. Robbins of JLI explained that JLI “did not change [its] pricing” as a result of the launch of MarkTen Elite. (Robbins (JLI) Tr. 3252).

#### **Response to Finding No. 1641**

The proposed finding is incomplete, misleading, contrary to the weight of the evidence, and unreliable as it relies solely on the self-serving testimony of a JLI executive. The record demonstrates not only that JLI competed head-to-head with Altria on price, (CCFF ¶¶ 1432-40), but that JLI considered MarkTen Elite to be a threat in the closed-system e-cigarette market. (PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”); CCFF ¶¶ 504-06 (discussing PX2005 (JLI) at 003, 004, 016 (“Altria Threat Competitive Response – May 2018”)); CCFF ¶¶ 1517-22 (discussing PX2289 (JLI) at 021 (“US Landscape: Competitive Analysis Framework”) (reflecting JLI’s conclusion in May 2018 that Elite was one of only four products besides JUUL with “long-term viability”))). For example, soon after Elite’s launch in February 2018, Bob Robbins wrote to his JLI colleagues that Elite was priced “for share-gain mode.”

(PX2269 (JLI) at 003; *see also* PX7039 (Robbins (JLI), Dep. at 20-21) (explaining Elite was “priced pretty aggressively”)).

1642. Instead, after the launch of Elite, JLI simply ran its “normal” seasonal promotion, namely their “standard” \$20 off the combined purchase of a battery and pods. (PX7019 Crozier (Sheetz) Dep. at 76-77). JLI’s promotions were generally planned six months to a year in advance, meaning that a spring 2018 promotion would have been planned by the fall of 2017 at the latest—long before Elite’s launch. (Robbins (JLI) Tr. 3255-56).

### **Response to Finding No. 1642**

The first sentence of the proposed finding is unsupported, incorrect, incomplete, and misleading. With respect to the statement that “JLI simply ran its ‘normal’ seasonal promotion,” Crozier did not testify that JLI’s promotions were unrelated to the launch of Elite, nor would he have had the foundation to make such a claim. (PX7019 (Crozier (Sheetz), Dep. at 76-77)). Furthermore, Crozier never testified that JLI’s promotion was “seasonal,” just that it was a “normal” promotion. (PX7019 (Crozier (Sheetz), Dep. at 76-77)).

The second sentence of the proposed finding is incomplete and misleading. The statement that “JLI’s promotions were generally planned six months to a year in advance” does not show that JLI did not plan its promotions in anticipation of competition with Altria. For example, in December 2017, only a few months before Elite’s launch, JLI characterized Altria as a “**real and credible threat** to JUUL,” noting its “significant brand name[], huge marketing campaign[], and strong distribution network[].” (PX2356 (JLI) at 017 (emphasis in original)). When JLI implemented a \$20 off promotion in March 2018, Altria viewed this as a direct response to Elite’s launch. (PX7002 (Schwartz (Altria), IHT at 89-90) (“Q. And these sales incentives were, to your knowledge, something that not only Nu Mark was doing with their Mark Ten and Mark Ten Elite products, but what their competitors in the market were doing with theirs as well? A. [. . .] JUUL, as soon as we came out, they knocked 20 bucks off their price. [. . .] Q. As soon as you came out with the Mark Ten Elite product. A. Um-hum, yep.”)).



The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence because it ignores evidence that shows not only that JLI competed head-to-head with Altria on price, (CCFF ¶¶ 1432-40), but that JLI considered MarkTen Elite to be a threat in the closed-system e-cigarette market. (PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”); CCFF ¶¶ 504-06 (discussing PX2005 (JLI) at 003, 004, 016 (“Altria Threat Competitive Response – May 2018”)); CCFF ¶¶ 1517-22 (discussing PX2289 (JLI) at 021 (“US Landscape: Competitive Analysis Framework”) (reflecting JLI’s conclusion in May 2018 that Elite was one of only four products besides JUUL with “long-term viability”))). For example, soon after Elite’s launch in February 2018, Bob Robbins wrote to his JLI colleagues that Elite was priced “for share-gain mode.” (PX2269 (JLI) at 003; *see also* PX7039 (Robbins (JLI), Dep. at 20-21) (explaining Elite was “priced pretty aggressively”)).

1643. JLI also did not change its pricing or promotions as a result of the withdrawal of MarkTen Elite. (Robbins (JLI) Tr. 3255; PX7025 Burns (JLI) Dep. at 232-33). Nor did it do so as a result of Altria’s decision to pull the remaining MarkTen cig-a-like products in December 2018. (Robbins (JLI) Tr. 3249; PX7025 Burns (JLI) Dep. at 232-33).

### **Response to Finding No. 1643**

The proposed finding is unreliable as it relies solely on the self-serving testimony of current and former JLI executives. The proposed finding is incomplete, misleading, and contrary to the weight of the evidence because it ignores evidence showing not only that JLI competed head-to-head with Altria on price, (CCFF ¶¶ 1432-40), but that JLI considered MarkTen Elite to be a threat in the closed-system e-cigarette market. (PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”); CCFF ¶¶ 504-06 (discussing PX2005 (JLI) at 003, 004, 016 (“Altria Threat Competitive Response – May 2018”)); CCFF ¶¶ 151-22 (discussing PX2289 (JLI) at 021 (“US Landscape: Competitive Analysis Framework”) (reflecting JLI’s conclusion in May 2018 that Elite was one of only four products besides JUUL with “long-term viability”))). For example, in

December 2017, only a few months before Elite’s launch, JLI characterized Altria as a “**real and credible threat** to JUUL,” noting its “significant brand name[], huge marketing campaign[], and strong distribution network[].” (PX2356 (JLI) at 017 (emphasis in original)).

The proposed finding is also incomplete and misleading to the extent that it suggests that post-transaction marketplace conditions demonstrate that the closed-system e-cigarette market was not harmed by Altria’s exit. Dr. Rothman testified that the appropriate way to evaluate the effect of the transaction on competition is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” (CCFF ¶ 1759 (citing PX5001 at 008-09 (¶ 14, n.26) (Rothman Rebuttal Report))). Dr. Rothman used an Antitrust Logit Model to compare the “actual world” with the “but-for world,” calculating that the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (*See* Response to RPF ¶ 1388).

1644. At trial, Robbins confirmed that JLI did not “ever change its pricing” or “its promotions” in response to the MarkTen cig-a-like products. (Robbins (JLI) Tr. 3245; *see also* Robbins (JLI) Tr. 3248 (stating that JLI never made any pricing decisions as a result of MarkTen Bold)). The same was true of Elite. (Robbins (JLI) Tr. 3252; *see also* Robbins (JLI) Tr. 3253-54 (explaining that JLI did not change its prices or promotions in response to the \$8.99 promotion for Elite or the clerk incentive program)).

#### **Response to Finding No. 1644**

The proposed finding is incomplete, misleading, contrary to the weight of the evidence, and unreliable because it relies solely on the self-serving testimony of a JLI executive. The evidence demonstrates that JLI not only competed head-to-head with Altria on price, (CCFF ¶¶ 1432-40), but that JLI considered MarkTen Elite to be a threat in the closed-system e-cigarette market. (PX2356 (JLI) at 017 (presentation entitled “What Keeps Us Up at Night”); CCFF ¶¶ 504-06 (discussing PX2005 (JLI) at 003, 004, 016 (“Altria Threat Competitive Response – May

2018”)); CCF ¶¶ 1517-22 (discussing PX2289 (JLI) at 021 (“US Landscape: Competitive Analysis Framework”) (reflecting JLI’s conclusion in May 2018 that Elite was one of only four products besides JUUL with “long-term viability”))).

For example, a May 2018 JLI presentation entitled “Altria Threat Competitive Response” provided to JLI’s CEO and other senior executives states that “Altria has entered into [a] contract . . . to invest **\$8,000 per door for preferential shelf placement . . . over the next three years . . .** [and] has also increased their retailer rebate across all products by 150% (\$5,400k per door per year). This is likely the first bid to foreclose shelf-space for their vapor products at the expense of JUUL. Initial analysis indicates that these competitor moves could **cost our business ~\$0.5B in sales per year.**” (PX2005 (JLI) at 003 (emphasis in original)). JLI decided to respond to Altria’s threats with its own initiatives, demonstrating the benefits of competition: “In order to address the [Altria] threat to our business, we propose a multi-pronged approach,” including “Additional incentives” to retailers and “Increased marketing spend” designed to “Increase consumer awareness” of JUUL. (PX2005 (JLI) at 016).

1645. “The fact that JLI did not respond to Altria discontinuing sales of its e-cigarette products by raising price clearly shows that Altria was not a competitive constraint on JLI and that, as a result, Altria’s discontinuation of its e-cigarette products did not diminish competition or harm consumers.” (RX1217 Murphy Report ¶ 89).

### **Response to Finding No. 1645**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (See Order on Post-Trial Filings at 3, dated June 28, 2021). The proposed finding should also be disregarded because it is unsupported. The cited paragraph of Dr. Murphy’s report contains no support for Dr. Murphy’s claim. Paragraph 89 of Dr. Murphy’s report contains no citations to witness testimony, data, or other record evidence. (See Responses to RPF ¶¶ 1639-44).

1646. As Professor Murphy explained further, “[t]he fact that competition from NJOY and Vuse, among others, has forced JLI to lower price, while JLI did not respond to competition from Altria when it launched the MarkTen Elite pod-based products, and did not raise price after Altria discontinued its products from the market, demonstrates that Altria’s discontinuation of its e-cigarette product lines did not diminish competition and, therefore, did not result in any harm to consumers.” (RX1217 Murphy Report ¶ 92; *see also* RX1217 Murphy Report ¶ 86 (“The lack of response by JLI to competition from MarkTen Elite provides clear evidence that competition from Altria did not constrain JLI’s pricing.”)).

### **Response to Finding No. 1646**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (*See* Order on Post-Trial Filings at 3, dated June 28, 2021). The proposed finding should also be disregarded because it is unsupported. The cited paragraphs of Dr. Murphy’s report contain no support for Dr. Murphy’s claims. Paragraphs 92 and 86 of Dr. Murphy’s report contain no citations to witness testimony, data, or other record evidence.

The proposed finding is also incomplete and misleading because Dr. Murphy did not attempt to calculate what the average price of pod-based cartridges would have been had Altria stayed in the closed-system e-cigarette market, (CCFF ¶ 2106), nor did he analyze whether cigalike cartridge prices rose or fell after Altria exited the e-vapor business. (CCFF ¶ 2095). Dr. Murphy also admitted that he did not control for confounding factors in his analysis of the transaction. (CCFF ¶¶ 2094-124). Dr. Rothman explained why Dr. Murphy’s assertion that the transaction “did not diminish competition and, therefore, did not result in any harm to consumers” is unfounded. (PX5001 at 015 (¶ 21) (Rothman Rebuttal Report)). As Dr. Rothman explained, “Dr. Murphy does not do anything to distinguish between new product introductions and share and sales volume growth that are transaction-specific and new product introductions and share and sales volume growth that would have occurred anyway.” (PX5001 at 015 (¶ 21) (Rothman Rebuttal Report)).

### **B. There Is No Evidence That Innovation Competition Has Decreased Following Altria’s Exit**

1647. There is no evidence that Altria was itself a source of innovative pressure within the industry. As detailed in other sections, Altria had shown no aptitude for internal innovation in e-vapor, and in late 2018, five years after it entered the e-vapor industry, Altria had not successfully developed a single e-vapor product, (Murillo (Altria/JLI) Tr. 2940-41; *see supra* Part II.A.1.e.i), nor was it likely to do so anytime soon, (*see supra* Part XVI.C).

### **Response to Finding No. 1647**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The first sentence is also vague because the term “innovation pressure” is neither defined nor explained.

As a whole, the proposed finding is incorrect, incomplete, misleading, and contrary to the weight of the evidence. Altria was one of a few firms well-positioned to compete in the closed system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41). In November 2017, Altria’s Chief Innovation Officer, Jim Dillard, told investors that, with respect to reduced harm products, “We have the top talent we need, recruited from around the world. They include nearly 195 PhDs and 75 engineers across multiple disciplines. They represent 16 different countries and speak 32 different languages, all working together under one roof and laser focused on advancing Altria’s harm reduction aspiration. Over the past 10 years these employees received over 660 patents and published research in nearly 225 publications.” (PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)). Altria’s then-CEO, Marty Barrington, similarly touted Altria’s innovative capabilities to investors: “This year we’re celebrating the 10th anniversary of our \$350 million Center for Research and Technology, which is just miles from here. We built it to house our team of more than 400 scientists, physicians, product developers, engineers, regulatory experts and others who are developing innovative products, pursuing their regulatory authorization and constructively engaging with the FDA on policy.” (PX9000 (Altria) at 005 (Nov. 2017 Investor Day remarks)). In March 2019, Altria’s then-CEO Howard Willard again touted Altria’s

innovation success, stating in an interview with the *Wall Street Journal* that Altria “developed very satisfying [e-vapor] products that early on were converting adult cigarette smokers.” (PX1172 (Altria) at 003; *see* CCFF ¶ 442).

Although Complaint Counsel does not disagree that some of Altria’s innovation efforts in the e-vapor space did not succeed, this was neither unusual nor unexpected. (CCFF ¶¶ 1558-63; PX7016 (Jupe (Altria), Dep at 215) (“Well, look, it’s been my experience, and I think anybody that has been sitting in my type of seat over the years, that innovation, you are more ripe to fail than you are to succeed. For every nine things that fail, hopefully, you get one success.”)). Because some R&D projects are bound to fail, Altria viewed innovation as a process of placing multiple “bets.” (CCFF ¶ 1560 (quoting PX7016 (Jupe (Altria), Dep. at 215) (“And, you know, the stories, Thomas Edison failed many more times than he succeeded. So innovation is like that. You’ve got to have a lot of different bets.”); *see also* Jupe (Altria) Tr. 2183 (“Q. And knowing that some R&D projects are going to fail, innovation is about placing multiple bets. Would you agree with that statement? A. I couldn’t agree with you more.”)).

And several of Altria’s “bets” in the e-vapor space succeeded. Indeed, the record includes many examples of Altria’s ability to innovate and improve its e-cigarette products. For example, Altria launched MarkTen Bold, a cigalike that used “a proprietary recipe for nicotine salts” and that offered “nicotine delivery at levels approaching that of cigarettes.” (PX9000 (Altria) at 017 (Nov. 2017 Investor Day remarks)). On July 26, 2018, Willard told investors that MarkTen Bold (and MarkTen Elite) were “[t]he drivers of the growth in second quarter and first half” and were “getting traction with consumers.” (PX9047 (Altria) at 009-10 (Altria’s Q2 2018 Earnings Call)). In addition, shortly before withdrawing Elite from the closed-system e-cigarette market, Altria successfully designed and implemented a new gasket that addressed the leaking issue with Elite’s

Pods. (CCFF ¶¶ 1206-36; *see* PX1579 (Altria) at 001 (email from Craig Schwartz thanking the product development team “for the excellent work done to fix the leaking associated with the MarkTen Elite Pod”). Altria also developed many new flavors and other innovative features, such as magnetic pods for Elite. (CCFF ¶¶ 1466-71, 1477-81). And before it abruptly exited the e-cigarette business in December 2018, Altria was not only working to develop and commercialize the next-generation of e-vapor products, including Elite 2.0 with nicotine salts and PMI’s pod-based product, VEEV, with its MESH technology, but also researching other innovations, including flavor development incorporating “sensomics,” ways to incorporate Bluetooth technology into e-cigarettes, and so-called “Smart-Pod” technology. (CCFF ¶¶ 1555, 1571-74).

JLI, for its part, feared Altria’s ability to innovate in e-cigarettes. Using its “Competitive Analysis Framework,” JLI concluded that MarkTen Elite (along with a PMI e-cigarette product) were two of only four products (besides JUUL) that had “Long-Term Viability.” (PX2289 (JLI) at 021; CCFF ¶ 1522). JLI’s competitive assessment took into account “Innovation Sustainability,” and scored Altria’s products based on the “Quality of current talent,” the “Ability to recruit high-quality talent,” and “Ownership of IP building blocks.” (PX2289 (JLI) at 021).

1648. To the contrary, all of Altria’s on-market e-vapor products were externally acquired. (PX7018 Schwartz (Altria) Dep. at 164; *see also supra* Part II.A.1.e.ii).

### **Response to Finding No. 1648**

The proposed finding is incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that none of Altria’s “bets” in the e-vapor space succeeded or that Altria never introduced a commercially successful e-cigarette product. (*See Responses to RPF ¶¶ 144, 181, 1647*).

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The proposed finding is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce internally developed products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. { [REDACTED] } [REDACTED] [REDACTED] [REDACTED] [REDACTED] }; PX7029 (Farrell (NJOY), Dep. at 157)). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. (PX8011 at 001 (¶ 3) (Eldridge (ITG), Decl.)).

1649. Nor is there evidence that Altria’s exit dampened innovation by other manufacturers. For starters, the evidence elicited by Complaint Counsel demonstrates that most e-vapor manufacturers acquired their e-vapor products from third parties as opposed to developing the product internally. (Valani (JLI) Tr. 906-07; Schwartz (Altria) Tr. 1863 (stating that Altria licensed Elite from a third-party); *see also* { [REDACTED] } [REDACTED] ). And there is no evidence that these third parties, which churn out products in the hopes of a future acquisition or licensing arrangement, have become less invested in innovation. As for JLI, which is one of the only e-vapor manufacturers that designs its own products, (Valani (JLI) Tr. 907), { [REDACTED] } [REDACTED] }; *see also* RX1217 Murphy Report ¶ 200 (“As a matter of economics, the exit of a competitor will *not*, in general, lead to reduced incentives to create and improve products. To the contrary, it will often, if not typically, lead to the opposite effect by stimulating additional investment in new product development by rivals as they compete more intensely for business.” (emphasis in original))).

### **Response to Finding No. 1649**

The first and third sentences of the proposed finding should be disregarded because they contain no citations to the record. In addition, the fourth sentence of the proposed finding is unreliable because it relies solely on the self-serving testimony of a JLI executive. Complaint Counsel adds that the quoted portion of Dr. Murphy’s report contains no citations to the record.



The record details the product development initiatives that Altria was pushing and would have pushed. (*See, e.g.*, CCFF ¶¶ 1527-87). Altria bragged about having the “top talent we need, recruited from around the world. They include nearly 195 PhDs and 75 engineers across multiple disciplines . . . all working together under one roof and laser focused on advancing Altria’s harm reduction aspiration. Over the past 10 years these employees received over 660 patents and published research in nearly 225 publications.” (PX9000 (Altria) at 011 (Nov. 2017 Investor Day remarks)). All of these efforts ceased when Altria entered into the non-compete agreement with JLI, as explained by Dr. Rothman: “The transaction eliminates . . . the competitive initiatives, the product development initiatives that Altria was pushing and would have pushed. This is a loss of innovation competition. . . . Altria was . . . investing aggressively to develop and bring new products to the market. It had strong incentives to do that. It had significant capabilities. Altria’s exit deprives the market of those efforts. It – it deprives the market of that innovation competition.” (PX7048 (Rothman Trial Dep. at 34-35)).

1650. Complaint Counsel suggested in its pretrial brief that the transaction decreased JLI’s incentive to develop a larger pod size, which Complaint Counsel insinuates was motivated by Elite. (CC Pretrial Br. 54 & n.320). But Complaint Counsel did not attempt to prove this theory at trial. And the evidence cited by Complaint Counsel in its brief does not support the allegation. Complaint Counsel merely cited a document noting that the “market is moving to larger, longer-lasting pods,” without referencing Elite. (PX2012 (JLI) at 020; *see also* PX2253 (JLI) at 001, 008 (forwarding Altria earnings transcript highlighting Elite’s pod size but not mentioning copying Nu Mark’s products)).

### **Response to Finding No. 1650**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the sufficiency of the evidence. Respondents inappropriately state their own arguments as a “fact.”

The proposed finding is also incomplete and misleading. The parenthetical describing PX2253 states that the exhibit “highlight[s] Elite’s pod size,” but does not “mention[] NuMark’s

products.” This statement is non-sensical because MarkTen Elite was a closed-system e-cigarette product sold by Nu Mark product. (See CCFF ¶ 9).

Finally, the proposed finding is incomplete and misleading to the extent that it ignores evidence that the transaction and Altria’s exit from the closed-system e-cigarette market has harmed competition. (CCFF ¶¶ 1408-730).

**C. Competition For Shelf Space Increased After The MarkTen Products Were Pulled From The Market**

1651. Nor did competition for shelf space decrease when Altria withdrew Nu Mark’s products from the e-vapor marketplace—to the contrary, and as explained below, Nu Mark’s exit created *more* competition.

**Response to Finding No. 1651**

The proposed finding should be disregarded because it contains no citations to the record. The proposed finding is also incomplete and misleading because it ignores evidence of the competition for shelf space between Altria and JLI prior to the transaction and Altria’s exit. (CCFF ¶¶ 1441-62).

1652. Dr. Rothman contends that Altria’s presence in the shelf-space market contributed to a “barrier” to entry for other competitors. (PX5000 Rothman Report ¶¶ 184-85). As he explains, “large tobacco companies like Altria can pay for shelf space by offering retailers rebates on traditional cigarettes.” (PX5000 Rothman Report ¶ 185; *see also* PX5000 Rothman Report ¶ 185 n.431 (explaining that, in addition to a traditional slotting fee, Altria offered up to a 6-cent rebate on every carton of Altria cigarettes sold, “which is a large amount given Altria’s share of cigarette sales” (internal quotation marks omitted))).

**Response to Finding No. 1652**

The first sentence of the proposed finding is incorrect, incomplete, and misleading. Dr. Rothman did not write that Altria’s presence alone was a barrier to entry, but rather that the need for closed-system e-cigarette competitors to secure shelf space was a barrier. (PX5000 at 099-101 (¶¶ 184-85) (Rothman Expert Report) (writing that “getting shelf space in retail stores is a primary way to advertise, develop brand awareness, and sell products”)). Dr. Rothman wrote that small

and new producers have trouble getting shelf space because the larger companies, including not just Altria, but also JLI, Reynolds, and ITG have already secured the space. (PX5000 at 099-101 (¶ 185) (Rothman Expert Report)).

1653. As a result, as Myers testified, Elite coming off the shelf in October 2018 made space available for other products to “compete for the space and . . . get the space.” (Myers (Altria) Tr. 3369). And when Altria discontinued its remaining Nu Mark products on December 7, 2018, further opportunities emerged. (PX2272 (JLI) at 001).

### **Response to Finding No. 1653**

The proposed finding is incorrect, incomplete, and misleading because it ignores evidence that Altria’s exit did not free up shelf space. The evidence shows that, in 2018, Altria spent approximately \$100 million to secure e-cigarette shelf space over a three-year period at retailers. (See CCFF ¶¶ 1445, 1448). JLI considered Altria’s efforts to lock up e-cigarette shelf space through its ITP program to be an “urgent” threat. (PX2001 (JLI) (email from Bob Robbins to Kevin Burns and Tim Danaher dated May 11, 2018 with the subject line “Altria shelf set competitive response”)). Altria’s discontinuation of MarkTen Elite did not, however, release the shelf space at ITP retailers that Altria had contracted for through 2021. (See CCFF ¶¶ 1458, 1462).

The last sentence of the proposed finding is unsupported, incomplete, and misleading. The cited exhibit is a JLI document celebrating Altria’s exit from the e-vapor business and touting “an opportunity . . . to gain some of that empty space.” (PX2272 (JLI) at 001). A company celebrating the exit of a competitor is exactly what one would expect, and what the antitrust laws seek to avoid. (See PX9098 (Horizontal Merger Guidelines) §§ 1, 6.2).

1654. JLI’s immediate reaction is telling in this regard: One employee commented, “[I]ots of great back bar space is going to be up for grabs. We are moving quickly on the chains to make sure we get that.” (PX2272 (JLI) at 001). Robbins, JLI’s Chief Growth Officer, responded: “Exactly right... thanks for sharing! Opportunity for us to gain some of that empty space.” (PX2272 (JLI) at 001).

### **Response to Finding No. 1654**

The proposed finding is unsupported, incomplete, and misleading. The cited exhibit is a JLI document celebrating Altria's exit from the e-vapor business and touting "an opportunity . . . to gain some of that empty space." (PX2272 (JLI) at 001). A company celebrating the exit of a competitor is exactly what one would expect, and what the antitrust laws seek to avoid. (*See* PX9098 (Horizontal Merger Guidelines) §§ 1, 6.2).

1655. The increased competition that Nu Mark's exit facilitated persisted even after Altria leased the ITP shelf space to JLI for approximately one year, from early 2019 to early 2020. (Willard (Altria) Tr. 1231-32; PX0012 at 001-02 (January 28, 2020 amendment terminating aspects of services agreement, including the lease of ITP shelf space)).

#### **Response to Finding No. 1655**

The proposed finding is unsupported, incomplete, and misleading. The proposed finding ignores evidence that, after Altria exited, it gave JLI access to the ITP shelf space that Altria had previously locked up, and required retailers to display JUUL products even if they preferred not to do so. (*See* CCFF ¶ 1462 ("After Altria discontinued the MarkTen brand and exited the sale of e-cigarettes, Altria required Wawa to display JUUL products in the space that Altria had previously contracted for MarkTen. (PX8006 at 005 (¶ 19) (Kloss (Wawa), Decl.)). Wawa was reticent to display JUUL products because of their association with youth vaping, but, after Altria and JLI insisted, Wawa agreed to display empty packs of JUUL in order to deter underage theft. (PX8006 at 005 (¶ 19) (Kloss (Wawa), Decl.)).

1656. To be sure, in some circumstances JUUL products moved up to take the place of Altria's when Altria's came off. (Murphy Tr. 3139). But this did not make JUUL the "biggest winner." "The biggest winner was actually the people that got on the shelf, the people who moved onto the bottom of the shelf. That is, the people who made it onto the shelf who wouldn't have been there before . . . ." (Murphy Tr. 3139-40).

#### **Response to Finding No. 1656**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported "fact." (*See* Order on Post-Trial Filings at 3, dated June 28, 2021). The

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proposed finding is also vague, incomplete, and misleading because it is not clear from the cited testimony which companies or products “got on the shelf” after Altria exited the e-vapor business. It is unclear, for example, whether existing competitors—as opposed to new entrants—may have obtained better shelf space and, if so, how that would increase competition.

1657. There were many of these “biggest winners”:

- (a). In an analysis that was not challenged by Complaint Counsel, Dr. Murphy “looked across the top 20 retailers, and . . . found that the average number of products per store in those top 20 retailers went from 3.0 to 3.8,” which “was a pretty dramatic increase, not a decrease. There was not a decrease when Altria’s products left.” (Murphy Tr. 3140).
- (b). Farrell, NJOY’s Chief Revenue Officer, testified that while in 2018 MarkTen was “often at the top of the shelves,” in 2019, R.J. Reynolds’s Vuse “was often in the top half of the shelf,” (Farrell (NJOY) Tr. 257), { [REDACTED] }  
[REDACTED]
- (c). At Sheetz, while the Altria-JLI shelf-space lease was in place in 2019, JUUL “occupie[d] the top three shelves in Sheetz’s vapor displays.” (PX8000 (Sheetz) Crozier Decl. at 003 ¶ 17). But Reynolds got “the next two shelves for its Vuse products. [And] NJOY, Blu, Logic, Leap, and dry nicotine pouches [were] all located below Vuse.” (PX8000 (Sheetz) Crozier Decl. at 003 ¶ 17). { [REDACTED] } Sheetz also “added products from three manufacturers that it did not previously sell when MarkTen was on the market—NJOY’s Ace, ITG’s myblu, and EAS[‘s] Leap.” (RX1217 Murphy Report ¶ 74). { [REDACTED] }  
[REDACTED]
- (d). At Wawa in 2018, Nu Mark, Reynolds, and NJOY paid to have their products displayed on “the best shelf space.” After Nu Mark’s products were pulled, other companies also were on Wawa’s shelves: “The third position [was] occupied by NJOY or ITG’s Blu brand, and JTI’s Logic [was] at the bottom of the display.” (PX8006 (Wawa) at 005 ¶ 20).

### **Response to Finding No. 1657**

The proposed finding is unsupported, incomplete, and misleading.

With respect to subpart (a), the proposed finding cites solely to an unsupported opinion by Dr. Murphy. (Murphy Tr. 3140). Though Dr. Murphy made a similar claim in paragraph 75 of his report, that paragraph contains no citations to any analysis other than a general claim that he used IRI data. (RX1217 at 059 (¶ 75) (Murphy Report)). The paragraph does not refer to any table or appendix where Dr. Murphy shows his data analysis. There is also a discrepancy between Dr. Murphy's testimony that the average number of products per store in the top 20 retailers went to 3.8, and his report, which claims that the number of products went to 4. (*Compare* Murphy Tr. 3140 *with* RX1217 at 059 (¶ 75) (Murphy Report)).

With respect to subparts (b) and (c), the proposed finding is incomplete and misleading. These subparts do not cite any evidence supporting the suggestion that Altria's exit is what caused suppliers to acquire shelf space. Furthermore, the statement that Sheetz "added products from three manufacturers that it did not previously sell when MarkTen was on the market—NJOY's Ace, ITG's *myblu*, and EAS['s] Leap" should be disregarded because it relies solely on expert testimony to establish a purported "fact." (*See* Order on Post-Trial Filings at 3, dated June 28, 2021).

With respect to subpart (d), the statement that "After Nu Mark's products were pulled, other companies also were on Wawa's shelves" is incomplete and misleading. This subpart does not cite any evidence that these products were not already on display prior to Altria's exit from the e-vapor business. (PX8006 at 005 (¶ 20) (Kloss (Wawa), Decl.)). On the contrary, if there was any "biggest winner" at Wawa, it was JUUL, which "Altria required Wawa to display" at "the top position in Wawa's electronic cigarette display shelves," even though Wawa "did not want to display JUUL" due to concerns about youth vaping. (PX8006 at 005 (¶ 20) (Kloss (Wawa), Decl.)) ("Once Altria discontinued MarkTen and exited the sale of electronic cigarettes, Altria required Wawa to display JUUL products in the space that Altria had previously contracted for MarkTen.

Wawa originally did not want to display JUUL because Wawa did not want to encourage youth vaping. However, after Altria and JUUL insisted, Wawa agreed to display empty packs of JUUL in order to deter underage theft. Currently, JUUL occupies the top position in Wawa's electronic cigarette display shelves.”)).

Finally, the proposed finding is incomplete and misleading because it ignores evidence of the competition for shelf space between Altria and JLI prior to the transaction and Altria's exit. (CCFF ¶¶ 1441-62).

1658. Dr. Murphy explained these market dynamics at trial, and the benefits they have for consumer choice: “[O]ne of the things that happens when a firm leaves the market is resources are re-allocated to other uses and often re-allocated within the same marketplace. And the resource that was re-allocated in this case was the shelf space of retailers; that is, Professor Rothman's analysis says, well, geez, Altria's product left the market. That means less choice for consumers. But if, when that product came off the shelf, other products went on the shelf, the person walking into the store doesn't have less choice. They might even have more choice than they had before.” (Murphy Tr. 3130). This process -- “products moving off the market and being replaced by other products -- is a normal part of the competitive process.” (Murphy Tr. 3134). “[W]hen products leave, particularly unsuccessful products, they typically will be replaced. And in this case, it looks like they were.” (Murphy Tr. 3134).

### **Response to Finding No. 1658**

The proposed finding should be disregarded because it is unsupported, incomplete, and misleading. The statement that shelf space “was re-allocated in this case” after Altria's exit should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (*See* Order on Post-Trial Filings at 3, dated June 28, 2021). The cited testimony of Dr. Murphy does not rely on any record evidence to support this claim.

The statement that “products moving off the market and being replaced by other products -- is a normal part of the competitive process” is incomplete and misleading because it ignores the substantial evidence that Altria's various justifications for removing its e-cigarette products from the market are pretextual. (*See* CCFF ¶¶ 1034-407).

The proposed finding is also incomplete and misleading because it ignores the significant body of evidence that it was far from “normal” for Altria—as the number three supplier of closed-system e-cigarettes, with all of its resources and incentives—to exit the market in 2018 when no other competitor, large or small, reached the same decision. (*See, e.g.*, King (PMI) Tr. 2379-80 (testifying that Altria’s decision to exit the sale and development of e-cigarettes did not make sense because “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, I think, unusual for a major tobacco company at the time not to have some initiative or way to deal with the growth of e-cigarettes.”); Huckabee (Reynolds) Tr. 391 (“I was very surprised at the announcement. . . . Altria had committed a great deal of resources to the marketing and distribution of MarkTen product, and the brand features very prominently in its activities certainly from a marketing standpoint, throughout the industry, and at retail. So the removal of the products comprised a substantial strategic shift.”); Crozier (Sheetz) Tr. 1501-02 (“I was surprised they were exiting the category, and I say that because they . . . have a leadership brand in the other categories, so I was kind of surprised that they would exit. And they were also our number two product.”); PX7019 (Crozier (Sheetz), Dep. at 109) (“Q. Are you surprised that Altria would launch a product with MarkTen Elite and discontinue it eight months later? . . . A. I was a little surprised that it hadn’t even been on the market an entire year, especially since we kind of had it as an exclusive product launch in March but less than a year is a pretty short time. Q. Do you recall any other examples of e-cigarette suppliers discontinuing products in that short of a time period? A. I do not.”), 115 (“Q. After the reasons that Altria gave for discontinuing MarkTen Elite in October of 2018, were you surprised to hear that Altria was partnering with JUUL three months later? . . . A. Yeah. It was a little striking. . . . Just ‘cuz they had talked about pod-based products



and then MarkTen was the -- MarkTen Elite was the pod-based product and so was JUUL.”); PX7012 (Eldridge (ITG), Dep. at 180-81) (“Q. What was your reaction when you found out that Altria was pulling MarkTen off the market? A. As I stated, I was surprised. Q. Why were you surprised? A. Once again, because I felt that – I heard it was a good product and felt that they had marketing power to drive the business in that space. And when I say ‘space,’ I meant the e-cigarette space. . . . Q. Based on your experience in the industry, did you think it was unusual for Altria to introduce a product and then announce they were pulling it off the market less than a year later? . . . A. Yes.”); PX8006 at 004-05 (¶ 18) (Kloss (Wawa), Decl.) (“I was surprised that Altria would shut down MarkTen because Altria had spent a lot of resources to develop and market its electronic cigarette products. I was also surprised by the decision since Altria had agreed to pay Wawa to build electronic cigarette displays just before Altria announced the discontinuation of MarkTen.”); PX1293 (Morgan Stanley) at 121-22 (“[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’s over the long-term, and a regulatory backdrop that aims to encourage a shift down ‘the continuum of risk’. . . . [W]e question if [MO’s decision to exit e-cigs] is related to a potential JUUL investment (note that JUUL has ~75% market share of e-cigs and a potential investment by MO could raise anti-trust issues.”); *see also* PX5000 at 043 (¶ 91) (Rothman Expert Report) (“Altria exited due to the transaction. Altria had strong incentives to compete, and it had the ability to compete.”)).

1659. This is exactly the process that played out at Sheetz, the example Dr. Murphy highlighted. After Altria’s exit from the e-vapor industry, “if you were going to a Sheetz outlet, what we would see is not fewer products but actually more products on the shelf afterward.” (Murphy Tr. 3132; *see also* RX1217 Murphy Expert Report ¶ 74). In sum, as the MarkTen products left the market, that shelf space was reallocated to other products. (Murphy Tr. 3132-33).

### **Response to Finding No. 1659**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (*See* Order on Post-Trial Filings at 3, dated June 28, 2021). The proposed finding should also be disregarded because it is unsupported. The cited testimony of Dr. Murphy does not rely on any witness testimony, documents, data, or other record evidence to support his claims.

1660. The resulting gains that these manufacturers reaped upon Altria’s exit more than offset any anticompetitive effect. (Murphy (Altria) Tr. 3169-70). Because “Altria’s products were a relatively small part -- in the case of Elite, a very small part -- of the marketplace,” to offset any loss from their exit, “you would have only needed a very small expansion, and the fact that when they left, it opened opportunities, for example, through shelf space, to have more -- made it easier to make that expansion, you might say. You really would say there’s just no reason to believe that this would amount to any anticompetitive impact.” (Murphy (Altria) Tr. 3169-70).

#### **Response to Finding No. 1660**

The proposed finding should be disregarded because it relies solely on expert testimony to establish a purported “fact.” (*See* Order on Post-Trial Filings at 3, dated June 28, 2021). The proposed finding is also unsupported, incomplete, and misleading. The cited testimony of Dr. Murphy does not rely on any record evidence. The statement that “Altria’s products were a relatively small part -- in the case of Elite, a very small part -- of the marketplace” is incorrect, incomplete, and misleading. This statement ignores evidence that Altria was the number three supplier of closed-system e-cigarettes when it began to exit the marketplace in 2018. (PX5001 at 043 (¶ 78) (Rothman Rebuttal Report)). In fact, as of August 2018, MarkTen was the second fastest growing e-cigarette brand as a whole and Elite was the fifth fastest growing pod-based product from July 1, 2017 to July 1, 2018, even though Elite had only been on the market since late February 2018. (PX1056 (Altria) at 031 (“Nu Mark Brand Update”); CCF ¶¶ 1104, 1507-08; *see also* PX1008 (Altria) at 001; Begley (Altria) Tr. 1059).

1661. Indeed, even if competition for shelf space had somehow been inhibited by Altria’s participation or exit—which Complaint Counsel has not demonstrated—that would not

hinder overall competition because shelf space is just one tool to market and promote e-vapor products, and there have been several e-vapor products that were able to grow and compete in the market without substantial shelf space. (Huckabee (Reynolds) Tr. 474).

### **Response to Finding No. 1661**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding about the sufficiency of the evidence. Respondents inappropriately state their own arguments as “fact.”

The proposed finding is also incomplete and misleading because it ignores evidence demonstrating that Altria was a significant competitor for shelf space, and that competition was lost as a result of the transaction. (See CCF ¶¶ 1442-62). In fact, JLI’s executives considered Altria’s competitive efforts to secure shelf space in 2018 to be an “urgent” threat. (PX2001 (JLI) (email from Bob Robbins to Kevin Burns and Tim Danaher dated May 11, 2018 with the subject line “Altria shelf set competitive response”)).

The proposed finding is also unsupported, incomplete, and misleading to the extent that it purports to rely on Wade Huckabee’s trial testimony. Huckabee actually testified that shelf space is “one of the drivers of sales.” (Huckabee (Reynolds) Tr. 474). The statement that “several e-vapor products . . . were able to grow and compete in the market without substantial shelf space” is also incomplete and misleading. Huckabee testified that JUUL and Logic were able “to grow regionally” and “early on without national shelf space,” but Huckabee never testified that shelf space was not necessary to grow nationally and/or maintain growth after early adoption. (Huckabee (Reynolds) Tr. 474).

1662. For example, “JUUL was able to grow their brand, particularly regionally, early on without national shelf space,” as was JTI’s Logic product. (Huckabee (Reynolds) Tr. 474; *see also* PX7037 Huckabee (Reynolds) Dep. at 115 (similar); PX7022 Begley (Altria) Dep. at 216 (“Think about JUUL. JUUL’s visibility was mixed in different stores. And even though JUUL didn’t have, you know, the visibility that we enjoyed in these stores, they somehow found a way, because of the quality of their product, to do very well.”); PX7009 Burns (JLI) IHT at 191-92 (noting that JUUL “went from, you know, less than 1 percent of the

combined cigarette/e-cig market to 7 to 8 percent, and [it was] doing that with less than optimal space”); PX7038 Myers (Altria) Dep. at 147 (noting that ZYN is another example of a product that “generally doesn’t have a home” at retail—i.e., is “not merchandised in a category”—but is the “largest [tobacco derived nicotine (TDN)] product in the marketplace”).

### **Response to Finding No. 1662**

The proposed finding is incomplete and misleading. Huckabee testified that JUUL and Logic were able “to grow regionally” and “early on without national shelf space,” but Huckabee never testified that shelf space was not necessary to grow nationally and/or maintain growth after early adoption. (Huckabee (Reynolds) Tr. 474). The proposed finding is also unsupported to the extent that it relies on the testimony of Myers regarding ZYN, which is not an e-cigarette but is rather a tobacco-derived oral nicotine pouch like Altria’s On!. (PX7010 (Gifford (Altria), IHT at 78, 82)).

1663. Moreover, “[r]etailers . . . have an incentive to give products with growing demand premier shelf space.” (PX5000 Rothman Report ¶ 185). As JLI’s former CEO Burns explained, “if you have increasing consumer demand, retailers are going to make space available to buy the product. So retailers were aware that [JUUL] was a product that was accelerating in demand. In addition, retailers were making somewhere around twice the gross margin percentage on [JUUL] than they were making on cigarettes. So it is attractive in terms of new growth . . . [and retailers] are always looking for new things to put in their stores to increase their revenues and increase their margins.” (PX7009 Burns (JLI) IHT at 77-78; *see also supra* Part III.D.2).

### **Response to Finding No. 1663**

The proposed finding is incomplete and misleading to the extent that it ignores evidence of the competition for shelf space provided by Altria before the transaction. (*See* CCFF ¶¶ 1442-62; Responses to RPF ¶¶ 413-21).

1664. Citing that very evidence, Dr. Rothman acknowledges that “JLI had leverage with retailers that would have enabled it to expand to more stores and increase shelf space” without Altria’s assistance. (PX5000 Rothman Report ¶ 169 & n.400). He also notes that, even without Altria investing in fixtures, other companies, such as JLI, “would have invested in additional fixtures.” (PX5000 Rothman Report ¶ 169).

### **Response to Finding No. 1664**

The proposed finding is vague because it does not identify “that very evidence” to which it refers. The second sentence of the proposed finding is also incorrect, incomplete, and misleading.

Dr. Rothman never claimed that [REDACTED] (PX5000 at 092 (¶ 169) (Rothman Expert Report) (emphasis added)). The actual

statement from Dr. Rothman’s expert report is that [REDACTED]

[REDACTED] (PX5000 at 092 (¶ 169) (Rothman Expert Report)).

**XVIII.COMPLAINT COUNSEL CANNOT ESTABLISH ANTICOMPETITIVE EFFECTS USING DR. ROTHMAN’S QUANTIFICATION OF CONSUMER HARM**

1665. Finally, Complaint Counsel, relying on an analysis by Dr. Rothman, contends that Altria’s exit from the e-vapor industry has resulted in an annual loss of consumer surplus of \$33.6 million, assuming that Altria would have had a 10 percent share of the closed-system e-vapor market if it had not exited the market. (CC Pretrial Br. 57 (citing PX5000 Rothman Report at ¶ 144 & Tbl. 9)). Dr. Rothman also calculates that, had Altria achieved a 20 percent share, the annual loss of consumer surplus would be \$66.5 million, (PX5000 Rothman Report ¶ 144 & Tbl. 9), although Complaint Counsel does not invoke this higher calculation in its pretrial brief, (see CC Pretrial Br. 57).

**Response to Finding No. 1665**

The proposed finding is incomplete. [REDACTED]

[REDACTED]

1666. As a threshold matter, even if Dr. Rothman’s model were reliable, at most it predicts a miniscule impact on consumers that could easily be offset by competitor expansion. Approximately 80 percent of the “harm” calculated by Dr. Rothman is attributable not to any supra-competitive pricing, but rather his calculation of the harm to consumers who were supposedly deprived of their first-choice e-vapor product. (Murphy Tr. 3161;

RX1217 Murphy Report ¶¶ 25(a), 167; PX7048 Rothman Trial Dep. at 130-31). Dr. Rothman does not dispute this. (PX7048 Rothman Trial Dep. at 131).

**Response to Finding No. 1666**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record.

The proposed finding is incorrect, incomplete, and misleading because it ignores harm to consumers who were deprived of their first-choice e-cigarette product. Respondents have provided no explanation and no evidence in the finding as to why the harm to these consumers should be ignored or discounted. As Respondents have admitted, e-cigarettes are differentiated products. (*See, e.g.*, PX7004 (Willard (Altria), IHT at 52, 54); PX7047 (Murphy, Dep. at 42-43, 292); PX7048 (Rothman, Trial Dep. at 210)). “In a market with differentiated products, the removal of a product from the market will be harmful. It will reduce consumer choice, and it will eliminate competitive constraint on the other products that remain in the market.” (PX7048 (Rothman, Trial Dep. at 125); *see also* PX7048 (Rothman, Trial Dep. at 210) (“In a differentiated product market, the removal of a product will harm consumers that preferred that product and will eliminate a competitive constraint on the -- on other products that that product competed with.”)). The Antitrust Logit Model is a differentiated products model that is capable of calculating the total loss of consumer surplus from various sources, including price effects and non-price effects. (PX7048 (Rothman, Trial Dep. at 125, 210-11)).

Moreover, there is additional harm from the loss of innovation that is not captured in Dr. Rothman’s pricing model. (*See Responses to RPF ¶¶ 1647-50*). As Dr. Rothman explained, “The transaction eliminates . . . the competitive initiatives, the product development initiatives that Altria was pushing and would have pushed. This is a loss of innovation competition. . . . Altria was . . . investing aggressively to develop and bring new products to the market. It had strong

incentives to do that. It had significant capabilities. Altria’s exit deprives the market of those efforts. It – it deprives the market of that innovation competition.” (PX7048 (Rothman, Trial Dep., at 34-35)).

Finally, the proposed finding is incomplete and misleading because it ignores testimony that Dr. Rothman does not have an opinion about whether one type of harm is more important than the other. (PX7048 (Rothman, Trial Dep. at 211)).

1667. In the context of Dr. Rothman’s \$33.6 million harm calculation, this means that \$26 million is attributable to loss of consumer choice, with just \$7.6 million attributable to price impact. (RX1217 Murphy Report ¶ 167; PX7048 Rothman Trial Dep. at 131-32).

#### **Response to Finding No. 1667**

The proposed finding is incomplete and misleading. (*See* Response to RPF ¶ 1666).

1668. Given that the closed-system e-vapor market was about \$2.4 billion as of 2018, that \$7.6 million price impact accounts for only 0.3 percent of overall market revenue. (Murphy Tr. 3169).

#### **Response to Finding No. 1668**

The proposed finding is vague because it does not identify what the \$2.4 billion is (e.g., sales, revenues, profits, . . .) or define with specificity what it means by “*that* \$7.6 million price impact.” (emphasis added). The proposed finding is unsupported, incomplete, misleading, and irrelevant. Respondents have provided no source for their calculation of a \$7.6 million price impact. To the extent that Respondents are referring to Dr. Rothman’s calculations, Dr. Rothman found that, assuming Altria would have maintained a 10 percent share, the loss of consumer surplus from Altria’s exit is approximately \$33.6 million per year. (CCFF ¶ 1525; PX5000 at 082 (¶ 144) (Rothman Expert Report)). Respondents provide no evidence or explanation in this proposed finding for eliminating \$26 million of expected annual harm to consumers (\$33.6 million less \$26 million is \$7.6 million); *see also* Response to RPF ¶ 1666). The proposed finding is also unsupported when it states that “the closed-system e-vapor market was about \$2.4 billion as of

2018” because the cited Dr. Murphy testimony refers only to a demonstrative exhibit that is not in evidence.

1669. In addition, as explained below, Dr. Rothman’s calculation is riddled with methodological flaws that render his model unreliable. (*See infra* Part XVIII.A). And any harm to consumers was more than offset by both competitor expansion and the efficiencies associated with the regulatory services Altria provided to JLI. (*See infra* Part XVII.B-C).

### **Response to Finding No. 1669**

The first sentence of the proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the sufficiency of the evidence. Furthermore, the first sentence of the proposed finding is vague because it does not identify the alleged methodological flaws or explain why they render the model unreliable. Respondents inappropriately state their own arguments as a “fact.” (*See* Responses to RPF Part XVIII.A). The second sentence of the proposed finding should be disregarded because it contains no citations to the record and ignores Respondents’ experts admissions that he did not verify efficiencies associated with regulatory services. (CCFF ¶¶ 2125-36). (*See* Responses to RPF Parts XVII.B-C).

#### **A. Dr. Rothman’s Model Supposedly Quantifying The Harm Is Flawed**

1670. Dr. Rothman’s model of consumer harm rests on at least five unsupported factual and economic assumptions that result in overstatement of the conjectured harm. (*See infra* Part XVIII.A.1-5).

### **Response to Finding No. 1670**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the sufficiency of the evidence. Respondents inappropriately state their own arguments as a “fact.” Furthermore, the proposed finding should be disregarded because it contains no citations to the record and is vague, incomplete, and misleading. The proposed finding is vague because it does not identify the “at least five unsupported factual and economic assumptions” to which it refers; *see also* Responses to RPF Parts XVIII.A.1-5).



**1. Dr. Rothman’s Economic Model—Logit Demand—Manufactures Harm By Assuming Consumers Were Unhappy With Their Alternatives To MarkTen And Elite, The So-Called Red Bus/Blue Bus Problem**

1671. Dr. Rothman uses the antitrust logit model (“ALM”) to attempt to quantify consumer harm. (PX5000 Rothman Report ¶¶ 141-45; PX7046 Rothman Dep. at 111).

**Response to Finding No. 1671**

The proposed finding is incomplete because it ignores testimony that the ALM understates the harm from the transaction because it does not account for Altria’s exit reducing all other producers’ incentives to invest in developing better products. (*See* PX5000 at 044 (¶ 92 n.189), 083 (¶ 145) (Rothman Expert Report)). The proposed finding is also incomplete and misleading because it fails to acknowledge that Dr. Rothman relied on both quantitative and qualitative evidence in his analysis, and that the qualitative evidence supports and is consistent with his quantitative analysis of harm. (*See* PX5000 at 043-83 (¶¶ 91-145) (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 30-33)).

1672. It is widely recognized in the economic literature that the ALM is a poor choice for estimating the cost to consumers of removing a product from the marketplace. (Murphy Tr. 3158-59; RX1217 Murphy Report ¶ 168; *see also* RX1217 Murphy Report ¶ 169 (explaining that the ALM “assum[es] that the value a consumer receives from consuming a product is uniquely driven by the identity of the product, rather than by its features and characteristics”)).

**Response to Finding No. 1672**

The proposed finding should be disregarded because it is unsupported, incomplete, and misleading. Respondents provide no support for the claim that “It is widely recognized in the economic literature that the ALM is a poor choice for estimating the cost to consumers of removing a product from the marketplace.” The citations to Dr. Murphy’s testimony and expert report contain only unsubstantiated opinion testimony and citations to two papers, neither of which makes the claim that “It is widely recognized in the economic literature that the ALM is a poor choice”

or that the ALM is a poor choice in this particular matter. (See Murphy Tr. 3158-59; RX1217 at 110-11 (¶¶ 168-69) (Murphy Report)).

The proposed finding is incomplete and misleading because it ignores Dr. Rothman's testimony that "The economics profession has developed tools that are helpful for evaluating the expected loss of consumer surplus from the removal of a product (or products) from a market and the efficiencies that would be required to offset the expected loss of consumer surplus. The Antitrust Logit Model (ALM) and the Compensating Marginal Cost Reduction (CMCR) calculation are two such tools." (PX5000 at 082 (¶ 142 n.355) (Rothman Expert Report) (*citing e.g.*, Gregory J. Werden, Luke M. Froeb, and Timothy J. Tardiff, "The Use of the Logit Model in Applied Industrial Organization," *International Journal of the Economics of Business*, Vol. 3, No. 1, 1996; Gregory J. Werden and Luke M. Froeb, "The Effects of Mergers in Differentiated Products Industries: Logit Demand and Merger Policy," *Journal of Law, Economics, & Organization*, Vol. 10, No. 2, 1994; Nathan Miller and Gloria Sheu, "Quantitative Methods for Evaluating the Unilateral Effects of Mergers," July 20, 2020.)).

Finally, the proposed finding ignores Dr. Rothman testimony that the ALM and CMCR calculation are "methodologies that antitrust economists often use." (PX7048 (Rothman, Trial Dep. at 70)). Dr. Rothman further explained that he has "worked on many antitrust matters with DOJ, with the FTC, on behalf of private parties. The antitrust logit model and the compensating marginal cost calculation are tools that I have used and I have seen other economists using in this work." (PX7048 (Rothman, Trial Dep. at 70)).

1673. A necessary implication of the ALM is that if any product leaves the market—regardless of its size or the ability of consumers to purchase other, similar products—consumers are harmed. (Murphy Tr. 3129).

### **Response to Finding No. 1673**

The proposed finding should be disregarded because it is unsupported. The cited testimony of Dr. Murphy does not rely on any record evidence or economic publications, and is unsubstantiated opinion testimony. The proposed finding is also incomplete and misleading because it ignores the testimony that “In a market with differentiated products, the removal of a product from the market will be harmful. It will reduce consumer choice, and it will eliminate [a] competitive constraint on the other products that remain in the market.” (PX7048 (Rothman, Trial Dep. at 125)). Dr. Rothman also testified that “[E]ven if you remove one product out of ten that only has a 4.7 percent market share,” “there are consumers that prefer that product, . . . they’re purchasing that product. Removing that product is harmful to those consumers, and . . . also [to] consumers for whom that product would be their second-best choice . . . or third-best choice, and so that product is constraining other products in the market as well. So removing that product would harm competition, would harm consumers.” (PX7048 (Rothman, Trial Dep. at 125)).

The proposed finding is incomplete because it ignores the detail that because the “antitrust logit model is a model of differentiated product competition,” a necessary implication is that “the removal of a product will harm consumers that preferred that product and will eliminate a competitive constraint on the -- on other products that that product competed with.” (PX7048 (Rothman, Trial Dep. at 125, 210)). Of course, “if you removed one out of a hundred products and that one product had a market share of less than 1 percent,” “[i]t would likely show” harm, but “that harm would likely be very, very small.” (PX7048 (Rothman, Trial Dep. at 126)) (The ALM “is a model of differentiated product competition, and removing a product that is differentiated from the others would -- would be harmful. In a market with a hundred products, one product may not be all that differentiated, so I would expect in general that the harm from removing that product would be very, very small.”)).

1674. The paradigmatic example of this problem is the “red bus/blue bus” problem: Although consumers “do not value the particular color of the bus they ride,” the ALM would still “find that removing red buses and replacing them with blue buses generates consumer harm.” (RX1217 Murphy Report ¶ 169).

#### **Response to Finding No. 1674**

The proposed finding is incomplete and misleading because it ignores the evidence demonstrating that closed-system e-cigarettes are differentiated products. (*See, e.g.*, PX7004 (Willard (Altria), IHT at 52, 54); PX7047 (Murphy, Dep. at 42-43, 292); PX7048 (Rothman, Trial Dep. at 210)). While a “red bus” is obviously not differentiated from a “blue bus,” neither Dr. Murphy nor Respondents claim that it is. (RX1217 at 111 (¶ 169) (Murphy Report)). The proposed finding is unsupported because Respondents’ incorrect application of the ALM in an undifferentiated “red bus/blue bus” scenario does not demonstrate that the ALM is the wrong model for the facts in this case. (*See* Responses to RPF 1672-73).

The proposed finding ignores Respondents’ own arguments about how differentiated Altria’s e-cigarettes are from JLI’s, highlighting the different form factors (cigalikes vs pods), e-liquids (nicotine salts), customers, prices, and other characteristics. (*See, e.g.*, RPF Part XIV.A.1. (“Pod-Based Products And Cigalikes Have Peculiar Characteristics”), XIV.A.2. (“Pod-Based Products And Cigalikes Have Distinct Customers”), XIV.A.3. (“Pod-Based Products And Cigalikes Are Priced Separately”)). Thus, this proposed finding should be disregarded because it is incompatible with Respondents’ previous proposed findings. Respondents are trying to have it both ways – highlighting the differentiation between Altria’s and JLI’s products for purpose of product market, and then attacking Dr. Rothman’s model for accounting for product differentiation by comparing e-cigarettes to “red buses” and “blue buses.” (*Compare* RPF Part XIV.A. with RPF Part XVIII.A.1).

1675. As a result, the ALM will predict harm even if a consumer subsequently buys a cheaper product that is better at converting him or her from cigarettes. (Murphy Tr. 3159).

**Response to Finding No. 1675**

The proposed finding should be disregarded because it is incomplete, misleading, unfounded, and improper testimony by Respondents' counsel. The proposed finding is unsupported because it relies on the question posed by Respondents' counsel for support, rather than the cited testimony of Dr. Murphy. In the cited testimony, Dr. Murphy did not testify that "the ALM will predict harm even if a consumer subsequently buys a cheaper product that is better at converting him or her from cigarettes." Rather, the only reference to this claim came from Respondents' counsel in the form of a leading question: "Q. So using that model, would Dr. Rothman predict that there was consumer harm even if the consumer ended up paying less for the product going forward -- this is when Elite comes off the market -- if the consumer had a better experience for converting, you know, from combustible cigarettes, and because they lost their first choice? Would he assume that's harmful even though they paid less and got a better product? A. Well, the way he implemented the antitrust logit model, it has to show harm. Removing of a product will always generate harm in that model, because there's no modeling of the supply side in that model. There's no model of the fact that other products will become more available when one product comes off the market. That's just simply ignored in that model." (Murphy Tr. 3159).

The proposed finding is incomplete and misleading because it ignores basic economic theory. Dr. Murphy did not testify as described in the proposed finding; indeed, the statement that the ALM will predict harm even if a consumer subsequently buys a cheaper product that is better at converting them from cigarettes is both implausible and inaccurate. As explained in response to RPF 1672-73, economic theory predicts that the removal of a differentiated product from a market will result in consumer harm to the consumers who were purchasing the removed product because, in the model, consumers are expected to purchase the product that gives them the greatest

consumer welfare. (*See* Responses to RPF ¶¶ 1672-73). If there was a cheaper product in the market that performed better, economic theory tells us that the consumer would have picked that one from the start, rather than a more expensive and inferior product. (*See* PX7048 (Rothman, Trial Dep. at 125, 210)).

As Respondents have admitted, e-cigarettes are differentiated products. (*See, e.g.*, PX7004 (Willard (Altria), IHT at 52, 54); PX7047 (Murphy, Dep. at 42-43, 292)). “In a market with differentiated products, the removal of a product from the market will be harmful. It will reduce consumer choice, and it will eliminate competitive constraint on the other products that remain in the market.” (PX7048 (Rothman, Trial Dep. at 125); *see also* PX7048 (Rothman, Trial Dep. at 210) (“In a differentiated product market, the removal of a product will harm consumers that preferred that product and will eliminate a competitive constraint on the -- on other products that that product competed with.”)). The ALM is a differentiated products model that is capable of calculating the total loss of consumer surplus from various sources, including price effects and non-price effects. (PX7048 (Rothman, Trial Dep. at 125, 210-11)).

Finally, the proposed finding is misleading to the extent that it implies that JUUL is a cheaper product that is better at converting cigarette smokers. The evidence demonstrates that Altria heavily discounted and promoted its e-cigarettes, which were significantly cheaper than comparable JUUL devices and pods. (*See* CCF ¶¶ 1419-31).

1676. Indeed, Dr. Rothman admits that according to his chosen model, “the removal of a product from the market will be harmful,” even if the consumer ultimately gets a cheaper or more effective product. (PX7048 Rothman Trial Dep. at 125, 133, 135-36). In fact, approximately 80 percent of his prediction of harm derives from his assumption that consumers were harmed by switching from the MarkTen brand to other products. (Murphy Tr. 3161; RX1217 Murphy Report ¶¶ 25(a), 167; PX7048 Rothman Trial Dep. at 130-31).

### **Response to Finding No. 1676**

The proposed finding should be disregarded because it is incomplete, misleading, and misstates the witness's testimony. Dr. Rothman never "admits" that "'the removal of a product from the market will be harmful,' even if the consumer ultimately gets a cheaper or more effective product." The Antitrust Logit Model assumes that customers who purchased Altria's e-cigarettes did so because it was their first choice, which they would not do if there were other cheaper and more effective products. (PX7048 (Rothman, Trial Dep. at 125) ("Q. And this model will show consumer harm even if you remove one product out of ten that only has a 4.7 percent market share before it's removed, correct? A. Correct. Again, this is a -- this is a model of differentiated product competition, and a product that has a market share of 4.7 percent, that product, there are consumers that prefer that product, that's -- they're purchasing that product. Removing that product is harmful to those consumers, and a product that there are also consumers for whom that product would be their second-best choice, and that -- or third-best choice, and so that product is constraining other products in the market as well. So removing that product would harm competition, would harm consumers.")). The proposed finding's implication that consumers of Altria's e-cigarette products were made better off by being forced to switch to a cheaper and more effective product is incorrect and unsupported. (*See* Response to RPF ¶ 1675).

The proposed finding is incomplete and misleading because it ignores the evidence that shows that Altria's e-cigarette customers were happy with their products and were harmed when their e-cigarettes of choice were discontinued. Altria's own documents describe how consumers valued Altria's e-cigarette products, and while there may have been fewer MarkTen customers than JUUL customers, Altria's customers preferred Altria's differentiated products. For example, Baculis testified that "MarkTen cigalikes was meeting the needs of a small niche of consumers, and I didn't see any reason why we should stop selling them." (PX7014 (Baculis (Altria), Dep. at

161); PX5000 at 075 (¶ 132 n.326) (Rothman Expert Report)). Baculis also explained that “what JUUL was really good at was providing nicotine satisfaction. It had okay flavors [...] And so if another option was given to put into the marketplace that had a better inhale/exhale experience and had better-tasting flavors, for the small group of people that would prefer that [...] that’s where I say Elite could have potentially taken some folks who were using JUUL currently.” (PX7014 (Baculis (Altria), Dep. at 165); PX5000 at 075 (¶ 132 n.326) (Rothman Expert Report)). Altria’s Mountjoy testified that Altria’s own research showed that Elite performed well against JUUL on multiple dimensions and that its customers “consistently preferred over...JUUL.” (PX7034 (Mountjoy (Altria), Dep. at 50-53); PX5000 at 075 (¶ 132 n.326) (Rothman Expert Report)).

Finally, the claim in the final sentence of the proposed finding that “80 percent of [Dr. Rothman’s] prediction of harm derives from his assumption that consumers were harmed by switching from the MarkTen brand to other products” is misleading, unfounded, vague, and irrelevant. To the extent that the proposed finding suggests that 80% of Dr. Rothman’s harm estimates should not count, the proposed finding ignores the point that neither Respondents nor Dr. Murphy explicitly make such an argument, thus it is not clear why the breakdown of price and non-price harm is relevant. The proposed finding’s argument may have been appropriate if Altria had entered into the transaction and kept its own products on the market. However, because Altria removed its e-cigarette products from the market to invest in JLI (*See Responses to RPF ¶¶ 1606, 1678*), there is harm to Altria’s customers who can no longer purchase the product of their choice, which Dr. Rothman and the ALM account for appropriately. (PX7048 (Rothman, Trial Dep. at 210-11); PX5000 at 075 (¶ 132 n.326), 077-83 (¶¶ 134-45) (Rothman Expert Report)).

1677. Dr. Rothman points to no evidence that MarkTen cig-a-like or Elite were unique or offered features that no other e-vapor product could replace—and, in the absence of such evidence, MarkTen and Elite are akin to “red buses,” the removal of which does not harm consumers. (*See PX5000 Rothman Report ¶¶ 141-44*).



**Response to Finding No. 1677**

The proposed finding should be disregarded because it is incorrect, unsupported, incomplete, and misleading. (*See* Response to RPF ¶ 1674). The proposed finding is not supported by its citation to the section of Dr. Rothman’s expert report addressing harm and efficiencies because Dr. Rothman cited to “documents and testimony” that “indicate that Altria had product offerings that were valuable to consumers” and that “Altria competed with other closed-system e-cigarette producers on price and other dimensions.” (PX5000 at 081-82 (¶ 141) (Rothman Expert Report)). Indeed, both Respondents and Dr. Rothman point to many examples of how MarkTen’s cigalikes and Elite were differentiated. (*See, e.g.*, RPF Part XIV.A; PX5000 at 075-81 (¶¶ 131-40) (Rothman Expert Report); *see also* CCFF ¶¶ 457, 465, 1494, 1524; Response to RPF ¶ 1676).

1678. Moreover, a loss of consumer choice is often anything but anticompetitive. (CoL ¶ 124). “Exit is an important part of” the process by which industries progress. “[W]hen less successful products leave the market, that often will help consumers, because it makes resources available and encourages the expansion of other products in that marketplace.” (PX7047 Murphy Dep. at 83; *see also* Murphy Tr. 3129-30).

**Response to Finding No. 1678**

The first sentence of the proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion about the effects of loss of consumer choice. Respondents inappropriately state their own arguments as a “fact.”

The second sentence of the proposed finding is unsupported, incomplete, and misleading because the cited Dr. Murphy testimony contains no citations to any record evidence, and it thus inappropriate as a finding of fact. The proposed finding is incomplete and misleading because it ignores evidence of the harm caused by the transaction and Altria’s exit. (CCFF ¶¶ 1408-730). Respondents try to conflate exit under normal competitive circumstances with Altria’s exit, which occurred as a condition and consequence of the transaction with JLI rather than as an independent

business decision. (*See* CCFE ¶¶ 867-1407). Altria's [REDACTED] other executives admitted that Altria did not abandon their work to develop e-cigarettes until the end of December 2018 when Altria entered into the transaction and non-compete agreement with JLI. (PX7010 (Gifford (Altria), IHT at 216) [REDACTED]  
[REDACTED]  
[REDACTED]; PX7026 (Gardner (Altria), Dep. at 176) (“I think the e-vapor growth team, which I was a member of, stopped at the end of December, when the JUUL deal was announced. Q. Do you know if it stopped because of the JUUL deal? A. I believe it stopped because of the JUUL deal, because we were -- we ceased development of e-vapor products.”)).

1679. It is thus “not good economics” to assume that product exit, particularly exit of “unsuccessful products,” necessarily leads to competitive harm. (PX7047 Murphy Dep. at 83).

#### **Response to Finding No. 1679**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather an unfounded expert opinion about the effects of Altria’s exit on competition. Respondents inappropriately state their own arguments as a “fact.” (*See* Responses to RPF ¶¶ 1671-78). Dr. Rothman does not just “assume” that product exit necessarily leads to competitive harm—on the contrary, he relies on both qualitative and quantitative evidence that shows that the transaction has harmed competition and will harm competition. (PX7048 (Rothman, Trial Dep. at 9-10, 51, 91-92); *see also* PX7048 (Rothman, Trial Dep. at 126) (“In a market with a hundred products, one product may not be all that differentiated, so I would expect in general that the harm from removing that product would be very, very small.”) (discussing hypothetical scenario unrelated to the transaction)).

The proposed finding is also incomplete and misleading because it ignores evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Dr. Murphy’s report, however, makes no mention of Altria’s work to produce an updated Elite 2.0 pod-based product. (*See generally* RX1217 (Murphy Report); *see also* CCFF ¶ 2117). Dr. Murphy also ignores the fact that Altria was collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Dr. Murphy conceded that his report does not mention Altria’s Joint Research, Development, and Technology Sharing Agreement (“JRDTA”) with PMI, nor the e-cigarette products that were in development under the JRDTA or that PMI had already commercialized and was selling in other parts of the world, e.g., VEEV. (CCFF ¶¶ 2115-16, 2118, 2121). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

**2. Dr. Rothman’s Chosen Model Also Requires An Assumption Of Proportional Diversion, Which Is Inconsistent With The Actual Patterns Of Substitution In The E-Vapor Marketplace**

1680. Another “assumption of a logit demand model is that whenever you lose customers, [they]’re just redistributed proportionally amongst all the other products in the market.” (Murphy Tr. 3119; *see also* RX1217 Murphy Report ¶ 173 (explaining that the ALM

“assum[es] a highly restrictive pattern of substitution among products such that diversion ratios . . . are assumed proportional to market shares, irrespective of how similar or distant those products are with respect to their characteristics and features”).

### **Response to Finding No. 1680**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather unsupported opinion testimony. In the cited testimony, Dr. Murphy mischaracterizes an assumption of the ALM as a “highly restrictive pattern of substitution.” (RX1217 at 113 (¶ 173) (Murphy Report)). The proposed finding ignores Dr. Rothman’s testimony that proportional redistribution was the “best way” to estimate the effect of Altria’s exit on competition because “the effect of Altria’s exit on competition was the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal. Reallocating Altria’s share equally among the remaining participants in proportion to their share, that holds all else equal.” (PX7048 (Rothman, Trial Dep. at 27)). Complaint Counsel does not disagree with the section of the proposed finding stating that an assumption of the ALM is proportional diversion. (See PX7048 (Rothman, Trial Dep. at 123-24)).

1681. In other words, the ALM model would assume that if Porsche vehicles were removed from the market for passenger cars in the United States, “Porsche consumers would switch to other cars—pickup trucks, minivans, 4-door sedans, SUVs—simply in proportion to their market share.” But, of course, “[i]n reality, we expect Porsche consumers would be more likely to switch to other high-end German-engineered cars.” (RX1217 Murphy Report ¶ 173).

### **Response to Finding No. 1681**

The proposed finding should be disregarded because it contains no citations to the record and is misleading. The proposed finding should also be disregarded because it is not a “finding of fact,” but unsupported expert opinion testimony. Respondents inappropriately state their own argument as a “fact.” In the proposed finding and cited testimony, Respondents and Dr. Murphy have failed to explain how the example involving Porsches relates to e-cigarettes, why “Porsche

consumers would be more likely to switch to other high-end German-engineered cars,” or what analysis Dr. Murphy performed to reach these conclusions.

1682. Notably, this is the same proportional diversion assumption that underpins Dr. Rothman’s HHI calculation. (*See supra* Part XV.A.3; PX7048 Rothman Trial Dep. at 122-23 (acknowledging that proportional diversion is “an assumption of the logit model”). And, as explained above, this “is very different than what we actually see in the marketplace.” (Murphy Tr. 3119-20; *see also supra* Part XV.A.3).

### **Response to Finding No. 1682**

The first sentence of the proposed finding is vague because it does not identify what is meant by “this” in the phrase “this is the same proportional diversion assumption.” (*See* Complaint Counsel’s Responses to RPFf Part XV.A.3).

The second sentence of the proposed finding should be disregarded because it contains no citations to the record and is unsupported expert opinion testimony. The second sentence presents no evidence in support for its statement that proportional diversion “is very different than what we actually see in the marketplace,” nor have they conducted their own diversion analysis or proposed any alternative diversions. Indeed, Dr. Murphy conceded that he failed to investigate, quantify, or demonstrate that any sales expansion by third parties post-Altria’s exit was in fact in response to Altria’s exit. (CCFF ¶¶ 2123-24).

The proposed finding is incomplete because it ignores the testimony of Dr. Rothman explaining that when calculating HHIs with Altria not in the market, he “reallocated Altria’s share to the remaining market participants in proportion to their shares” because it “was the best way to estimate . . . the effect of Altria’s exit on concentration.” (PX7048 (Rothman, Trial Dep. at 26-27)). “[T]he effect of Altria’s exit on competition was the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal. Reallocating Altria’s share equally among the remaining participants in proportion to their share, that holds all else equal.” (PX7048 (Rothman, Trial Dep. at 27)).

Finally, the proposed finding is incomplete because it ignores the section of Dr. Rothman's rebuttal report where he showed that "Altria's exit increases concentration even if substitution would have been different from proportional shares." (PX5001 at 041 (¶ 72 n.174) (Rothman Rebuttal Report)). For example, even "if all of Altria's share goes to Reynolds" and there was no diversion to JLI, "the change in HHI would be 460," which is still well above the Guidelines' presumption of 200. (PX5000 at 041 (¶ 72 n.174) (Rothman Expert Report); PX9098 (Horizontal Merger Guidelines) § 6.4 at 022).

1683. As a result, Dr. Rothman's model "grossly overstates the extent to which JLI benefitted from Altria's removal of the MarkTen products . . . and greatly overstates the measure of antitrust harm." (RX1217 Murphy Report ¶ 176).

### **Response to Finding No. 1683**

The proposed finding should be disregarded because it is unsupported expert opinion testimony that contains no citations to the record. Furthermore, Dr. Murphy conceded that he failed to investigate, quantify, or demonstrate that any sales expansion by third parties post-Altria's exit was in fact in response to Altria's exit. (CCFF ¶¶ 2123-24). The proposed finding is incomplete and misleading because it fails to account for the evidence demonstrating that the transaction and Altria's exit from the e-cigarette business has caused harm, including the loss of price and non-price competition and the elimination of products that appealed to consumers and future development by Altria. (CCFF ¶¶ 1408-730).

Moreover, as explained in Dr. Rothman's rebuttal report, Dr. Murphy's own regression model does not support his claim that Dr. Rothman's model overstates the extent to which JLI benefitted from Altria's removal of MarkTen's products: "Applying Dr. Murphy's logic . . . diversion from Altria's cig-a-like products to pod-based products following Altria's discontinuation was greater than 1. . . . What this means is that Dr. Murphy's regression does not

provide any information about diversion from cig-a-like products to pod-based products.” (PX5001 at 029 (¶ 44) (Rothman Rebuttal Report)).

### 3. Dr. Rothman’s Model Rests On Unrealistic Market Share Inputs

1684. Separate from the flaws inherent to his chosen model, Dr. Rothman unreasonably premises his calculation on the assumption that “Altria would have maintained its 10 percent [market] share” or “grown its share to 20 percent by 2020.” (PX5000 Rothman Report ¶ 143).

#### **Response to Finding No. 1684**

The proposed finding should be disregarded because it is not a “finding of fact,” but an unsupported legal conclusion regarding the appropriateness of Dr. Rothman’s assumption. Respondents inappropriately state their own argument as a “fact.”

The proposed finding is also vague because it does not identify what it means by “the flaws inherent to his chose model.” Furthermore, the proposed finding should be disregarded because it contains no citations to the record. Finally, the proposed finding is incomplete and misleading because it ignores evidence demonstrating that but for the transaction, Altria was one of a few firms well-positioned to compete and grow in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

1685. *First*, Dr. Rothman’s 10 percent market share scenario is not a reliable baseline. Although Dr. Rothman characterizes 10 percent as Altria’s existing market share at the time of the transaction, it was actually a measure of Altria’s share for the previous 12-month period, just as in his HHI calculation. (PX5000 Rothman Report ¶¶ 87, 92; PX7048 Rothman Trial Dep. at 115-16; *see also* PX5000 Rothman Report ¶ 89, Tbl. 2 (assigning Altria a 10 percent pre-transaction share, which Dr. Rothman used for his HHI calculation)).

#### **Response to Finding No. 1685**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The second sentence of the proposed finding is unsupported because it does not cite to any evidence showing or explaining why “Dr. Rothman’s 10 percent market share

scenario is not a reliable baseline.” The citations listed as support for the proposed finding only confirm that { [REDACTED]

[REDACTED] } The proposed finding is incomplete and misleading because it ignores testimony that Dr. Rothman had good reason to average shares over a 12-month period. Dr. Rothman explained that market share calculations are “affected by noise in the data” because “shares from one month to another can -- can change.” (PX7048 (Rothman, Trial Dep. at 206-07)). As a result, when “[c]alculating shares over a 12-month period . . . the role of noise in the data will be less pronounced,” which is important because in general, “noise can make things less precise.” (PX7048 (Rothman, Trial Dep. at 207)).

Furthermore, the proposed finding is incomplete and misleading because it ignores evidence of Altria’s plans to provide future competition and grow in e-cigarettes, including discounting and improved products. (CCFF ¶¶ 1527-52). Altria was actively working to improve its existing e-cigarette products, including introducing the MarkTen Elite gasket fix in 2018 to prevent leaking, and was working on incorporating nicotine salts and other improvements in Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce VEEV in the U.S., and started selling an earlier version of VEEV called APEX in September 2018. (CCFF ¶¶ 1588-730). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730).

1686. But, as noted above, Dr. Rothman admits that Altria’s market share was declining over the entirety of the one-year period he used to calculate the 10 percent market share. (PX7048 Rothman Trial Dep. at 113, 115).

### **Response to Finding No. 1686**

The proposed finding is vague because the proposed finding does not define what product market it is referring to when it refers to market share or explain why it matters that share was



declining. To the extent that the proposed finding is referring to the closed-system e-cigarette market and is implying that using a 12-month average share overstates Altria's actual share, then the proposed finding is incomplete and misleading because it is also necessarily true that a 12-month average share *understates* JLI's share. (PX7048 (Rothman, Trial Dep. at 205) ("JLI's share in November 2018 is higher than its share over the -- the period October 2017 through September 2018.")).

Furthermore, the proposed finding is incomplete and misleading because it ignores evidence of Altria's plans to provide future competition and grow in e-cigarettes, including discounting and improved products. (CCFF ¶¶ 1527-52). Altria was actively working to improve its existing e-cigarette products, including introducing the MarkTen Elite gasket fix in 2018 to prevent leaking, and was working on incorporating nicotine salts and other improvements in Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce VEEV in the U.S., and started selling an earlier version of VEEV called APEX in September 2018. (CCFF ¶¶ 1588-730). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730).

1687. As noted above, by the time that Altria withdrew MarkTen Elite from the market, the company's market share had declined to 7.5 percent based on unit share, (PX1127 (Altria) at 003), and 4.7 percent based on dollar share, (PX2062 (JLI) at 007).

### **Response to Finding No. 1687**

The proposed finding is vague because it does not identify for what product market it is stating shares. The proposed finding is also unsupported, incomplete, and misleading because the two cited exhibits do not identify the sources or bases for their purported share estimates, and they may differ from the data sources that Dr. Rothman used. (PX1127 (Altria) at 003; PX2062 (JLI) at 007). The proposed finding is also incomplete and misleading because the cited two exhibits reference shares from different time periods: PX1127 references shares from September 2018 and

PX2062 references shares from November 2018, compared with Dr. Rothman's share estimates from October 2017 through September 2018. (PX1127 (Altria) at 003; PX2062 (JLI) at 007; PX7048 (Rothman, Trial Dep. at 205)).

Furthermore, the proposed finding is incomplete and misleading because it ignores evidence of Altria's plans to provide future competition and grow in e-cigarettes, including discounting and improved products. (CCFF ¶¶ 1527-52). Altria was actively working to improve its existing e-cigarette products, including introducing the MarkTen Elite gasket fix in 2018 to prevent leaking, and was working on incorporating nicotine salts and other improvements in Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce VEEV in the U.S., and started selling an earlier version of VEEV called APEX in September 2018. (CCFF ¶¶ 1588-730). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730).

1688. In addition, this market share calculation does not take into account the additional decrease over the ensuing months in the cig-a-like segment, which is where the majority of Altria's e-vapor sales were made. (Murphy Tr. 3166-67).

### **Response to Finding No. 1688**

The proposed finding should be disregarded because it contains no citations to the record in support of the statement that there was an "additional decrease over the ensuing months in the cig-a-like segment." The cited testimony of Dr. Murphy contains no citations to record evidence or specific sections of his report, data, figures, or charts. The proposed finding is also vague because it does not specify the amount of the purported decrease in in the cigalike segment.

The proposed finding is incomplete and misleading because it ignores evidence that, before the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine salts and other improvements into Elite 2.0.

(CCFF ¶¶ 1538-52). Dr. Murphy’s report, however, makes no mention of Altria’s work to produce an updated Elite 2.0 pod-based product. (*See generally* RX1217 (Murphy Report); *see also* CCFF ¶ 2117). Dr. Murphy also ignores the fact that Altria was collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Dr. Murphy conceded that his report does not mention Altria’s Joint Research, Development, and Technology Sharing Agreement (“JRDTA”) with PMI, nor the e-cigarette products that were in development under the JRDTA or that PMI had already commercialized and was selling in other parts of the world, e.g., VEEV. (CCFF ¶¶ 2115-16, 2118, 2121).

The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (*See* PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of 2018); *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). [REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

1689. *Second*, the only source for Dr. Rothman’s 20 percent scenario is a forward-looking goal from a single slide created by Altria in February 2018—*before Elite was even launched*. (PX4012 (Altria) at 009; *see also* PX7046 Rothman Dep. at 243 (conceding that neither the 10 percent nor the 20 percent scenario is based on any “specific opinion” about what Altria’s share would be at any particular time)).

**Response to Finding No. 1689**

The proposed finding is incomplete and misleading. First, the 20 percent scenario from Dr. Rothman's model was based on an estimate from February 2018 that was presented to Altria's Board. (PX1289 (Altria) at 005; PX4012 (Altria) at 009; *see also* PX5000 at 077 (¶ 133 n.333); PX7048 (Rothman, Trial Dep., at 207-09) ("This was one of two counterfactual scenarios. One of the counterfactual scenarios assumed that Altria would grow its share by 20 percent by 2020. That counterfactual scenario was based on the projection that Altria presented to its board of directors.")). The proposed finding is unsupported, in part, because nowhere in the Board presentations were the share projections characterized, as the proposed finding does, as a "forward-looking goal." Second, the claim in this proposed finding that Dr. Rothman conceded that "that neither the 10 percent nor the 20 percent scenario is based on any 'specific opinion' about what Altria's share would be at any particular time" mischaracterizes the witness's testimony. Dr. Rothman testified that "The specific 10 and -- 10 to 20 percent, that's specifically relevant to the quantification of harm. In terms of the question of would Altria have continued to compete and would Altria likely have been a significant competitor, I'm not reaching a -- I'm not offering a specific opinion that says -- when I say Altria likely would have been a significant competitor, its share in 2020 would have been 14.3 percent. It's -- my opinion is that Altria would have continued to compete. And it would have continued to be a significant competitor if it had continued to compete. And then for the quantification of harm, I considered a range of scenarios that ranged from Altria maintaining its share of 10 percent up to Altria growing its share to 20 percent by 2020." (PX7046 (Rothman, Dep. at 243)).

Furthermore, the proposed finding is incomplete and misleading because it ignores testimony from Dr. Rothman's trial deposition, where he clarified that he came up with his own estimates of Altria's share absent the transaction in two counterfactual scenarios. (PX7048

(Rothman, Trial Dep., at 208-09) (“Q. Why didn’t you come up with your own share estimates for Altria instead? A. I guess I would push back and say that I did. One of the counterfactual scenarios I considered was that Altria would maintain its current share over the 12-month period prior to it beginning to withdraw its products. . . . My analysis is that Altria would have been a significant competitor if it hadn’t entered into the transaction, and I considered two counterfactual scenarios. One, that Altria would have maintained its current market share. This was based on its share over the prior 12 months. And the other scenario that I considered was based on the projection that was presented to Altria’s board of directors in February 2018. That was that Altria would grow its share 20 percent by 2020.”)).

1690. As Gifford explained, it would not be appropriate to rely on a February 2018 forecast to predict performance in 2019 and 2020 because businesses, including Altria, “make adjustments on a regular basis as the market is developing.” (Gifford (Altria) Tr. 2746). This was especially true in the e-vapor category in 2018, when cig-a-likes were “dropping so significantly” and pods “really w[ere] driving the e-vapor growth.” (Gifford (Altria) Tr. 2746). Instead, “[y]ou would look at the later part of the year, because things were changing so significantly . . . you would want the latest trends and latest forecasts.” (Gifford (Altria) Tr. 2836).

### **Response to Finding No. 1690**

The proposed finding is incomplete, misleading, and unreliable because it relies solely on the self-serving testimony of an Altria executive. With respect to Gifford’s claim that “[y]ou would look at the later part of the year, because things were changing so significantly . . . you would want the latest trends and latest forecasts,” the proposed finding is incomplete because Dr. Rothman used Altria’s share estimates from February 2018 since they were the latest estimates that Altria prepared prior to beginning to exit the market. (*See* PX1289 (Altria) at 005).

The proposed finding is also incomplete and misleading to the extent that it suggests that cigalikes are an obsolete product. (*See* PX1644 (Altria) at 010 (showing only a modest decline in U.S. cigalike sales from 93.7 million in the first half of 2017 to 89.7 million in the first half of

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2018); *see also* PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria’s Board that the MarkTen cigalike platform was declining and citing the fact that Altria’s MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). { [REDACTED]

[REDACTED] } ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

1691. In addition, Altria’s February 2018 projection depended heavily on the assumption that Altria would grow Elite’s market share substantially. (RX1217 Murphy Report ¶ 147). As Begley explained, “success in pod-based products was going to be absolutely critical for [Nu Mark] to achieve [its] three-year plan targets and . . . at that point in time, [Nu Mark was] optimistic, but [it] had, really, no marketplace learnings in terms of the pod-based products that [it] had in [its] portfolio.” (PX7022 Begley (Altria) Dep. at 262-63; *see also* Gifford (Altria) Tr. 2739 (explaining that the projection included assumptions about how Elite would contribute to Nu Mark’s financial viability)).

### **Response to Finding No. 1691**

The proposed finding ignores evidence of Altria’s plans before the transaction to provide future competition in e-cigarettes, including discounting and introducing improved products. (CCFF ¶¶ 1527-730). Altria was actively working, before the transaction, to improve its existing e-cigarette products, including introducing the MarkTen Elite gasket fix in 2018 to prevent leaking, and was working on incorporating nicotine salts and other improvements in Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce VEEV in the U.S., and started selling an earlier version of VEEV called APEX in September 2018. (CCFF ¶¶ 1588-730). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). The proposed finding is also incomplete and misleading because it ignores evidence that demonstrates that Altria was one of a few firms well-

positioned to compete and grow in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

1692. Yet the next several months showed that Elite would not drive share growth for Altria. Rather, despite heavy promotions, Elite's sales were dismal, (*see supra* Part III.E), and it never achieved more than a one percent share of cartridge unit sales among closed systems, (RX1217 Murphy Report ¶ 147).

### **Response to Finding No. 1692**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record.

The statement in the second sentence of the proposed finding that MarkTen Elite “never achieved more than a one percent share of cartridge unit sales among closed systems” is incomplete and misleading. While it is true that MarkTen Elite achieved about 1% share in the 8 months that it was on the market, by comparison, JUUL achieved less 1% share in the first year that it was on the market. (*See* PX7009 (Burns (JLI), IHT at 191-92); PX7048 (Rothman, Trial Dep., at 47) (“[O]ver the eight months that Elite was on the market, its share was about 1 percent, and in JUUL's first year on the market, its share was -- was less than 1 percent.”)).

The proposed finding is also incomplete and misleading because it ignores evidence that Altria was actively working, before the transaction, to improve its existing e-cigarette products, including introducing the MarkTen Elite gasket fix in 2018 to prevent leaking, and was working on incorporating nicotine salts and other improvements in Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce VEEV in the U.S., and started selling an earlier version of VEEV called APEX in September 2018. (CCFF ¶¶ 1588-730). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730).

The proposed finding is further incomplete and misleading because it ignores evidence that, for a product that was on the market for less than 8 months and was still ramping up distribution, Elite had been performing quite well. (*See Responses to RPF Part III.E*). MarkTen Elite was the fifth fastest growing pod-based product from July 1, 2017 to July 1, 2018, even though Elite had only been on the market for less than half of that period. (PX1056 (Altria) at 031; CCF ¶¶ 1104, 1507-08, 1660)).

Finally, the proposed finding is unsupported, incomplete, and misleading because Dr. Murphy—whose testimony is cited as support for this proposed finding—conceded that his report does not mention Altria’s Joint Research, Development, and Technology Sharing Agreement (“JRDTA”) with PMI, nor the e-cigarette products that were in development under the JRDTA or that PMI had already commercialized and was selling in other parts of the world, e.g., VEEV. (CCF ¶¶ 2115-16, 2118, 2121). Likewise, Dr. Murphy’s report makes no mention of Altria’s work to produce an updated Elite 2.0 pod-based product. (*See generally* RX1217 (Murphy Report); *see also* CCF ¶ 2117).

1693. Indeed, Altria recognized that Nu Mark’s February 2018 projection was unlikely to be achieved and, by mid-2018, had revised its forecast for Nu Mark’s retail share from 15.7 percent for 2018 to just 9.1 percent. (*Compare* PX4012 (Altria) at 009, *with* PX1127 (Altria) at 003; *see also* Gifford (Altria) Tr. 2744 (explaining that Altria prepares a “second revised forecast” or “2RF” of its budget projections “at midyear”). And even that was overly optimistic: By September 2018, Altria calculated that Nu Mark’s actual retail share was only 7.5 percent. (PX1127 (Altria) at 003 (listing Altria’s “2018 Act” share)).

### **Response to Finding No. 1693**

The proposed finding is incomplete and misleading because it ignores evidence that demonstrates that Altria was one of a few firms well-positioned to compete and grow in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCF ¶¶ 1832-41). The proposed finding also ignores evidence that Altria was actively working, before the transaction, to



improve its existing e-cigarette products, including introducing the MarkTen Elite gasket fix in 2018 to prevent leaking, and was working on incorporating nicotine salts and other improvements in Elite 2.0. (CCFF ¶¶ 1538-52). Altria was also collaborating with PMI to introduce VEEV in the U.S., and started selling an earlier version of VEEV called APEX in September 2018. (CCFF ¶¶ 1588-730). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730).

1694. Dr. Rothman also does nothing to account for the likelihood (and observed reality) that the 20 percent projection was excessively optimistic relative to the products' actual performance. (RX1217 Murphy Report ¶ 148). This is a significant oversight given Nu Mark's long history of missing market share and earnings projections, a trend that was documented by Professor Murphy, (RX1217 Murphy Report ¶¶ 149-51), and testified about by numerous Altria witnesses, (*see supra* Parts III.A.1, IX.F.1).

#### **Response to Finding No. 1694**

The first sentence of the proposed finding is incomplete and misleading because there was no "observed reality," as suggested in the finding, of what Altria's share was in 2020 because Altria exited the market in 2018. The proposed finding is incomplete and misleading because it ignores the testimony of Dr. Rothman that this is why he used two "counterfactual scenarios" to model potential scenarios in the but-for world assuming that Altria did not enter into the transaction with JLI. (*See* PX7048 (Rothman, Trial Dep., at 68-69, 71, 207-09)).

The proposed finding is also misleading when it characterizes Dr. Rothman's 20 percent counterfactual scenario as a "significant oversight." The proposed finding ignores the testimony showing that Dr. Rothman never claimed that Altria would hit 20% share in 2020 because that would be impossible for anyone to predict that in the but-for world; Dr. Rothman simply modeled the harm from the transaction under different counterfactual scenarios, one of which was that Altria would grow its share to 20% by 2020 based on a projection that Altria presented to its Board in February 2018, and the other scenario assuming that Altria would have maintained its existing

share of approximately 10%. (PX7048 (Rothman, Trial Dep., at 68-69, 71, 207-09); *see also* Responses to RPPF Parts III.A.1, IX.F.1).

#### **4. Applying The Correct Market Definition—Pods—Reduces Dr. Rothman’s Predicted Harm By Nearly 90 Percent**

1695. Dr. Rothman’s consumer harm model also assumes a closed-system market including both cig-a-like and pod-based products. (PX5000 Rothman Report ¶¶ 141-44).

#### **Response to Finding No. 1695**

The proposed finding is incomplete and misleading because Dr. Rothman did not just “assume” that the relevant product market is closed-system e-cigarettes; in stark contrast to Dr. Murphy, (*see* CCFF ¶¶ 2086-93), Dr. Rothman performed a hypothetical monopolist test to conclude that the relevant product market is the sale of closed-system e-cigarettes. (PX5000 at 031-41 (¶¶ 62-82) (Rothman Expert Report); PX7048 (Rothman, Trial Dep. at 14-17) (“Q. . . . What conclusion did you reach with respect to product market definition? A. Closed-system e-cigarettes are a relevant product market. Q. And how did you reach that opinion? A. I applied the hypothetical monopolist test to the facts of the case. Q. How did you apply the hypothetical monopolist test to the facts in this case? A. I started by defining a candidate market around Altria’s closed-system e-cigarette products. Those e-cigarette products and product development initiatives were in closed-system e-cigarettes. Altria withdrew all of its closed-system e-cigarettes and exited for six years. A candidate market defined around Altria’s closed-system cigarettes is a logical starting place. I then evaluated if a hypothetical monopolist of closed-system e-cigarettes would likely impose at least a SSNIP.”)).

The proposed finding is also incomplete and misleading because it fails to account for the tenet that it is appropriate and common to include differentiated products within the same relevant product market, as discussed in the Horizontal Merger Guidelines. (*See, e.g.*, PX9098 (Horizontal Merger Guidelines) § 6.1 at 023-25). The proposed finding is also incomplete, misleading, and

contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. The evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407; *see* Responses to RPF ¶¶ 1383-426).

Finally, the proposed finding is incomplete and misleading because it ignores testimony that Dr. Rothman’s consumer harm model is a differentiated products model that takes into account differences between products within the same product market. (PX7048 (Rothman, Trial Dep. at 125 (“The antitrust logit model is a model of differentiated product competition.”))).

1696. As already discussed, cig-a-like and pod-based products are substantially differentiated. (*See supra* Part XIV.A).

#### **Response to Finding No. 1696**

The proposed finding should be disregarded because it contains no citations to the record. The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. The evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407); *see* Responses to RPF ¶¶ 1383-426). Finally, the proposed finding is vague because it does not define what it means by “substantially.”

1697. Correcting for this approach alone—even without correcting for the myriad other flaws—reduces Dr. Rothman’s “predicted harm by 88 percent to only \$4.2 million per year.” (RX1217 Murphy Report ¶ 179).

#### **Response to Finding No. 1697**

The proposed finding is vague because it does not identify what is meant by “this approach” or identify with specificity the “myriad other flaws.” Also, the proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the

reliability of expert analysis. Respondents inappropriately state their own argument as a “fact.” The proposed finding is incomplete and misleading to the extent that it is referring to Dr. Rothman’s opinion on the product market definition and to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. The evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

The proposed finding is unsupported because it ignores the testimony of Dr. Rothman explaining that Dr. Murphy’s “correction” in ¶ 179 of his expert report does not actually correct anything. As Dr. Rothman explained in his Rebuttal Report, all that Dr. Murphy does is calculate harm for a hypothetical pod-only market, but that is wrong, misleading, and flawed for a number of reasons. (PX5001 at 030 (¶ 46) (Rothman Rebuttal Report)). As Dr. Rothman explained, “Dr. Murphy’s pod-only analysis assumes that MarkTen Elite’s share of less than 2 percent over the period from October 2017 through September 2018 reflects what Altria’s share of pod-based products would have been over time if Altria had not exited. This cannot be correct. MarkTen Elite was not even on the market for the entire October 2017 through September 2018 period. And the relevant question is what Altria’s competitive significance was and would have been over time absent the transaction. MarkTen Elite’s share in the approximately eight months it was on the market in 2018 is not a reflection of that.” (PX5001 at 030 (¶ 47) (Rothman Rebuttal Report)).

Furthermore, Dr. Murphy’s “correction,” cited in support for this finding, completely ignores the harm from Altria’s discontinuation of its cigalike products. The proposed finding ignores the evidence demonstrating that even if one were to assume that pods and cigalikes were in separate product markets for the purpose of this analysis, there would still be harm in a hypothetical cigalike-only market from the discontinuation of Altria’s cigalike products if Altria

discontinued its cigalike products because it entered into the transaction with JLI. (PX5001 at 030-31 (¶ 48) (Rothman Rebuttal Report); *see* CCFF ¶¶ 578-1407). The proposed finding should be disregarded because Dr. Murphy provides no support for his assumption that Altria would have independently discontinued its cigalike products absent the transaction. The proposed finding ignores the section of Dr. Rothman's Rebuttal Report showing that when he runs his model in a hypothetical cigalike-only market, the loss of consumer surplus from the discontinuation of Altria's cigalike products is \$25.5 million per year, which should be added to the harm of \$4.2 million that Dr. Murphy calculated in a hypothetical pod-only market for a total predicted harm of approximately \$29.7 million per year. (PX5001 at 030-31 (¶ 48) (Rothman Rebuttal Report) ("If I follow Dr. Murphy's approach of considering cig-a-like products and pod-based products as separate markets and running my model separately for them, the loss of consumer surplus from the discontinuation of Altria's cig-a-like products is \$25.5 million.")).

1698. In other words, 88 percent of Dr. Rothman's predicted harm is driven by his assumption of substitutability between Altria's cig-a-like product and pod-based products. (RX1217 Murphy Report ¶ 179).

### **Response to Finding No. 1698**

The proposed finding should be disregarded because it is unsupported, incomplete, and misleading. As previously explained in response to RPF, the predicted harm under distinct pod and cigalike markets would be approximately \$29.7 million per year, which is not significantly different from the \$33.6 million harm per year predicted in a market consisting of closed-system e-cigarettes. (*See* Response to RPF ¶ 1697; PX5000 at 082-83 (¶ 144) (Rothman Expert Report); PX5001 at 030-31 (¶¶ 46-48) (Rothman Rebuttal Report)).

The proposed finding is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. The evidence establishes that the sale of closed-system e-cigarettes,

which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

### **5. Dr. Rothman Further Inflates The Alleged Harm By Positing An Unrealistic “Hypothetical” Profit Margin**

1699. Dr. Rothman also inflates the alleged harm by manipulating the model’s profit margin input. He asserts that “Altria’s margin in 2018 likely understates its competitive significance,” (PX5001 Rothman Rebuttal ¶ 91), and therefore “calibrate[s]” his model using a “hypothetical” (i.e., made up) 27 percent profit margin for Altria, (PX5001 Rothman Rebuttal ¶ 89; *see also* RX1217 Murphy Report ¶ 182).

#### **Response to Finding No. 1699**

The first sentence of the proposed finding should be disregarded because it contains no citation to the record. The proposed finding is also incomplete, misleading, and contains statements that are not “findings of fact,” but rather legal conclusions regarding expert analysis. First, the proposed finding’s characterization of Dr. Rothman’s margin calculations as “made up” should be disregarded because it is unsupported; Dr. Murphy never claims that the margin Dr. Rothman’s uses to calibrate the model is “made up” in the cited section of Dr. Murphy’s report.

The proposed finding ignores how Dr. Rothman explained in detail the process and reasoning for his model calibration in both his original expert report and rebuttal report. (*See* PX5000 at 147-49 (Appendix E) (Rothman Expert Report); PX5001 at 048-50 (¶¶ 88-93) (Rothman Rebuttal Report)). As Dr. Rothman explained, “I calibrated the economic model of closed-system e-cigarettes using observed margins for Altria, JLI, ITG, and Reynolds and observed shares and prices for all firms. I calibrated the model in two steps. First, given the observed margins, prices, and shares, and the elasticity of demand for closed-system e-cigarettes, I solved for parameters that reflect consumer price sensitivity,  $\alpha$ , the outside good share,  $s_0$ , and the average consumer taste for non-price aspects of each product,  $\delta_i$ . Second, given the parameters  $\alpha$  and  $s_0$ , I used the model to recover estimates of each producer’s economic margin—a measure

of competitive significance that is consistent with the economic model.” (PX5001 at 048 (¶ 88) (Rothman Rebuttal Report)).

Dr. Murphy’s claims that are used as support for this proposed finding are incorrect and misleading. Dr. Murphy asserts that Altria’s observed margin in 2018 of 2% is a “problem” for the model because it “suggests that consumers did not have strong preferences for the MarkTen products.” (RX1217 at 117 (¶ 182) (Murphy Report); PX5001 at 048 (¶ 89) (Rothman Rebuttal Report)). These claims ignore what Dr. Rothman explained in his initial report: Altria launched MarkTen Elite in 2018 with significant but transitory costs, and based on the upward trend in margins that Altria had realized over time, Dr. Rothman concluded that Altria’s margin in 2018 likely understates its competitive significance. (PX5001 at 048-49 (¶ 91) (Rothman Rebuttal Report)).

In addition, the proposed finding is incomplete and misleading because Dr. Murphy’s sensitivity analysis, upon which the statements in the proposed finding are based, uses only Altria’s margin to calibrate the model and ignores information on other competitors’ margins. As a result, Dr. Murphy understates the economic margins for all other closed-system e-cigarette producers in the model, which had higher observed margins (PX5001 at 049 (¶ 92) (Rothman Rebuttal Report)). Dr. Rothman notes that “Dr. Murphy’s model calibration predicts the lowest possible estimate of harm of \$5.8 million per year because it yields the lowest average economic margin of 2.3 percent.” (PX5001 at 049 (¶ 93) (Rothman Rebuttal Report)). Using Dr. Murphy’s average economic margin of 2.3% is inconsistent with reality since it predicts “an average elasticity of demand of -43.5 ( $1 \div 0.023 = 43.5$ ).” (PX5001 at 049 (¶ 93 n.217) (Rothman Rebuttal Report)). “An average elasticity of demand of -43.5 is substantially higher than the product-level elasticities of { } or less reported { } (PX5001 at 049 (¶ 93 n.217)

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(Rothman Rebuttal Report); PX2486 (JLI) at 013-15 {

Dr. Rothman’s model uses all available margin information to calculate an average economic margin of 24.6%, which predicts harm of \$33.6 million, and is consistent with an average elasticity of demand of -4.1 ( $1 \div 0.246 = 4.1$ ). (PX5001 at 049 (¶ 93) (Rothman Rebuttal Report)). As Dr. Rothman demonstrated, using only Altria’s margin—as Dr. Murphy does—produces an implied average industry margin of 2.3%, far below the actual average industry margin of 19.4%. (*See* PX5001 at 049 (¶ 93 & n.217) (Rothman Rebuttal Report); PX5000 at 114 (Ex. 7) (Rothman Expert Report)).

Finally, Dr. Murphy concedes that, in his report, he did not compare the profitability of Altria’s e-vapor business to other e-vapor competitors at the time of Altria’s exit. (CCFF ¶ 2119).

1700. Professor Murphy translated this into layman’s terms: Dr. Rothman “just said, I’m going to lower Altria’s costs from the actual value they had in the real world, to a hypothetical value low enough to generate that 27 percent margin.” (Murphy Tr. 3162).

#### **Response to Finding No. 1700**

The proposed finding is vague because it does not define what “this” refers to in the phrase “translated this into layman’s terms.” The proposed finding should be disregarded because it contains no citations to record evidence and is unsupported expert opinion testimony cited as fact. To be clear, Dr. Rothman never testified or wrote as the cited Dr. Murphy testimony suggests Dr. Rothman did. (*See* Response to RPF ¶ 1699).

1701. That hypothetical margin bears no relationship to reality. As Dr. Rothman concedes in a footnote to his report, Elite’s actual variable margin was negative 47 percent. (PX5000 Rothman Report ¶ 116 n.294).

#### **Response to Finding No. 1701**



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The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The proposed finding is incomplete and misleading because it ignores testimony that, in the portion of Dr. Rothman's report that proposed finding cites, Dr. Rothman actually explained that "Altria's gross margin on MarkTen Elite was { [REDACTED] }, and its variable margin on MarkTen Elite was { [REDACTED] } For all other e-cigarette products, Altria's gross margin in 2018 was { [REDACTED] } and its variable margin was { [REDACTED] }." [REDACTED]

[REDACTED] The fact that Elite was a new product launch is consistent with the margin breakdown for Altria's e-cigarette products in 2018, and supports the notion that MarkTen Elite's margins were temporarily suppressed consistent with other new product launches. (PX5001 at 48-49 (¶ 91) (Rothman Rebuttal Report)).

1702. But Dr. Rothman does not explain how or when Altria would improve this margin, particularly in the face of more aggressive discounting by competitors. (PX7048 Rothman Trial Dep. at 166-67 (explaining that he had not done any analysis to show that Altria would have improved its profit margin); *see also* PX5000 Rothman Report ¶ 116 n.294 (describing aggressive price promotions on pod-based products)).

### **Response to Finding No. 1702**

The proposed finding is incomplete and misleading because it ignores testimony in which Dr. Rothman explains that MarkTen Elite's margins would likely rise in future years, consistent with the upward trend in margins that Altria had realized over time with its other e-cigarette products, and consistent with how other competitors marketed new products. (PX5001 at 49 (¶ 93) (Rothman Rebuttal Report); PX5000 at 066-67 (¶ 116 n.294) (Rothman Expert Report) (*in camera*)).

1703. Given the aggressive price competition in the e-vapor industry starting in late 2018 and continuing to today, (RX1217 Murphy Report ¶ 69; *see also supra* Parts XII.A, XIII.A), it is implausible to assume that Altria could both end price promotions on its MarkTen Elite device and also gain market share, (RX1217 Murphy Report ¶ 133 (“MarkTen Elite was heavily promoted during its short time on the market; but for those promotions, its share would very likely have been substantially smaller.”)).

#### **Response to Finding No. 1703**

The proposed finding is unsupported, incomplete, and misleading. The proposed finding does not contain citations to any evidence to support the assertion that “it is implausible to assume that Altria could both end price promotions on its MarkTen Elite device and also gain market share.” Indeed, there is no such evidence because the claim deals with a hypothetical but-for world that does not exist. The proposed finding ignores Dr. Rothman’s testimony that “the effect of the transaction depends on the difference between the actual and the but-for world, not on the -- how prices have evolved over time. How prices have evolved over time, that doesn't indicate whether the transaction has harmed competition.” (PX7048 (Rothman, Trial Dep. at 196-97)).

1704. Nor can Dr. Rothman explain how Altria would have more than doubled the 13 percent variable profit margin on its other products. (PX7048 Rothman Trial Dep. at 166-67; *see also* PX5000 Rothman Report n.294).

#### **Response to Finding No. 1704**

The proposed finding is incomplete and misleading because it ignores Dr. Rothman’s testimony that because Altria entered into the transaction with JLI and exited from competing in the e-cigarettes, there is no “crystal ball” showing what would have happened in a “but-for” world in which Altria had not exited. (PX7048 (Rothman, Trial Dep. at 36) (“products would have evolved over time and what products Altria would have had on the market and when is inherently unknowable, because Altria -- Altria exited. You know, this crystal ball doesn’t exist.”)). However, that does not prevent Dr. Rothman from using economic tools to analyze the likely effects from the transaction. (PX7048 (Rothman, Trial Dep. at 36) (“products would have evolved over time

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and what products Altria would have had on the market and when is inherently unknowable, because Altria -- Altria exited. You know, this crystal ball doesn't exist. That doesn't mean that the effect of Altria -- of the transaction and Altria's exit from competition can't be valued. Economists evaluate counterfactually by focusing on incentives and ability. Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so.”).

1705. In reality, Altria's cig-a-like products, which constituted the majority of Altria's e-vapor sales, could not reach Dr. Rothman's hypothetical 27 percent margin because cig-a-likes were a declining category unlikely to improve margins. (Murphy Tr. 3163; RX1217 Murphy Report ¶ 41 & Fig. IV.2; *see supra* Part XII.B).

### **Response to Finding No. 1705**

The proposed finding is unsupported, incomplete, and misleading. The claim in the proposed finding that cigalikes were “unlikely to improve margins” should be disregarded because there is no support (or even discussion) about cigalike margins in any of the sources cited for this proposed finding.

The proposed finding is incomplete and misleading because it ignores evidence that Altria had healthy margins on its cigalike products prior to discontinuing those products in December 2018. Dr. Rothman showed that Altria's cigalike gross margins were {█} and variable margins were {█} in 2018. (PX5000 at 066-67 (¶ 116 n.294) (Rothman Expert Report) (“Altria's gross margin on MarkTen Elite was {█}, and its variable margin on MarkTen Elite was {█}. For all other e-cigarette products, Altria's gross margin in 2018 was {█} and its variable margin was {█}.”) (*in camera*)); *see also* Response to RPF ¶ 1701). Dr. Rothman also showed that Altria experienced a consistent upward trend in cigalike e-cigarette margins over time. Altria's gross margins on its cigalike products improved from {█} in 2015 to {█} in 2016, {█} in 2017, and {█} in 2018. (PX5000 at 064 (Table 4), 066-67 (¶ 116

n.294), 112 (Exhibit 6) (Rothman Expert Report) (*in camera*); PX5001 at 48-49 (¶ 91) (Rothman Rebuttal Report)). Altria's cigalike margins of [REDACTED] in 2018 were not far from the 27% margin that Dr. Rothman's model predicts, especially given Altria's consistent upward trajectory in cigalike margins each year. (PX5000 at 064 (Table 4), 066-67 (¶ 116 n.294), 112 (Exhibit 6) (Rothman Expert Report) (*in camera*); PX5001 at 49 (¶ 93) (Rothman Rebuttal Report)).

The proposed finding is also incomplete and misleading to the extent that it characterizes cigalikes as a "declining category." While it is true that cigalikes were declining relative to pod-based products, which were growing rapidly, none of the cited sources indicated that cigalike sales were declining in absolute terms. (*See* Murphy (Altria/JLI) Tr. 3163; RX1217 at 028-30 (¶ 41 & Fig. IV.2); PX1008 (Altria) at 001 (email from Brian Quigley dated August 2018 disputing the statement in a draft presentation to Altria's Board that the MarkTen cigalike platform was declining and citing the fact that Altria's MarkTen cigalike was the second fastest growing e-vapor brand in the United States behind only JUUL)). [REDACTED]

[REDACTED] ITG and NJOY also continue to market and sell cigalike products today. (CCFF ¶¶ 1173, 1175-76).

The proposed finding is further incomplete and misleading because it ignores evidence that, prior to the transaction, Altria had plans to compete vigorously in the closed-system e-cigarette market in the future, including through discounts and the introduction of improved products. (CCFF ¶¶ 1527-52). Before entering into the transaction, Altria was working to improve its existing e-cigarette products, including by introducing a new gasket for MarkTen Elite that stopped leaking and reduced formaldehyde generation, and was working on incorporating nicotine

salts and other improvements into Elite 2.0. (CCFF ¶¶ 1538-52). Dr. Murphy’s report, however, makes no mention of Altria’s work to produce an updated Elite 2.0 pod-based product. (*See generally* RX1217 (Murphy Report); *see also* CCFF ¶ 2117). Dr. Murphy also ignores the fact that Altria was collaborating with PMI to introduce its pod-based VEEV product in the U.S. and had started selling APEX—a prior version of VEEV—in September 2018. (CCFF ¶¶ 1588-716). Dr. Murphy conceded that his report does not mention Altria’s Joint Research, Development, and Technology Sharing Agreement (“JRDTA”) with PMI, nor the e-cigarette products that were in development under the JRDTA or that PMI had already commercialized and was selling in other parts of the world, e.g., VEEV. (CCFF ¶¶ 2115-16, 2118, 2121). Overall, Altria was pushing a number of competitive initiatives, and it had strong incentives and significant ability to continue doing so. (CCFF ¶¶ 1527-730). Furthermore, the evidence demonstrates that Altria was one of only a few firms well-positioned to compete in the closed-system e-cigarette market, with significant resources, FDA expertise, distribution, shelf space, marketing, R&D capabilities, and a strong e-vapor patent portfolio. (CCFF ¶¶ 1832-41).

1706. Re-running Dr. Rothman’s model using only pod-based product sales and calibrating using Altria’s actual variable profit margin for all of its e-vapor products, which was 2 percent, reduces the predicted harm to only \$0.17 million per year, a 99.5 percent reduction. (RX1217 Murphy Report ¶ 187; Murphy Tr. 3168). And, if one uses the actual variable margin of Elite, which was negative 47 percent, “Dr. Rothman’s prediction of harm vanishes.” (RX1217 Murphy Report ¶ 187 n.266).

### **Response to Finding No. 1706**

The proposed finding is unsupported, incomplete, and misleading. In the cited sections of the Murphy report, Dr. Murphy combines the inappropriate exclusion of all cigalike products, (*see* Responses to RPF ¶¶ 1695-98), with the misleading reduction in margins, (*see* Responses to RPF ¶¶ 1699-705), to reach an implausible and unfounded result from Dr. Rothman’s model. (*See* PX5001 at 051 (¶ 95) (Rothman Rebuttal Report)). “Each assumption on its own understates

the harm from the transaction; combining both assumptions further understates the harm from the transaction.” (PX5001 at 051 (¶ 95) (Rothman Rebuttal Report)).

The proposed finding is also incomplete and misleading, because if Dr. Rothman’s harm predictions “vanish,” as Dr. Murphy claims, it is only because Dr. Murphy completely ignores the harm from Altria’s discontinuation of its cigalike products. (*See* Response to RPF ¶ 1697). The proposed finding also ignores evidence that shows that Altria discontinued its cigalike products because it entered into the transaction with JLI, (CCFF ¶¶ 944-94); thus, the proposed finding does not account for the substantial harm from Altria’s discontinuation of its cigalike products that directly results from the transaction and related non-compete agreement. (PX5001 at 030-31 (¶ 48) (Rothman Rebuttal Report); CCFF ¶¶ 578-1407). As a result, the harm from discontinuing the sale of cigalikes does not “vanish” as Respondents claim.

\* \* \*

1707. Pulling all this together, to credit Dr. Rothman’s consumer loss calculation, the Court would need to find:

- (a). That consumers preferred Nu Mark’s products over available alternatives in the pod and cig-a-like markets such that they would not be able to find an equally attractive substitute, notwithstanding the lack of evidence that Nu Mark’s products offered uniquely desirable features. (*See supra* Part XVIII.A.1).
- (b). That following Altria’s exit, Nu Mark’s share was redistributed to remaining competitors in proportion to their market share in 2018, notwithstanding that (1) those shares were based on an average of the prior twelve months; (2) there have been dramatic shifts in market leadership in the ensuing years; and (3) the actual market evidence shows that Nu Mark’s customers primarily switched to other cig-a-like brands, not JUUL. (*See supra* Part XVIII.A.2).
- (c). That Nu Mark would have attained at least a 10 percent market share had it not exited, notwithstanding that (1) as of October 2018 its actual share had already fallen well under 10 percent; (2) the cig-a-like market is now largely irrelevant; and (3) the pod-based products market is dominated by products with salts. (*See supra* Part XVIII.A.3).

- (d). That the relevant market is closed-system products, notwithstanding the wealth of evidence showing that cig-a-likes and pod-based products are meaningfully differentiated. (*See supra* Parts XIII.A, XVIII.A.4).
- (e). And that Altria would have dramatically increased its profit margins (while growing share), notwithstanding that among pod-based products, which account for 95 percent of closed-system e-vapor sales, all of the leading products are aggressively discounted. (*See supra* Part XVIII.A.5).

### **Response to Finding No. 1707**

The proposed finding should be disregarded because it contains no citations to the record and is not a “finding of fact,” but rather a series of broad and unfounded legal conclusions regarding how to credit Dr. Rothman’s consumer harm calculations. Respondents inappropriately state their own argument as “facts.”

The proposed finding is also incomplete and misleading because the evidence indicates: (a) that closed-system e-cigarettes are differentiated products and that customers who purchased Altria’s closed-system e-cigarettes did so because it was their top choice; (b) that proportional redistribution of shares is the best way to estimate the effect of Altria’s exit on competition holding all else equal; (c) that Dr. Rothman’s opinion is that Altria would have continued to compete absent the transaction, that Altria would have continued to be a significant competitor if it had continued to compete, and that for the *quantification* of harm, Dr. Rothman considered a range of scenarios, one of which is that Altria would have maintained its share of 10 percent; (d) that both the hypothetical monopolist test and qualitative evidence support the conclusion that closed-system e-cigarettes are a relevant product market; and (e) that the profitability of Altria’s e-cigarettes was growing and was in line with other competitors. (*See Responses to RPF* Parts XVIII.A.1-5). The proposed finding is also vague because it does not identify what “[p]ulling all this together” refers to in the opening phrase of the finding.

1708. Those findings, both individually and collectively, are untenable. (*See supra* Part XVIII.A).

**Response to Finding No. 1708**

The proposed finding should be disregarded because it contains no citations to the record and is not a “finding of fact,” but rather a legal conclusion regarding the sufficiency of unspecified evidence. Respondents inappropriately state their own argument as a “fact.” The proposed finding is also vague because it neither identifies the findings to which it refers nor explains why they are “untenable.” (See Responses to RPF Part XVIII.A).

**B. Expansion By Competitor Firms Was More Than Sufficient To Offset Dr. Rothman’s Predicted Harm**

1709. Dr. Rothman is also wrong that his predicted loss of consumer surplus, flawed as it is, cannot be offset by enhanced competition. His argument focuses on *entry* by new competitors. (PX5000 Rothman Report ¶ 180 (“Entry would not be timely, likely, and sufficient to mitigate the effect of the transaction.”)).

**Response to Finding No. 1709**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the sufficiency of economic evidence. Respondents inappropriately state their own argument as a “fact.”

The proposed finding is also inaccurate, incomplete, and misleading because Dr. Rothman considered both entry and *expansion* in concluding that they would not offset the harm from the transaction. (See PX5000 at 097 (¶ 180) (Rothman Expert Report) (“Any potential entry or *expansion* induced by Altria’s exit would be unlikely to replace the competition lost due to Altria’s exit.”) (emphasis added); PX5001 at 035 (¶ 60) (Rothman Rebuttal Report) (“I explained in my initial report that entry and/or *expansion* would not be timely, likely, and sufficient to mitigate the effect of the transaction.”) (emphasis added); see also PX5000 at 097 (¶¶ 177-79), 099 (¶ 184) (Rothman Expert Report); PX5001 at 036-37 (¶ 62) (Rothman Rebuttal Report) (“The observation that other products were introduced around the time Altria exited e-cigarettes and that some products grew their shares and sales volume after Altria exited does not mean that “*expansion*”



has or will offset the harm from the transaction. New product introductions and share and sales volume growth that would have occurred even if Altria had remained in the market are not “*expansions*” that offset the harm from Altria’s exit because they are not transaction-specific. Dr. Murphy does not do anything to distinguish between new product introductions and sales volume growth that were transaction-specific and new product introductions and sales volume growth that would have occurred anyway.”) (emphasis added).

Furthermore, the first sentence of the proposed finding should be disregarded because it contains no citations to the record and is vague. The proposed finding does not define what it means by “flawed as it is.” The second sentence of the proposed finding is also vague because it does not identify to what argument it is referring in “His argument.”

1710. Dr. Rothman ignores the expansion and repositioning by competitors that occurred in 2019 and 2020. (RX1217 Murphy Report ¶ 197). In fact, he sidesteps the effects of these recent expansions and instead focuses on whether expansion is currently likely, arguing that “current competitors do not expect to expand rapidly.” (PX5000 Rothman Report ¶ 186). But that is no answer to the fact that NJOY, Reynolds, and ITG have already expanded in the wake of Altria’s exit.

#### **Response to Finding No. 1710**

The proposed finding is incomplete and misleading because it ignores material from Dr. Rothman’s Rebuttal Report. Dr. Rothman does not ignore the expansion and repositioning by competitors that occurred in 2019 and 2020; in fact, he addresses it directly. (See PX5001 at 035-37 (¶¶ 60-62) (Rothman Rebuttal Report)).

The proposed finding is incomplete in failing to account for principles outlined in the Entry section of the Horizontal Merger Guidelines. The first paragraph of the Entry section of the Guidelines states that “This section concerns entry or adjustments to pre-existing entry plans *that are induced by the merger.*” (PX9098 (Horizontal Merger Guidelines) § 9 at 030 (emphasis added); PX5001 at 036-37 (¶ 62) (Rothman Rebuttal Report)). Dr. Rothman notes that “Dr. Murphy does

not do anything to distinguish between new product introductions and sales volume growth that were transaction-specific and new product introductions and sales volume growth that would have occurred anyway.” (PX5001 at 037 (¶ 62) (Rothman Rebuttal Report)). Per the Horizontal Merger Guidelines, if expansion by NJOY, Reynolds, or other e-cigarette producers would have occurred regardless of the transaction, then it is not considered to be entry or expansion that alleviates competitive concerns from the transaction. (See PX9098 (Horizontal Merger Guidelines) § 9 at 030; PX5001 at 036-37 (¶ 62) (Rothman Rebuttal Report)).

The proposed finding is also incomplete in failing to recognize that Dr. Rothman notes that “The observation that other products were introduced around the time Altria exited e-cigarettes and that some products grew their shares and sales volume after Altria exited does not mean that ‘expansion’ has or will offset the harm from the transaction.” (PX5001 at 036 (¶ 62) (Rothman Rebuttal Report)). As a result, “New product introductions and share and sales volume growth that would have occurred even if Altria had remained in the market are not ‘expansions’ that offset the harm from Altria’s exit because they are not transaction-specific,” and thus do not qualify as entry under the Guidelines. (PX5001 at 036-37 (¶ 62) (Rothman Rebuttal Report); PX9098 (Horizontal Merger Guidelines) § 9 at 030).

The last sentence of the proposed finding regarding Reynolds, NJOY, and ITG should be disregarded because it contains no citations to the record.

1711. Indeed, as Professor Murphy demonstrates, from October 2019 to September 2020, NJOY and Reynolds expanded more than *twice* the amount necessary to offset the harm predicted by Dr. Rothman’s model. (RX1217 Murphy Report ¶ 194).

### **Response to Finding No. 1711**

The proposed finding is unsupported because in the cited section of the Murphy report, Dr. Murphy cites no data, figures or charts, or any evidence in the record to support his opinions and analysis in that paragraph.

The proposed finding is also incomplete and misleading because Dr. Murphy never demonstrates or even claims that NJOY's or Reynolds' expansion was "induced by the" transaction. (PX9098 (Horizontal Merger Guidelines) § 9 at 030; RX1217 at 121-22 (¶ 194) (Murphy Report)).

Finally, the proposed finding is incomplete because it ignores Dr. Rothman's testimony that "Dr. Murphy's before-and-after comparisons violate basic principles of economic analysis by not controlling for confounding factors." (PX5001 at 033 (¶ 55) (Rothman Rebuttal Report)). "Dr. Murphy's 'post-event evidence' does not show lack of harm. . . . What Dr. Murphy calls 'actual post-event evidence' is not that at all. . . . Dr. Murphy's before-and-after comparisons (which he calls "actual post-event evidence") also assume that the competition Altria brought to the market with MarkTen, MarkTen Elite, and Apex in 2018 is *the* competition Altria would have brought to the market over time absent the transaction. This effectively assumes away a key economic issue of what Altria's competitive significance likely would have been over time absent the transaction." (PX5001 at 034 (¶ 56) (Rothman Rebuttal Report) (quoting RX1217 at 010 (¶ 16) (Murphy Report) (emphasis in original))). Furthermore, Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (CCFF ¶¶ 2094-124).

1712. If Dr. Rothman's model is limited to sales of pod-based products, just 2.2 percent of NJOY and Reynolds's actual expansion would have been sufficient to offset the predicted harm. (RX1217 Murphy Report ¶ 195).

### **Response to Finding No. 1712**

The proposed finding is unsupported because in the cited section of the Murphy report, Dr. Murphy cites no data, figures or charts, or any evidence in the record regarding Reynolds' or NJOY's sales to support his opinions and analysis in that paragraph.

The proposed finding is also incomplete and misleading because it ignores cigalikes, which the evidence demonstrates are also in the relevant product market. (CCFF ¶¶ 208-407). As

previously explained in response to RPF 1695-98 and 1706, limiting the harm to pod-based products ignores the significant harm that has also occurred in cigalikes following Altria's withdrawal of its cigalike products. (See Responses to RPF 1695-98, 1706). As a result, the calculations in the proposed finding are meaningless and misleading.

1713. And, if the model is further calibrated with Altria's 2 percent gross margin, then "just a *de minimis* percent of Reynolds' and NJOY's sales expansion would have been sufficient to offset the hypothetical harm predicted by Dr. Rothman's model." (RX1217 Murphy Report ¶ 195; see also Murphy Tr. 3168).

### **Response to Finding No. 1713**

The proposed finding is unsupported because in the cited section of the Murphy report, Dr. Murphy cites no data, figures or charts, or any evidence in the record regarding Reynolds' or NJOY's sales to support his opinions and analysis in that paragraph.

The proposed finding is also incomplete and misleading because it ignores significant events at Altria (the launch of Elite) that impacted its margin. As previously explained in response to RPF 1695-1706, Altria's gross margin from 2018 margin was impacted by the launch of a new product (Elite), and using the 2018 gross margin would not produce meaningful or accurate results. (See Responses to RPF 1699-706). As a result, the calculations in the proposed finding are meaningless and misleading.

1714. Dr. Rothman cannot simply dismiss these expansions because, in his words, "they are not transaction-specific." (PX5001 Rothman Rebuttal ¶ 62). Just as Dr. Rothman is wrong to ignore the real-world evidence of decreased prices, increased output, and decreased concentration, (see *supra* Part XIII.D), he is wrong to ignore post-transaction expansion.

### **Response to Finding No. 1714**

The proposed finding should be disregarded because it is not a "finding of fact," but rather a legal conclusion regarding the sufficiency of expert analysis. Respondents inappropriately state their own arguments as a "fact."

The proposed finding is also incomplete and misleading for the reasons stated in response to RPF 7010-11. (*See Responses to RPF 1710-11*). The proposed finding fails to recognize that the Horizontal Merger Guidelines require entry to be “induced by the merger,” i.e., “transaction-specific,” in order to qualify. (PX9098 (Horizontal Merger Guidelines) § 9 at 030). As a result, the burden rests on Respondents to show that entry or expansion was transaction-specific and counteracted any effects of the transaction. Respondents have not met that burden, and thus, their expansion claims cannot be credited under the Guidelines. (PX9098 (Horizontal Merger Guidelines) § 9 at 030).

1715. The only support he identifies is a snippet cherry-picked from the Horizontal Merger Guidelines, which explains that a particular section of that document focuses on entries that are “induced by the merger.” (PX5001 Rothman Rebuttal ¶ 62 n.154 (citing PX9098 (HMG) at 030 § 9)). But, read in context, that language is merely distinguishing between firms were already “committed to entering the market,” which “will normally be treated as market participants,” and those firms that subsequently decided to enter. (PX9098 (HMG) at 030 § 9). Elsewhere the Guidelines note, without any such limitation, that “Agencies consider any reasonably available and reliable evidence to address the central question of whether a [transaction] may substantially lessen competition,” including “actual effects observed in consummated” transactions. (PX9098 (HMG) at 005-06 § 2).

### **Response to Finding No. 1715**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding the application of the Horizontal Merger Guidelines. Respondents inappropriately state their own arguments as a “fact.” In addition, the proposed finding is incomplete and misleading. (*See Responses to RPF 1710-11*). The proposed finding is also vague because it does not identify who the “he” is that is referred to in the first sentence or for what he is identifying “support.”

Quoting directly from the Entry section of the Horizontal Merger Guidelines cannot be considered “cherry-picking.” The Entry section is clear as to the requirement that entry and

expansion is “induced by the merger.” (PX9098 (Horizontal Merger Guidelines) § 9 at 030; *see also* Responses to RPF ¶¶ 1710-11).

Respondents quote a completely different section of the Horizontal Merger Guidelines, which states that “‘Agencies consider any reasonably available and reliable evidence to address the central question of whether a [transaction] may substantially lessen competition,’ including ‘actual effects observed in consummated’ transactions.” (*See* PX9098 (Horizontal Merger Guidelines) § 2 at 005-06). This section addresses Evidence of Adverse Competitive Effects. Complaint Counsel does not disagree with the proposition that Respondents quote from Section 2 of the Horizontal Merger Guidelines, but it is misleading to the extent that Respondents try to rewrite the clear language from Section 9 that deals specifically with Entry. (*Compare* PX9098 (Horizontal Merger Guidelines) § 2 at 005-06 *with* § 9 at 030).

The proposed finding is incomplete because it ignores Dr. Rothman’s Rebuttal Report where he addresses the growth of NJOY, Reynolds, and other e-cigarette suppliers when analyzing competitive effects. (PX5001 at 031-35 (¶¶ 49-59) (Rothman Rebuttal Report)). In particular, Dr. Rothman highlights that Dr. Murphy “ignore[s] basic principles of economic analysis because [he does] not account for what economists call “confounding factors”—factors that affected Dr. Murphy’s measures that were unrelated to the transaction and therefore would have occurred even without the transaction. (PX5001 at 031-35 (¶ 55) (Rothman Rebuttal Report)). For example, Dr. Murphy observes that closed-system e-cigarette volumes were higher after Altria’s exit than before Altria’s exit, but he ignores that closed-system e-cigarette volumes were growing prior to Altria’s exit; Dr. Murphy also asserts that closed-system e-cigarette prices did not take into account any confounding factors, not increase after Altria’s exit, but he ignores that, around the time of the transaction, vaping-related deaths and the health effects of vaping were in the news; the age

minimum for purchasing nicotine products increased; youth vaping was rising and related regulatory actions, including federal and state bans on non-tobacco and non-menthol flavored e-cigarette products, were enacted; and the COVID-19 pandemic began. (PX5001 at 031-35 (¶¶ 49-59) (Rothman Rebuttal Report)). These events—which were unrelated to the transaction and therefore would have occurred even without the transaction—likely affected the before-and-after measures Dr. Murphy compares.” (PX5001 at 031-32 (¶ 50) (Rothman Rebuttal Report)). Dr. Murphy admits that he did not control for confounding factors in his analysis of the transaction. (CCFF ¶¶ 2094-124).

The proposed finding also ignores the weakness in Dr. Murphy’s analysis that he also “assume[s] that the competition Altria brought to the market prior to its exit is the competition Altria would have brought to the market over time if Altria had not exited. In so doing, Dr. Murphy effectively assumes away a key economic issue of what Altria’s competitive significance likely would have been over time absent the transaction . . . [and] effectively ignore the competitive initiatives that were in process in 2018 but not yet on the market, as well as competitive initiatives Altria would have undertaken after 2018.” (PX5001 at 032-33 (¶ 51) (Rothman Rebuttal Report)). “By assuming that the competition Altria brought to the market with MarkTen, MarkTen Elite, and Apex is the sum total of the competition Altria would have brought to the market absent the transaction, Dr. Murphy effectively asserts that the MarkTen Elite leakage fix in October 2018 was irrelevant; that Elite 2.0 and Elite 3.0 would have been abandoned or failed; that the collaboration with PMI would have been abandoned or failed; that the R&D projects for the next generation of e-cigarettes would have been abandoned or failed; and that the growth teams Altria created in October 2018 would have been abandoned or failed.” (PX5001 at 033 (¶ 52) (Rothman Rebuttal Report)).

1716. And this Court has recognized—also without any caveat about inducement—that the “[t]he ability and willingness of current competitors to expand their foothold in the market . . . greatly reduces the anticompetitive effects of a merger.” (CoL ¶ 47).

### **Response to Finding No. 1716**

The proposed finding should be disregarded because it is not a “finding of fact,” but rather a legal conclusion regarding entry. Respondents inappropriately state their own argument as a “fact.” (See Response to Respondents’ Proposed COL ¶ 47).

#### **C. The Harm Predicted By Dr. Rothman’s Model Is Offset By The Increased Probability That JLI’s Products Will Receive Regulatory Approval As A Result Of Altria’s Services**

1717. Nor does Dr. Rothman meaningfully engage with Respondents’ efficiencies argument. Instead, he “looks only at the possible benefits of the Transaction in terms of factors that may have reduced JLI’s marginal costs.” (RX1217 Murphy Report ¶ 203; see also PX5000 Rothman Report ¶ 156 (“[T]he relevant question is . . . whether Altria reduced the cost required for JLI to receive PMTA approval.”)). In doing so, he “fails to consider efficiencies that could derive from Altria’s experience and expertise in seeking and securing regulatory approval yielding an *increased probability* of JLI obtaining regulatory approval for its products.” (RX1217 Murphy Report ¶ 203 (emphasis added)).

### **Response to Finding No. 1717**

The first sentence of the proposed finding should be disregarded because it contains no citations to the record. The first sentence of the proposed finding is also incorrect in suggesting that “Nor does Dr. Rothman meaningfully engage with Respondents’ efficiencies argument.” Dr. Rothman addressed efficiencies in detail in his original and rebuttal expert reports, including every efficiencies argument that Respondents’ raised. (See PX5000 at 083-96 (¶¶ 146-76) (Rothman Expert Report); PX5001 at 37-39 (¶¶ 63-68) (Rothman Rebuttal Report)).

The second sentence of the proposed finding is incorrect in claiming that Dr. Rothman “looks only at the possible benefits of the transaction in terms of factors that may have reduced JLI’s marginal costs” and “fails to consider efficiencies that could derive from Altria’s experience and expertise in seeking and securing regulatory approval yielding an *increased probability* of JLI



obtaining regulatory approval for its products.” Dr. Rothman addresses the absence of proof of regulatory efficiencies in both his original report and his rebuttal report. (*See* PX5000 at 085-88 (¶¶ 150-56) (Rothman Expert Report); PX5001 at 37-39 (¶¶ 63-68) (Rothman Rebuttal Report)).

Furthermore, the proposed finding should be disregarded because it is not supported by the cited testimony of Dr. Murphy. Indeed, Dr. Murphy conceded that he did not offer an opinion in his report on whether the transaction likely gave rise to consumer benefits resulting from Altria’s assumed regulatory expertise, and the basis for his statements about possible efficiencies from the transaction were statements by people at Altria and JLI. (CCFF ¶¶ 2125-26). Dr. Murphy conceded that he did not do any work to verify whether the potential consumer benefits from Altria’s regulatory advisory services have actually occurred, and nowhere in his report does Dr. Murphy discuss any work that he did to verify whether the potential consumer benefits from Altria’s regulatory advisory services are likely to occur. (CCFF ¶ 2134). Moreover, Dr. Murphy conceded that he did not independently assess Altria’s expertise in PMTAs or whether Altria’s expertise would increase the probability of JLI obtaining FDA approval. (CCFF ¶¶ 2127-34).

1718. But, as Professor Murphy explains, “given the demonstrated consumer appeal of the JUUL products and JLI’s large share, even a small increase in the probability of regulatory approval could lead to a large increase in consumer surplus.” (RX1217 Murphy Report ¶ 203; *see also* Murphy Tr. 3156-57).

### **Response to Finding No. 1718**

The proposed finding should be disregarded because it is unsupported by the cited testimony. Dr. Murphy conceded “whether [Altria’s] expertise would lead to what magnitude of increase in the probability [that JLI receives regulatory approval], that’s outside my area of expertise.” (Murphy Tr. 3218). Indeed, Dr. Murphy conceded that he did not offer an opinion in his report on whether the transaction likely gave rise to consumer benefits resulting from Altria’s assumed regulatory expertise, and the basis for his statements about possible efficiencies from the

transaction were statements by people at Altria and JLI. (CCFF ¶¶ 2125-26). Dr. Murphy conceded that he did not do any work to verify whether the potential consumer benefits from Altria's regulatory advisory services have actually occurred, and nowhere in his report does Dr. Murphy discuss any work that he did to verify whether the potential consumer benefits from Altria's regulatory advisory services are likely to occur. (CCFF ¶ 2134). Moreover, Dr. Murphy conceded that he did not independently assess Altria's expertise in PMTAs or whether Altria's expertise would increase the probability of JLI obtaining FDA approval. (CCFF ¶¶ 2127-34).

The proposed finding is also incomplete and misleading. JLI has not substantiated this efficiency claim as required by the Horizontal Merger Guidelines. The Horizontal Merger Guidelines state that "it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific. Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means." (PX9098 at 032 § 10 (Horizontal Merger Guidelines)).

The proposed finding is further incomplete and misleading because it ignores Dr. Rothman's testimony [REDACTED]

[REDACTED]  
[REDACTED]. JLI's O'Hara testified that it would be "super speculative" to estimate the value of the services provided by Altria to JLI. (PX7033 (O'Hara (JLI), Dep. at 188)). The proposed finding ignores internal JLI emails discussing regulatory efficiencies but make no claims that Altria would increase the likelihood that JLI would obtain PMTA approval in any respect, and also indicate that JLI could not measure the time or

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cost savings from Altria's regulatory support. (PX2029 (JLI) at 001 ("Other issue on these qualitative KPIs (to Joseph's point) is we won't know if timeline to PMTA has been reduced until we are on the other side of approval.") and ("KPIs for mission realization are all vs. counterfactuals... i.e. the KPIs are 'saves time/money vs. not engaging w/ MO' so if we engage with them we won't really have anything to compare it to so hard to generate a KPI . . . ."))).

Furthermore, the proposed finding fails to account for the fact that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The proposed finding is also incorrect and fails to account for the testimony of Murray Garnick. According to Garnick, Altria had "no role" in JLI's PMTA strategy, and did not even know for which products JLI was planning to file a PMTA. (PX7000 (Garnick (Altria), IHT at 153-54 ("Q. Does Altria currently have any input into JUUL's decisions on its e-vapor products? A. No. So we do certain projects for them in support of their PMTA as part of our services. We do not have any role in their strategy, their putting together the PMTA actual application. So for example, sitting here right now, I could not tell you what products they are going to file a PMTA on. I don't know. . . . Q. So even with your PMTA experience, if you thought there was a better strategy for getting a PMTA approved, right now you have no role in that with JUUL? A. We have no role in that with JUUL.")).

Finally, the proposed finding should be disregarded because, as Dr. Rothman explained, the claim that Altria's regulatory support increases the likelihood that JLI receives a PMTA is not only unsubstantiated but also unlikely to be true. (See PX5000 at 087-88 (¶ 156) (Rothman Expert Report)). According to Dr. Rothman, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }, 124 (“Q. So would you have moved forward your timeline even if you hadn’t entered into the services agreement? A. We would have to in a way, yeah.”)). JLI’s hiring of Altria’s Joe Murillo to lead the PMTA submission process, which was entirely independent from the regulatory services that Altria provided, is an example of JLI’s ability and incentive to hire the right talent and devote the resources necessary to obtain PMTA approval. (See, e.g., PX7008 (Cullen (JLI), IHT at 124-25); PX7027 (Murillo (Altria/JLI), Dep. at 011-12; see also PX7027 (Murillo (Altria/JLI), Dep. at 48-51 (“JLI was hiring people all the time.”)). As a result, according to Dr. Rothman, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1719. As detailed above, Altria’s assistance both improved the quality of JLI’s PMTA and enabled it to be filed on time. (See *supra* Part XI.C). Briefly summarized:

**Response to Finding No. 1719**

The proposed finding should be disregarded because it contains no citations to the record and is not a “finding of fact,” but an unsupported claim regarding Altria’s assistance to JLI. (See Responses to RPF Part XI.C). Respondents inappropriately state their own argument as a “fact.”

1720. Altria’s assistance “[a]bsolutely” had an effect on the quality of the JLI PMTA. (Murillo (Altria/JLI) Tr. 3009). Its expertise and experience “was very valuable.” (Murillo (Altria/JLI) Tr. 3009).

**Response to Finding No. 1720**

The proposed finding should be disregarded because it is unsupported, vague, speculative, misleading, and based on the self-serving testimony of a current JLI (and former Altria) executive. The proposed finding is vague because it does not identify how Altria “[a]bsolutely” had an effect on the quality of the JLI PMTA, nor does it specify how or in what ways Altria’s experience “was very valuable.” The cited testimony does not rise to the level of substantiation required to credit efficiencies under the Horizontal Merger Guidelines. (PX9098 at 032 § 10 (Horizontal Merger Guidelines)).

Furthermore, Respondents’ economic expert, Dr. Murphy, conceded that he did not offer an opinion in his report on whether the transaction likely gave rise to consumer benefits resulting from Altria’s assumed regulatory expertise, and the basis for his statements about possible efficiencies from the transaction were statements by people at Altria and JLI. (CCFF ¶¶ 2125-26). Dr. Murphy conceded that he did not do any work to verify whether the potential consumer benefits from Altria’s regulatory advisory services have actually occurred, and nowhere in his report does Dr. Murphy discuss any work that he did to verify whether the potential consumer benefits from Altria’s regulatory advisory services are likely to occur. (CCFF ¶ 2134). Moreover, Dr. Murphy conceded that he did not independently assess Altria’s expertise in PMTAs or whether Altria’s expertise would increase the probability of JLI obtaining FDA approval. (CCFF ¶¶ 2127-34).

1721. And PMI, which is familiar with Altria’s services based on the two companies’ collaboration on the IQOS PMTA, believes that Altria’s “expertise on exactly what should be included in the [PMTA]” “would be very helpful.” (PX7020 King (PMI) Dep. at 65).

**Response to Finding No. 1721**

The proposed finding is unsupported, vague, incomplete, and misleading. The proposed finding is unsupported because, Martin King, whose testimony is cited in support for this proposed finding, admitted that his answer was “just speculative. It’s potential. It’s hard to say exactly what

would have happened.” (PX7020 King (PMI), Dep. at 65)). Moreover, Respondents misquote King’s testimony. King answered that it “would be very helpful” to a different question, but never gave that answer regarding Altria’s “expertise on exactly what should be included in the [PMTA].” (See PX7020 King (PMI), Dep. at 65) (“Q. Would Altria’s regulatory expertise have helped with the likelihood that VEEV would ultimately receive FDA approval, as well? A. Again, it’s speculation. I think it would be helpful to have their expertise on exactly what should be included in the package, and that could potentially lead to a higher likelihood of success and a faster likelihood of success. But it’s just speculative. It’s potential. It’s hard to say exactly what would have happened.”)). Finally, the proposed finding should be disregarded because the speculation of a third party witness from PMI about another product, VEEV, does not help to substantiate Respondents’ efficiency claims regarding the JUUL product.

1722. As to timeliness, Dr. Gardner, who worked on JLI’s PMTA on behalf of Altria, testified that JLI could not have submitted a PMTA by September 2020 without Altria’s assistance. (Gardner (Altria) Tr. 2639).

### **Response to Finding No. 1722**

The proposed finding is speculative, misleading, and unreliable because it relies solely on the self-serving testimony of an Altria executive. The fact that Dr. Gardner, who works at Altria, answered “No” to a leading question about whether he “believe[s] JLI would have been able to submit a successful PMTA in 2020 without Altria’s assistance” should be given no weight. (Gardner (Altria) Tr. 2639). Moreover, Dr. Gardner has limited knowledge on the topic of PMTA submissions. While Dr. Gardner was the “science lead” for Altria’s PMTA support efforts to JLI, Elizabeth Copeland was the “Program Manager” and “team lead,” and Rehan Khan was Altria’s “Project Manager,” responsible for “project plans” and “timelines.” (PX4122 (Altria) at 005; see also Gardner (Altria) Tr. 2691). Dr. Gardner is not an expert in the FDA’s assessment of conversion potential, nicotine satisfaction, or abuse liability. (CCFF ¶¶ 2000-02). The proposed

finding is also misleading because it ignores JLI's Cullen's testimony that JLI would have moved forward its PMTA submission timeline even if JLI had not entered into the regulatory services agreement with Altria. (PX7008 (Cullen (JLI), IHT at 124)).

The proposed finding is also incomplete and misleading because it is contrary to the weight of the evidence. As explained in Complaint Counsel's Proposed Findings of Fact, Altria's claimed regulatory efficiencies are not verifiable, merger-specific, or cognizable. (See CCF ¶¶ 1889-955; PX7048 (Rothman, Trial Dep. at 77-84)). JLI did not need the transaction to accelerate and improve its PMTA submissions. (CCFF ¶¶ 1929-41; PX7048 (Rothman, Trial Dep. at 78-79); PX5000 at 087-88 (¶ 156) (Rothman Expert Report)). For example, JLI was able to hire employees from Altria independently of the transaction, including Joe Murillo to serve as JLI's Chief Regulatory Officer. (CCFF ¶¶ 1934-40). JLI also contracted with other outside consultants to work on its PMTA independently of the transaction. (CCFF ¶¶ 1942-52).

1723. JLI estimates that Altria shaved "17 to 28 months" from JUUL's PMTA process, and believes that the "value" of this time savings "would be very difficult to overstate." "It is an input to [JLI's] ability to continue operating in the United States as [it does] now." (PX7008 Cullen (JLI) IHT at 123).

### **Response to Finding No. 1723**

The proposed finding is unsupported, incomplete, and misleading. The proposed finding ignores the section of Dr. Rothman's report where he considered the claim that Altria's assistance would save "17 to 28 months" and concluded that "JLI has not substantiated this claim." (PX5000 at 085 (¶¶ 152-53) (Rothman Expert Report)). Moreover, the proposed finding is unsupported. Respondents' claim that "JLI estimates that Altria shaved '17 to 28 months' from JUUL's PMTA process" is based on a figure from JLI's Second Request response and a draft JLI presentation. (PX2160 at 088 (JLI Second Request Response, October 10, 2019); PX2193 (JLI) at 006 (*in camera*)). The time savings are characterized as "target[s]" in the draft JLI presentation. (PX2160

at 088 (JLI Second Request Response, October 10, 2019)). There is no explanation or backup in either PX2160 or PX2193 that substantiates how JLI came up with the “17 to 28 months” estimate, and no JLI witness had the foundation to explain the estimate. (PX2160 at 088; PX2193 (JLI) at 006). In fact, other JLI emails discussing regulatory efficiencies stated that it was impossible for JLI to measure the time or cost savings from Altria’s regulatory support. (PX2029 (JLI) at 001 (“Other issue on these qualitative KPIs (to Joseph’s point) is we won’t know if timeline to PMTA has been reduced until we are on the other side of approval.”) and (“KPIs for mission realization are all vs. counterfactuals... i.e. the KPIs are ‘saves time/money vs. not engaging w/ MO’ so if we engage with them we won’t really have anything to compare it to so hard to generate a KPI . . . .”))).

Furthermore, Respondents’ expert, Dr. Murphy, conceded that he did not offer an opinion in his report on whether the transaction likely gave rise to consumer benefits resulting from Altria’s assumed regulatory expertise. (CCFF ¶ 2125). Dr. Murphy conceded that he did not do any work to verify whether the potential consumer benefits from Altria’s regulatory advisory services have actually occurred, and nowhere in his report does Dr. Murphy discuss any work that he did to verify whether the potential consumer benefits from Altria’s regulatory advisory services are likely to occur. (CCFF ¶ 2134). Moreover, Dr. Murphy conceded that he did not independently assess Altria’s expertise in PMTAs or whether Altria’s expertise would increase the probability of JLI obtaining FDA approval. (CCFF ¶¶ 2127-34).

1724. Re-running Dr. Rothman’s analysis under multiple scenarios demonstrates how easily even a slight improvement to JLI’s PMTA prospects could offset the predicted harm:

**Response to Finding No. 1724**

The proposed finding should be disregarded because it contains no citations to the record and it is not a “finding of fact,” but a vague and unsupported claim about expert analysis.



Furthermore, Respondents' expert, Dr. Murphy, conceded that he did not offer an opinion in his report on whether the transaction likely gave rise to consumer benefits resulting from Altria's assumed regulatory expertise, and the basis for his statements about possible efficiencies from the transaction were statements by people at Altria and JLI. (CCFF ¶¶ 2125-26). Dr. Murphy conceded that he did not do any work to verify whether the potential consumer benefits from Altria's regulatory advisory services have actually occurred, and nowhere in his report does Dr. Murphy discuss any work that he did to verify whether the potential consumer benefits from Altria's regulatory advisory services are likely to occur. (CCFF ¶ 2134). Moreover, Dr. Murphy conceded that he did not independently assess Altria's expertise in PMTAs or whether Altria's expertise would increase the probability of JLI obtaining FDA approval. (CCFF ¶¶ 2127-34).

The proposed finding is also incomplete and misleading because it is contrary to the weight of the evidence. As explained in Complaint Counsel's Proposed Findings of Fact, Altria's claimed regulatory efficiencies are not verifiable, merger-specific, or cognizable. (CCFF ¶¶ 1889-1955; PX7048 (Rothman, Trial Dep. at 77-84)).

1725. Taking all of Dr. Rothman's inputs into the model, "a 1 percent increase in the probability with which JLI receives regulatory approval for its products would be sufficient to offset approximately 25 percent [of] the hypothetical harm predicted by Dr. Rothman's model due to *higher predicted prices*." (RX1217 Murphy Report ¶ 203 (emphasis added)).

### **Response to Finding No. 1725**

The proposed finding is unsupported, incomplete, and misleading. The proposed finding ignores Dr. Rothman's explanation in his Rebuttal Report that "Dr. Murphy's calculation is internally inconsistent and misleading because he assumes that JLI's exit would harm consumers through higher prices and fewer choices, but that Altria's exit only harms consumers through higher prices." (PX5001 at 038 (¶¶ 66-67) (Rothman Rebuttal Report); *see also* Responses to RPF

¶¶ 1666-67 (Dr. Murphy excludes harm from loss of consumer choice when considering Altria's exit, but includes harm from loss of consumer choice when considering harm from JLI's exit)).

The proposed finding is also incomplete and misleading because it ignores Dr. Rothman's statement that "After taking into account that Altria's exit also harms consumers through higher prices and fewer choices, a one percent increase in the likelihood of JLI receiving PMTA approval would offset only 5.4 percent of the harm from the transaction" (PX5001 at 038-39 (¶ 67) (Rothman Rebuttal Report)). Moreover, Dr. Rothman concluded that if Altria's share would have grown over time to 20%, a 1% increase in the likelihood of JLI receiving PMTA approval would offset only 2.5% of the harm from the transaction (PX5001 at 039 (¶ 68) (Rothman Rebuttal Report)). If one were to only measure the harm due to price changes from Altria's exit and JLI's exit, then a 1% increase in the likelihood of JLI receiving PMTA approval would offset only 1.9 percent of the harm due to price changes. (PX5001 at 038-39 (¶ 67 n.165) (Rothman Rebuttal Report)). As a result, an apples-to-apples comparison demonstrates that a 1% increase in the probability of JLI receiving regulatory approval for its products would offset approximately 1.9%-5.4% of the harm from the transaction. (PX5001 at 038-39 (¶ 67) (Rothman Rebuttal Report)).

The proposed finding is also unsupported because it is purely a hypothetical example. The proposed finding does not cite to any evidence that Altria would actually increase the probability that JLI would receive approval for its e-cigarette products, nor is there any way to actually quantify such a hypothetical [REDACTED] (PX5000 at 085-86 (¶¶ 153-54) (Rothman Expert Report); *see also* PX2029 (JLI) at 001). Thus, the proposed finding should be disregarded because the claim of regulatory efficiencies made in the finding does not qualify as a creditable efficiency under the Horizontal Merger Guidelines. (*See* PX9098 (Horizontal Merger Guidelines) § 9 at 030).

Furthermore, the proposed finding is misleading because it describes a “1 percent increase in the probability with which JLI receives regulatory approval,” but Dr. Murphy conceded that he did not offer an opinion in his report that the transaction would, in fact, result in a one percent increase in the probability that JLI receives regulatory approval for its products. (CCFF ¶ 2136). Dr. Murphy further conceded that he did not offer an opinion in his report on whether the transaction likely gave rise to consumer benefits resulting from Altria’s assumed regulatory expertise. (CCFF ¶ 2125). Also, Dr. Murphy conceded that he did not independently assess Altria’s expertise in PMTAs or whether Altria’s expertise would increase the probability of JLI obtaining FDA approval. (CCFF ¶¶ 2127-34).

1726. Assuming a pod market but holding all other inputs constant, “a 1 percent increase in the probability with which JLI receives regulatory approval for its products would be sufficient to offset 25 percent of *all harm* predicted by Dr. Rothman’s model, including both harm due to higher predicted prices as well as alleged los[s of] consumer surplus from the removal of the Altria products.” (RX1217 Murphy Report ¶ 203 (emphasis added)).

### **Response to Finding No. 1726**

The proposed finding should be disregarded because it is unsupported, incorrect, incomplete, and misleading. As previously explained in prior responses, it is inaccurate and misleading to claim that Altria’s exit only results in harm to pod products in a pod-only market. The proposed finding is contrary to the weight of the evidence to the extent that it implies that the closed-system e-cigarette market is not a proper market. The evidence clearly establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407). The proposed finding is incomplete because it ignores evidence showing that the transaction and Altria’s discontinuation of cigalikes harmed consumers, (CCFF ¶¶ 1408-730), and the harm from Altria’s discontinuation of its cigalike products does not simply disappear. (*See Responses to RPF* ¶¶ 1695-98, 1706). In addition, the

proposed finding is misleading because it relies on the same flaws in Dr. Murphy's analysis that were explained in response to RPF 1725. (*See* Response to RPF 1725).

Furthermore, the proposed finding is misleading because it describes a "1 percent increase in the probability with which JLI receives regulatory approval," but Dr. Murphy conceded that he did not offer an opinion in his report that the transaction would, in fact, result in a one percent increase in the probability that JLI receives regulatory approval for its products. (CCFF 2136). Dr. Murphy further conceded that he did not offer an opinion in his report on whether the transaction likely gave rise to consumer benefits resulting from Altria's assumed regulatory expertise. (CCFF 2125). Also, Dr. Murphy conceded that he did not independently assess Altria's expertise in PMTAs or whether Altria's expertise would increase the probability of JLI obtaining FDA approval. (CCFF 2127-34).

1727. Assuming a pod market and recalibrating "Altria's price and share to account for competitive dynamics, then even a 0.1 percent increase in the probability with which JLI receives regulatory approval would offset *all harm* predicted by Dr. Rothman's model." (RX1217 Murphy Report 203 (emphasis added)).

#### **Response to Finding No. 1727**

The proposed finding should be disregarded because it makes a significant error in its quote of Dr. Murphy at paragraph 203 of his expert report (RX1217). The proposed finding describes a 0.1 percent increase in probability, but in paragraph 203, Dr. Murphy describes a 1.0 percent increase in probability.

The proposed finding is also contrary to the weight of the evidence to the extent that it implies that the closed-system e-cigarette market is not a proper market. The evidence clearly establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF 208-407).

The proposed finding should also be disregarded because it is unsupported and misleading. Dr. Murphy takes all of the inconsistencies and flaws from the two models discussed in RPF 1725-26, and adds an additional “recalibrat[ion of] Altria’s price and share to account for competitive dynamics” in order to manufacture the result in RPF ¶ 1727. In the cited section of the Murphy report, Dr. Murphy provides is no explanation for the adjustment to Altria’s price and share to account for so-called “competitive dynamics.” (*See* RX1217 at 126-27 (¶ 203) (Murphy Report)).

Furthermore, the proposed finding is misleading because it describes a “[1] percent increase in the probability with which JLI receives regulatory approval,” but Dr. Murphy conceded that he did not offer an opinion in his report that the transaction would, in fact, result in a one percent increase in the probability that JLI receives regulatory approval for its products. (CCFF ¶ 2136). Dr. Murphy further conceded that he did not offer an opinion in his report on whether the transaction likely gave rise to consumer benefits resulting from Altria’s assumed regulatory expertise. (CCFF ¶ 2125). Also, Dr. Murphy conceded that he did not independently assess Altria’s expertise in PMTAs or whether Altria’s expertise would increase the probability of JLI obtaining FDA approval. (CCFF ¶¶ 2127-34).

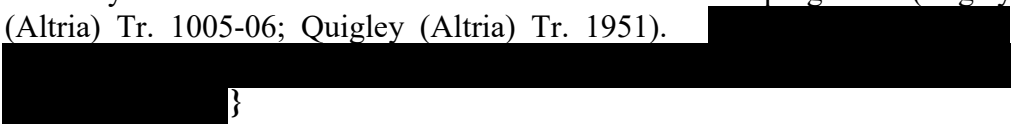
## **XIX. GLOSSARY FOR PROPOSED FINDINGS OF FACT**

1728. The following are abbreviations and acronyms commonly used in the documents and testimony in the hearing record:

- a. AGDC stands for Altria Group Distribution Company. (Myers (Altria) Tr. 3298).
- b. ALCS stands for Altria Client Services LLC. (Begley (Altria) Tr. 1069).
- c. AS stands for adult smokers. (Jupe (Altria) Tr. 2314).
- d. AS&V stands for adult smokers and vapers. (Begley (Altria) Tr. 967).
- e. AV stands for adult vapers. (Begley (Altria) Tr. 1063).

- f. ATC stands for adult tobacco consumers. (Willard (Altria) Tr. 1394).
- g. BAT stands for British American Tobacco. (Huckabee (Reynolds) Tr. 471; [REDACTED]).
- h. BOM stands for bill of materials. (PX7018 Schwartz (Altria) Dep. at 32).
- i. CAGNY stands for Consumer Analyst Group of New York. (Willard (Altria) Tr. 1151).
- j. CI&E stands for Altria's Consumer Insights and Engagement group. (PX7023 Fernandez (Altria) Tr. 136-37).
- k. CMI stands for Altria's Consumer Marketplace Insights group. (PX7023 Fernandez (Altria) Dep. at 14)).
- l. CMT stands for Altria's Change Management Team. (Schwartz (Altria) Tr. 1891).
- m. CR stands for consumer research. (Jupe (Altria) Tr. 2145).
- n. CRO stands for clinical research organization. (PX8005 Graham (NJOY) Decl. at 004 ¶ 26).
- o. CRT stands for Altria's Center for Research and Technology. (Jupe (Altria) Tr. 2211).
- p. [REDACTED]
- q. EBITDA stands for earnings before interest, taxes, depreciation, and amortization. (PX7032 Valani (JLI) Dep. at 41).
- r. ELT stands for Altria's Executive Leadership Team. (PX7023 Fernandez (Altria) Tr. 179).
- s. ENDS stands for electronic nicotine delivery system. (Willard (Altria) Tr. 1361).
- t. FME stands for fixed manufacturing expenses. (Gifford (Altria) Tr. 2720).
- u. GC stands for gas chromatography. (Gardner (Altria) Tr. 2615, 2621; Murillo (Altria/JLI) Tr. 3004).
- v. HPHC stands for harmful or potentially harmful constituent. (Murillo (Altria/JLI) Tr. 3072).
- w. HUT stands for home use test. (Begley (Altria) Tr. 986).

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- x. IRI refers to a third-party data service provider that measures and projects sales data using retailer registers. (Gifford (Altria) Tr. 2732; Robbins (JLI) Tr. 3243).
- y. ITP may refer to Altria's Innovative Tobacco Product program. (Begley (Altria) Tr. 1005-06; Quigley (Altria) Tr. 1951).  

- z. Jack was a code word used to refer to JUUL Labs, Inc. during the negotiations. (Pritzker (JLI) Tr. 688; Willard (Altria) Tr. 1231; Gifford (Altria) Tr. 2763).
- aa. JLI stands for JUUL Labs, Inc. (O'Hara (JLI) Tr. 492).
- bb. JTI stands for Japan Tobacco International. (Crozier (Sheetz) Tr. 1489; RX1616 (JLI) at 053).
- cc. LE stands for latest estimate. (Gifford (Altria) Tr. 2815).
- dd. LTM may stand for latest twelve months. (Gifford (Altria) Tr. 2832). Within Altria, it can also stand for leadership team meeting. (PX7022 Begley (Altria) Dep. at 198).
- ee. MICR stands for Altria's Market Information Consumer Research group. (Gifford (Altria) Tr. 2858).
- ff. MO is Altria's stock ticker symbol. (PX7033 O'Hara (JLI) Tr. 185).
- gg. MOC stands for multi-outlet and convenience. (Begley (Altria) Tr. 1089).
- hh. MRTP stands for modified risk tobacco product. (Murillo (Altria/JLI) Tr. 3010).
- ii. MS stands for mass spectrometry. (Gardner (Altria) Tr. 2615, 2621; Murillo (Altria/JLI) Tr. 3004).
- jj. MST stands for moist smokeless tobacco. (Myers (Altria) Tr. 3343-44).
- kk. NBW stands for nicotine by weight. (Jupe (Altria) Tr. 2146).
- ll. NB3 is a term used by Reynolds to refer to competitors that are not one of its top-three competitors. (PX7037 Huckabee (Reynolds) Dep. at 61-62).
- mm. NMI stands for Nu Mark Israel. (Jupe (Altria) Tr. 2184).
- nn. NPC stands for Altria's New Products Committee. (Jupe (Altria) Tr. 2239).
- oo. OB stands for original budget. (Begley (Altria) Tr. 973).
- pp. OCI stands for operating company income. (Gifford (Altria) Tr. 2724).

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- qq. OTP stands for other tobacco products, meaning products other than cigarettes. (Myers (Altria) Tr. 3340).
- rr. PD stands for product development. (Begley (Altria) Tr. 1004).
- ss. PFT stands for pre-filled tank. (Farrell (NJOY) Tr. 357).
- tt. PI stands for product integrity. (Murillo (Altria/JLI) Tr. 3054).
- uu. PK stands for pharmacokinetic. (Jupe (Altria) Tr. 2231).
- vv. PUK is a term used by Reynolds to refer to a power unit kit, also known as a device battery. (PX7037 Huckabee (Reynolds) Dep. at 71; *see also* { [REDACTED] } [REDACTED] }).
- ww. PMI stands for Philip Morris International, Inc. (King (PMI) Tr. 2336).
- xx. PMTA stands for premarket tobacco product application. (PX9027 (FDA) at 004).
- yy. PM USA stands for Philip Morris USA Inc. (RX1928 (Altria) at 001).
- zz. PWP stands for Perella Weinberg Partners. (Willard (Altria) Tr. 1181).
- aaa. RHP stands for reduced-harm product. (Jupe (Altria) Tr. 2315).
- bbb. Richard was a code word used to refer to Altria during the negotiations. (Pritzker (JLI) Tr. 688; Garnick (Altria) Tr. 1586; Gifford (Altria) Tr. 2763).
- ccc. RK stands for refill kit, also known as a cartridge. (PX7039 Robbins (JLI) Tr. 33-34).
- ddd. ROFR stands for right of first refusal. (Gifford (Altria) Tr. 2767).
- eee. RRP stands for reduced-risk product. (Willard (Altria) Tr. 1379; Quigley (Altria) Tr. 2024).
- fff. RST stands for regulatory strategy and tactics. (Gardner (Altria) Tr. 2578).
- ggg. S&BD stands for Altria's Strategy & Business Development group. (Begley (Altria) Tr. 1008).
- hhh. SKU stands for stock-keeping unit. (Murillo (Altria/JLI) Tr. 2950).
- iii. [REDACTED] }
- jjj. SVC stands for standard variable costs. (Gifford (Altria) Tr. 2719).



- kkk. Tree was a code word used to refer to either Altria's investment in JLI, (Pritzker (JLI) Tr. 725; Willard (Altria) Tr. 1183), or JLI specifically, (Willard (Altria) Tr. 1469), during the negotiations.
- lll. TSM stands for territory sales manager. (PX7038 Myers (Altria) Tr. 64).
- mmm. USSTC stands for U.S. Smokeless Tobacco Company LLC. (RX1928 (Altria) at 001).
- nnn. YTD stands for year to date. (Gifford (Altria) Tr. 2783-84).
- ooo. 3YP stands for three-year plan. (Gifford (Altria) Tr. 2719).
- ppp. 2RF stands for second revised forecast. (Gifford (Altria) Tr. 2744).

### **Response to Finding No. 1728**

Complaint Counsel does not disagree, but adds the following:

“GC” (sub-part u.) may also refer to a company's General Counsel. (*See, e.g.*, PX7009 (Burns (JLI), IHT at 42); PX7011 (Valani (JLI), IHT at 110)).

“IRI” (sub-part x.) provides store-level retail sales data from convenience stores, which sell predominantly closed-system e-cigarettes. (PX1250 (Altria) at 009 (“Juul Labs Investor Presentation”) (slide entitled “Marketplace data sources and capabilities”); PX7039 (Robbins (JLI), Dep. at 28-29 (“[Q.] What's IRI? A. IRI is another data compiler similar to Nielsen [...] In Nielsen and IRI, we track other vapor products and cigarettes [...] So products that are sold through that pathway, which is primarily convenience [...] stores and gas stations.”); *see also* PX4029 (Altria) at 008 (“Nu Mark BOD Orientation”) (stating that 90% of the e-vapor volume in the “Mass/Convenience (MOC)” channel consists of closed-system e-cigarettes); Begley (Altria) Tr. 972 (conceding that the “MOC channel” sells predominantly closed-system products and that the MOC channel is “primarily a closed-system outlet”). Altria and JLI relied on IRI data to inform their competitive strategy. (PX7025 (Burns (JLI), Dep. at 15); PX7009 (Burns (JLI), IHT at 57-58); PX7031 (Willard (Altria), Dep. at 23)).

“MOC” (sub-part gg.) refers to the sales channel that includes “conventional convenience stores, supermarkets, and various other outlets where cigarettes are sold.” (Begley (Altria) Tr. 1090). The MOC sales channel consists almost entirely of closed-system e-vapor products. PX4029 (Altria) at 008 (“Nu Mark BOD Orientation”) (stating that 90% of the e-vapor volume in the “Mass/Convenience (MOC)” channel consists of closed-system e-cigarettes); Begley (Altria) Tr. 972 (conceding that the “MOC channel” sells predominantly closed-system products and that the MOC channel is “primarily a closed-system outlet”).

COMPLAINT COUNSEL'S RESPONSESTO RESPONDENTS' PROPOSED CONCLUSIONS OF LAW**I. RESPONSES TO “COMPLAINT COUNSEL FAILED TO PROVE AN AGREEMENT THAT ALTRIA WOULD REMOVE ITS E-VAPOR PRODUCTS AS A PRECONDITION OF ITS INVESTMENT IN JLI, DOOMING ITS SECTION 1 CLAIM AND GUTTING ITS SECTION 7 CLAIM”****A. Responses to “Section 1 Requires Complaint Counsel To Prove An Agreement”**

1. Section 1 of the Sherman Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1.

**Response to Proposed Conclusion No. 1**

Complaint Counsel has no specific response.

2. The essence of a Section 1 violation is an illegal “agreement.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007).

**Response to Proposed Conclusion No. 2**

Complaint Counsel has no specific response.

3. Complaint Counsel bears the burden to prove an illegal agreement. *In the Matter of McWane, Inc.*, 2013 WL 8364918, at \*208, \*227 (F.T.C. May 1, 2013) (initial decision).

**Response to Proposed Conclusion No. 3**

The Proposed Conclusion is incomplete. Complaint Counsel’s burden is to establish Respondents’ agreement by a preponderance of the evidence. *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56, 663 (7th Cir. 2002); *In the Matter of Adventist Health Sys./West*, 117 F.T.C. 224, 297 (F.T.C. Apr. 1, 1994). In other words, a plaintiff need only 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)). An agreement may be established through either direct or

circumstantial evidence, or a combination of the two. *See In the Matter of Benco Dental Supply*, 2019 WL 5419393, at \*9; *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010).

Because it is rare for parties to an illegal agreement to commit the entirety of their agreement to writing, plaintiffs commonly prove the existence of an agreement through inferences drawn from circumstantial evidence. *See Benco*, 2019 WL 5419393, at \*9; *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 569 (11th Cir. 1998); *see also In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 734 (8th Cir. 2014); *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 681 (S.D.N.Y. 2012) (“[C]onspiracies nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators.” (citation omitted)). 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. *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). When evaluating the existence of an anticompetitive agreement, courts must consider the “totality of the evidence.” *Apple*, 952 F. Supp. 2d at 689 (quoting *In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51, 64 (2d Cir. 2012)); *Benco*, 2019 WL 5419393, at \*9.

4. To satisfy this burden, Complaint Counsel must prove “a unity of purpose or a common design and understanding, or a meeting of minds.” *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

#### **Response to Proposed Conclusion No. 4**

Complaint Counsel does not disagree with the Proposed Conclusion. Indeed, Complaint Counsel proved by a preponderance of the evidence that there was an “understanding, or a meeting of the minds” that Altria would exit its existing e-cigarette business as a condition of a deal with

JLI. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). Additionally, the existence of the written non-compete agreement (“Non-Compete”) is not in dispute, so there is no question that there was a “meeting of the minds” that Altria would not compete with JLI in the future. *Id.*

5. “In other words,” Complaint Counsel must prove there was “a ‘conscious commitment to a common scheme designed to achieve an unlawful objective.’” *McWane*, 2013 WL 8364918, at \*223 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

#### **Response to Proposed Conclusion No. 5**

The Proposed Conclusion is incomplete to the extent that it excludes the specific language in *Monsanto* explaining: “The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [parties]. That is, there must be *direct or circumstantial evidence* that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984) (emphasis added).

6. Section 1 does not prohibit “independent decisions” by market actors “even if they lead to the same anticompetitive result as an actual agreement among market actors.” *Id.*

#### **Response to Proposed Conclusion No. 6**

The Proposed Conclusion is incomplete, misleading and contrary to the weight of the evidence to the extent it implies that there was no agreement between Altria and JLI because Altria chose the method to comply with JLI’s terms. *See* (CCFF §§ VIII, IX); CCCOL ¶¶ 53-58; CC’s Post-Trial Br. § III.A; CC’s Post-Trial Reply Br. Discussion § I.

7. Therefore, a “crucial question” in a Section 1 case “is whether the challenged anticompetitive conduct stems from independent decision or from an agreement.” *Twombly*, 550 U.S. at 553 (citations and alterations omitted).

#### **Response to Proposed Conclusion No. 7**

The Proposed Conclusion is misleading to the extent that it omits the specific language in *Twombly* stating that “[t]he crucial question is whether the challenged anticompetitive conduct

stem[s] from independent decision or from an agreement, *tacit or express.*” *Twombly*, 550 U.S. at 553 (citations omitted) (emphasis added).

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. v. United States*, 340 F.2d 1000, 1008 (9th Cir. 1965) (citations 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 *American Tobacco*, 328 U.S. at 809-10).

Moreover, the Proposed Conclusion is misleading for the reasons described in Response to Proposed Conclusion No. 6, *supra*.

8. “[P]roof of a [Section] 1 conspiracy must include evidence tending to exclude the possibility of independent action.” *Id.* at 554.

### **Response to Proposed Conclusion No. 8**

Complaint Counsel does not dispute that Respondents have accurately quoted *Twombly*; however, the Proposed Conclusion is misleading to the extent that it suggests the facts of this case are similar to the facts in *Twombly*. *Twombly* was decided on a motion to dismiss where plaintiffs failed to allege more than parallel conduct to support an inference of agreement. *See Twombly*, 550 U.S. at 556. Not only has Complaint Counsel provided facts beyond parallel conduct, the record contains both direct and circumstantial evidence that support a finding that Respondents

entered into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI. *See* (CCFF §§ VIII-IX).

9. Where an antitrust plaintiff's allegations "could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy," the plaintiff has failed to carry its burden and cannot establish a Section 1 violation. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008).

#### **Response to Proposed Conclusion No. 9**

The Proposed Conclusion is misleading to the extent that it suggests the facts of the instant case are similar to the facts in *Kendall v. Visa U.S.A.* *Kendall* was decided on a motion to dismiss where plaintiffs failed to allege more than parallel conduct to support an inference of agreement. *See* 518 F.3d at 1048. Not only has Complaint Counsel provided facts beyond parallel conduct, the record contains both direct and circumstantial evidence that support a finding that Respondents entered into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI. *See* (CCFF §§ VIII-IX).

10. For example, where the evidence demonstrates that the conduct in question was the result of a company's "strategic planning as to whether and when to pursue particular business opportunities," courts have been "unwilling to question such business judgment." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 127 (3d Cir. 1999).

#### **Response to Proposed Conclusion No. 10**

The Proposed Conclusion is misleading and incomplete. Respondents selectively quote *In re Baby Food Antitrust Litigation* to fashion a general rule that conduct that results from "strategic planning" can never constitute evidence of an illegal agreement. In reality, the Third Circuit was only "unwilling to question" the business judgment at issue in *In re Baby Food* where the record evidence was "as consistent with independent behavior as it is with price-fixing." 166 F.3d 112, 127 (3d Cir. 1999). Here, in contrast, Complaint Counsel has provided facts beyond parallel conduct, and the record contains both direct and circumstantial evidence that support a finding that

Respondents entered into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI. *See* (CCFF §§ VIII-IX); CCCOL ¶¶ 23-45.

Moreover, “[a]ctions 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 the Matter of McWane, Inc.*, Docket No. 9351, 2012 WL 4101793, at \*9 (F.T.C. Sept. 14, 2012). Actions against unilateral economic self-interest is plus-factor evidence that supports a finding of conspiracy. *Apple*, 952 F. Supp. 2d at 690. “Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market.” *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004). Respondent Altria’s abrupt shutdown of its Nu Mark subsidiary and e-cigarette business was against its economic self-interest and indicative of an agreement. (CCFF § IX.A.1). The evidence is clear that Altria would never have exited the U.S. e-cigarette market in the absence of the JLI transaction because Altria viewed market leadership in e-cigarettes as critically important to its long-term success. *See* (CCFF ¶¶ 93-108, 409-10, 532-44). Indeed, the evidence in the record establishes that Respondents “would not have acted as they did had they not been conspiring in restraint of trade.” *In re Polyurethane Foam Antitrust Litig.*, 152 F. Supp. 3d 968, 989 (N.D. Ohio 2015) (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 572 (11th Cir. 1998)). In fact, what Altria did was *highly* unusual and outside the normal range of independent business conduct, as evidenced by the market’s head-scratching reaction to Altria’s pull of its e-cigarette products. *See* (CCFF ¶¶ 1016-27).

11. Where a Section 1 “case is based entirely on . . . circumstantial evidence, the court must be especially vigilant to [e]nsure that liberal modes of proof do not become the pretext for unfounded speculation.” *Murdaugh Volkswagen, Inc. v. First Nat’l Bank of S.C.*, 639 F.2d 1073, 1075 (4th Cir. 1981) (quoting *Overseas Motors, Inc. v. Imported Motors Ltd., Inc.*, 375 F. Supp. 499, 531 (E.D. Mich. 1974)).

### **Response to Proposed Conclusion No. 11**



The Proposed Conclusion is misleading to the extent that it suggests that circumstantial evidence may not be sufficient to establish an illegal agreement. The case law is clear that 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, circumstantial evidence is no less persuasive than direct evidence. *E.g., Apple, Inc.*, 952 F. Supp. 2d at 689.

Further, the Proposed Conclusion is misleading to the extent that it suggests that Complaint Counsel has relied entirely on circumstantial evidence. Here, Complaint Counsel has set forth extensive evidence—both circumstantial *and* direct—that shows an agreement between Altria and JLI for Altria to exit e-cigarettes and no longer compete against JLI. Indeed, Respondents’ insinuation that Complaint Counsel’s case is “based entirely on . . . circumstantial evidence” is plainly wrong. In this case, part of the illegal agreement between Altria and JLI (the Non-Compete) was reduced to writing—a rarity in conspiracy cases. *See In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 681 (“[C]onspiracies nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators.” (citation omitted)). There is also ample direct evidence supporting a finding that Altria and JLI agreed that Altria would exit its existing e-cigarette business. Indeed, JLI put its demand that Altria exit e-cigarettes in writing (*e.g.*, CCF ¶¶ 892-97, 914-24), and Altria’s contemporaneous business documents show that it agreed to this demand. *E.g.*, (CCFF ¶¶ 945-86).

Indeed, the federal district court overseeing the parallel private litigation, based on the same transaction at issue here, aptly described the relationship between direct and circumstantial evidence when it denied Altria and JLI’s motions to dismiss plaintiffs’ Sherman Act Section 1 and Clayton Act Section 7 claims. *In re JUUL Labs, Inc., Antitrust Litig.*, 20-cv-02345-WHO, 2021

WL 3675208 (N.D. Cal. Aug. 19, 2021). In doing so, the court found that the written non-compete and evidence regarding the allegations of a “non-written agreement to withdraw in whole from the market need to be considered together.” *Id.* at \*18. With respect to plaintiffs’ Sherman Act Section 1 claim, the court found that plaintiffs alleged facts supporting an inference that Altria’s exit from e-cigarettes was a “key part of the overall Agreement between JLI and Altria.” *Id.* at \*17 (emphasis in original).

12. Where an antitrust plaintiff is confronted with uniform sworn denials that there was an agreement, the plaintiff faces a substantial burden to overcome the weight of that evidence and “produce significant probative evidence . . . that [the] conspiracy existed.” *Lamb’s Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978); see *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (same); see also *Impro Prod., Inc. v. Herrick*, 715 F.2d 1267, 1276 (8th Cir. 1983) (where “alleged conspiracy agreement ha[d] been denied under oath by [defendant] and all the officers and employees of the corporate defendants,” and where “uncontradicted sworn testimony” rebutted plaintiff’s “conspiracy interpretation,” defendants were entitled to summary judgment).

### **Response to Proposed Conclusion No. 12**

The Proposed Conclusion is misleading as to the relative importance of sworn denials of an agreement. Courts have regularly found the existence of an agreement despite the defendants’ denials of any agreement. See, e.g., *Gainesville Utils. Dep’t v. Florida Power & Light Co.*, 573 F.2d 292, 301 n.14 (5th Cir. 1978) (overturning denial of judgment notwithstanding the verdict relying on witness denials); *United States v. Champion Int’l Corp.*, 557 F.2d 1270, 1273 (9th Cir. 1977) (upholding trial court finding of an agreement to eliminate competitive bidding for timber where defendants asserted that meetings were innocent, but court found otherwise); *United States v. Capitol Service, Inc.*, 568 F. Supp. 134, 144-45 (E.D. Wis. 1983), *aff’d*, 756 F.2d 502 (7th Cir. 1985) (finding agreement despite defendants’ testimony that no agreement existed); *United States v. Beachner Constr. Co.*, 555 F. Supp. 1273, 1278-79 (D. Kan. 1983), *aff’d*, 729 F.2d 1278 (10th Cir. 1984) (“[A]lthough witnesses denied any overall agreement or understanding or participation

in a single conspiracy, there can be no doubt that bid rigging was a way of life in the industry in Kansas.”).

Indeed, where testimony is in direct conflict with contemporaneous business documents, courts afford such testimony little weight. *Gainesville Utils. Dep’t*, 573 F.2d at 301 n.14. Because witness memories fade over time, contemporaneous business documents are the best evidence of the witness intentions and beliefs at the time. *United States v. Gen. Elec. Co.*, 82 F. Supp. 753, 844 (D.N.J. 1949), *decision supplemented*, 115 F. Supp. 835 (D.N.J. 1953) (As the documents in the record were “never intended to meet the eyes of any one but the [executives] themselves, [they were] cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of intention, and although in many instances [a defendant’s executive] attempted to contradict them, his contradiction only served to affect the general credibility of his testimony.”).

The Proposed Conclusion is therefore irrelevant because of the substantial record evidence and the cases that Respondents cite here are inapposite. In those cases, the plaintiffs failed to put forward *any* evidence supporting an inference of conspiracy. *See Lamb’s Patio Theatre, Inc. v. Universal Film Exchanges, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978) (noting lack of “any credible evidence” that a conspiracy or agreement existed); *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 131-34 (D.D.C. 2006) (plaintiffs failed to show “evidence of opportunity to conspire, direct evidence of an agreement, or other circumstantial evidence”); *Impro Prods., Inc. v. Herrick*, 715 F. 2d 1267, 1276-77 (8th Cir. 1983) (plaintiff failed to introduce any evidence supporting an inference that defendants conspired to harm plaintiff’s business, and uncontradicted testimony established that defendants had never even discussed plaintiff or its products).

As the Commission itself has explained, cases such as *Lamb's Patio Theatre* and *City of Moundridge*, where plaintiffs failed to adduce evidence of conspiracy, are inapposite when Complaint Counsel has put forward “sufficient evidence from which a reasonable trier of fact could infer an agreement.” *In the Matter of Benco Dental Supply Co.*, Docket No. 9379, 2018 WL 6338485, at \*18 and n.17 (F.T.C. Nov. 26, 2018) (Opinion and Order denying summary judgment) (distinguishing *Lamb's Patio Theatre*, 582 F. 2d 1068 and *City of Moundridge*, 429 F. Supp. 2d 117); see *Trabert & Hoeffler, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 481 (7th Cir. 1980) (observing that in *Lamb's Patio Theatre*, “plaintiff had failed to produce any evidence of a conspiracy apart from the weakness of the defendant’s proffered explanation,” in contrast to the case before the *Trabert* court, in which “the record contained a plethora of additional evidence probative of the existence of a conspiracy”).

Unlike in the cases cited by Respondents, the record here contains extensive evidence supporting an inference that Altria and JLI agreed that Altria would exit e-cigarettes. (CCFF ¶¶ 880-986); see also *In re JUUL Labs, Inc., Antitrust Litig.*, 20-cv-02345-WHO, 2021 WL 3675208, at \*18 (N.D. Cal. Aug. 19, 2021) (denying motion to dismiss private action alleging *per se* anticompetitive agreement between Altria and JLI under Section 1 of the Sherman Act, and finding that plaintiffs alleged facts “tending to exclude the possibility that the alternative explanation is true”) (citation omitted).

Finally, several of the witnesses whose sworn denials Respondents now rely so heavily on have fatally undermined their credibility after providing materially misleading testimony during the FTC’s investigation. CCCOL ¶¶ 51-52. 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. (CCFF ¶ 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. (CCFF ¶ 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).

13. A “plaintiff cannot make its case just by asking the fact finder to disbelieve the defendant’s witnesses,” as “[m]ere disbelief does not rise to the level of positive proof of an agreement.” *McWane*, 2013 WL 8364918, at \*267 (citations and alterations omitted).

### **Response to Proposed Conclusion No. 13**

The Proposed Conclusion is misleading and incomplete to the extent that it suggests that Respondents’ witnesses provided uncontradicted testimony. As explained in Complaint Counsel’s Proposed Conclusions of Law (“CCCOL”), Respondents’ denials do not offset the body of evidence supporting an inference of agreement. *See* CCCOL § III.C (“Respondents’ Denials Are Unavailing”).

The Proposed Conclusion is also misleading to the extent that it suggests Respondents’ denials deserve greater weight than the rest of the evidence, or that Complaint Counsel asks the Court to discount Respondents’ denials as self-serving. Complaint Counsel does not ask the Court to dismiss Respondents’ denials blindly, but instead to weigh the denials against the totality of the record evidence—including Respondents’ own contemporaneous documents—that point strongly towards agreement. *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (“A plaintiff cannot make his case just by asking the jury to disbelieve the defendant’s witnesses, but there is much more here.”).

Further, the cited case is inapposite. In *McWane*, evidence of “opportunity to conspire,” without more, could not overcome sworn denials. *In the Matter of McWane, Inc.*, 155 F.T.C. 903, 2013 WL 8364918, at \*265 (Initial Decision May 1, 2013). Here, there is clear evidence showing that Respondents directly communicated about the subject matter of the alleged agreement—Altria

exiting its existing e-cigarette business and not competing with JLI. *See* (CCFF ¶¶ 867-986). Through direct communications (often written), JLI demanded and Altria understood that any deal had to result in Altria exiting its existing business and not competing in the future for closed system e-cigarettes. *See* (CCFF ¶¶ 867-943). Altria agreed to JLI’s demand that it had to stop competing in the closed-system e-cigarette market (*see* CCFF ¶¶ 944-67) and Altria indicated to JLI that it might comply with JLI’s non-compete demand by shutting down its closed-system e-cigarette business. *See* (CCFF ¶¶ 968-86). Moreover, as term sheets and other ordinary-course documents make clear, JLI insisted on a non-compete not only against products in development and future products, but also against Altria’s existing e-vapor products. *See* (CCFF ¶¶ 880-924). Indeed, JLI left no room for doubt when, in August 2018, it called out (in a written form handed over in an in-person meeting) as “not acceptable to us” any attempt by Altria to continue competing with its existing MarkTen products. *See* (CCFF ¶¶ 914-24). From that point forward, no term sheet permitted Altria to keep its e-vapor products on the market indefinitely. *See* (CCFF ¶¶ 957, 965-67). In addition, the second part of the agreement between Altria and JLI is embodied in a written non-compete in the transaction documents. *See* (CCFF ¶¶ 38-40, 995-1001).

Finally, several of the witnesses whose sworn denials Respondents now rely so heavily on have fatally undermined their credibility after providing materially misleading testimony during the FTC’s investigation. CCCOL ¶¶ 51-52. 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. (CCFF ¶ 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. (CCFF ¶ 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).

14. “Communications between competitors do not permit an inference of an agreement unless those communications rise to the level of an agreement, tacit or otherwise.” *Id.* at \*364.

#### **Response to Proposed Conclusion No. 14**

The Proposed Conclusion is incomplete and misleading. Evidence of frequent communications between conspirators is an independent “plus factor” supporting an inference of agreement. *McWane*, 2012 WL 4101793, at \*13 n.11 (citing *In re Plywood Antitrust Litig.*, 655 F.2d 627, 633 (5th Cir. 1981)); *see also Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 803 F.3d 1084, 1092-93 (9th Cir. 2015); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 432 (4th Cir. 2015).

Further, the Proposed Conclusion is misleading to the extent that it suggests the facts of the instant case are similar to the facts in *McWane*. In *McWane*, the subject communications were “[a]t best” sufficient to prove an “opportunity to conspire.” 2013 WL 8364918, at \*265 (emphasis omitted). Here, in contrast, Respondents’ numerous in-person meetings (sometimes without lawyers), frequent exchanges of text messages, and one-on-one telephone calls provide plus-factor evidence relevant to a finding of agreement. *See* (CCFF ¶¶ 614-24). Moreover, unlike in *McWane*, here there is clear evidence showing that Respondents directly communicated about the subject matter of the alleged agreement—Altria exiting its existing e-cigarette business and not competing with JLI. *See* (CCFF ¶¶ 867-986).

15. Likewise, meetings or discussions between parties, without more, are not evidence of conspiracy. *Id.* at \*253 (holding “mere proof of a meeting” is not proof of conspiracy); *Areeda & Hovenkamp, Antitrust Law* ¶ 1417b (“The courts always conclude that the mere fact of meetings or discussions at which a conspiracy might have occurred, but without additional evidence of conspiracy, is insufficient.”).

#### **Response to Proposed Conclusion No. 15**

The Proposed Conclusion is misleading to the extent that it suggests that Complaint Counsel relies solely on “mere proof of a meeting.” The record contains both direct and circumstantial evidence that support a finding that Respondents entered into an unlawful agreement, including, *inter alia*, evidence of numerous in-person meetings. These meetings are one of several independent plus factors supporting an inference of agreement. *See McWane*, 2012 WL 4101793, at \*13 n.11 (citing *In re Plywood Antitrust Litig.*, 655 F.2d at 633); *see also Stanislaus Food Prods.*, 803 F.3d at 1092-93; *SD3, LLC*, 801 F.3d at 432. Moreover, unlike in *McWane*, here there is clear evidence showing that Respondents directly communicated about the subject matter of the alleged agreement—Altria exiting its existing e-cigarette business and not competing with JLI. *See* (CCFF ¶¶ 867-986).

16. Non-binding term sheets exchanged between negotiating parties do not constitute offers that may be accepted for purposes of forming a Section 1 agreement. *See Azco Biotech, Inc. v. Qiagen, N.V.*, 2015 WL 12516024, at \*5 (S.D. Cal. July 2, 2015) (holding that where term sheet left price open, it did not constitute an offer); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 217 (E.D.N.Y. 2003) (rejecting “claim of anticompetitive conduct flowing from” unexecuted term sheet that merely “embodie[d] [the parties’] attempt to negotiate in good faith”).

### **Response to Proposed Conclusion No. 16**

The Proposed Conclusion is not supported by the cited cases, and indeed, finds no support in the law. *Azco Biotech, Inc. v. Qiagen* is not even a Section 1 case. In the discussion cited by Respondents, the *Azco* court dismissed a breach of contract claim—not an antitrust claim—under California law because the parties’ outward manifestations, including a missing price term, did not suggest that the parties intended to be bound by the term sheet at issue. *See* 2015 WL 12516024, at \*4-5 (S.D. Cal. July 2, 2015). This is not a breach of contract case, and Complaint Counsel does not contend that any term sheet was the final agreement to the overall transaction. *See In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d at 734 (Sherman Act Section 1 case “is not a contracts case in which the scope of the alleged anticompetitive agreement is cabined by the four



corners of the written document” and a plaintiff may instead use “all manner of extrinsic evidence” to show an illegal agreement). As the federal district court overseeing the ongoing private antitrust action based on the same transaction at issue here noted, “the intended scope of the express, written non-compete agreements . . . and plaintiffs’ allegations regarding the non-written agreement to withdraw in whole from the market need to be considered together and tested on an evidentiary basis.” *In re JUUL Labs Antitrust Litig.*, 2021 WL 3675208, at \*18.

In *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, the plaintiffs argued that an agreement under which generic manufacturers deferred entry into the market until a patent held by the brand name manufacturer expired, in return for payments to be received from brand name manufacturer, was an illegal market allocation in violation of Section 1. *See* 261 F. Supp. 2d 188, 188 (E.D.N.Y. 2003). In the discussion cited by Respondents, the court granted a motion to dismiss by an individual defendant that was not a party to the challenged agreements, reasoning that the existence of an unexecuted term sheet was “too speculative to support a cause of action” against that individual defendant. *Id.* at 217. Moreover, Complaint Counsel is not arguing that “anticompetitive conduct flow[ed] from” term sheets, 261 F. Supp. 2d at 217, but instead that the term sheets here provide support for an inference that Altria and JLI agreed that Altria would exit its own e-cigarette business as part of any deal.

Therefore, neither case supports a conclusion of law that non-binding term sheets do not constitute offers that may be accepted in violation of Section 1.

Further, Respondents incorrectly suggest that Complaint Counsel is asking this Court to find a Section 1 agreement based solely on nonbinding term sheets. To the contrary, Complaint Counsel’s position is that the *totality of the evidence* supports a finding of an agreement to exit. *See Apple*, 952 F. Supp. 2d at 689. The term sheets form *part* of that total body of evidence—

which also includes witness testimony, ordinary course documents, and Altria's course of conduct in shutting down its e-cigarette business immediately prior to entering the transaction. *See American Tobacco*, 328 U.S. at 809 (conspiracy may be “found in a course of dealing or other circumstances as well as in an exchange of words”).

**B. Responses to “Complaint Counsel Failed To Prove That Altria Agreed With JLI To Withdraw Nu Mark’s E-Vapor Products”**

17. Complaint Counsel has failed to satisfy its burden to prove the essence of its Section 1 case: an illegal agreement between Altria and JLI that Altria would withdraw Nu Mark’s e-vapor products as a precondition of an investment in JLI. *See Twombly*, 550 U.S. at 553.

**Response to Proposed Conclusion No. 17**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is also contrary to the weight of the evidence. Complaint Counsel has demonstrated by a preponderance of the evidence that Respondents violated Section 1 of the Sherman Act by entering into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI. *See* (CCFF §§ VIII-IX); CC’s Post-Trial Br. § III; CC’s Post-Trial Reply Br. Discussion § I.A.

Moreover, the Proposed Conclusion is misleading to the extent it implies the facts of the instant case are analogous to *Twombly*, for the reasons described in Response to Proposed Conclusion No. 8.

18. To the contrary, Respondents have introduced substantial evidence that the challenged conduct—discontinuing (1) Nu Mark’s pod-based and non-traditional flavored cig-a-like products in October 2018 and (2) discontinuing Nu Mark’s remaining cig-a-like products in December 2018—“stems from [an] *independent decision*” of Altria and not “from an agreement” between Altria and JLI. *Twombly*, 550 U.S. at 553 (emphasis added) (citations and alterations omitted).

**Response to Proposed Conclusion No. 18**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is also contrary to the weight of the evidence. Complaint Counsel has demonstrated by a preponderance of the evidence that Respondents violated Section 1 of the Sherman Act by entering into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI. *See* (CCFF §§ VIII-IX); CC's Post-Trial Br. § III; CC's Post-Trial Reply Br. Discussion § I.A.

Moreover, the Proposed Conclusion is misleading to the extent it implies the facts of the instant case are analogous to *Twombly*, for the reasons described in Response to Proposed Conclusion No. 8.

19. Specifically, Respondents have introduced substantial testimony and documentary evidence that the decision to discontinue Nu Mark's pod-based and non-traditional flavored cig-a-like products in October 2018 was made in response to FDA concerns about youth usage of such products and against the backdrop of other serious regulatory hurdles and commercial challenges that the products faced. (FF ¶¶ 917-59, 997-1007; *see also* FF ¶¶ 562-761).

#### **Response to Proposed Conclusion No. 19**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is also contrary to the weight of the evidence. Complaint Counsel has demonstrated by a preponderance of the evidence that Respondents violated Section 1 of the Sherman Act by entering into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI. *See* (CCFF §§ VIII-IX); CC's Post-Trial Br. § III; CC's Post-Trial Reply Br. Discussion § I.A. Furthermore, Complaint Counsel specifically showed that Altria's stated reasons for removing its e-cigarette products are pretextual and inconsistent with the record evidence. *See* (CCFF § IX); CC's Post-Trial Br. § III.A.2; CC's Post-Trial Reply Br. Discussion § I.B.

20. Similarly, Respondents have introduced substantial testimony and documentary evidence that the decision to discontinue Nu Mark's remaining cig-a-like products in December 2018 was made for budgetary and financial reasons and again against the backdrop of serious regulatory hurdles and commercial challenges that the products faced. (FF ¶¶ 1074-98; *see also* FF ¶¶ 562-761).

**Response to Proposed Conclusion No. 20**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is also contrary to the weight of the evidence. Complaint Counsel has demonstrated by a preponderance of the evidence that Respondents violated Section 1 of the Sherman Act by entering into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI. *See* (CCFF §§ VIII-IX); CC's Post-Trial Br. § III; CC's Post-Trial Reply Br. Discussion § I.A. Furthermore, Complaint Counsel specifically showed that Altria's stated reasons for removing its e-cigarette products are pretextual and inconsistent with the record evidence. *See* (CCFF § IX); CC's Post-Trial Br. § III.A.2; CC's Post-Trial Reply Br. Discussion § I.B.

21. In addition, Respondents have introduced substantial testimony and documentary evidence that there was no agreement between Altria and JLI requiring Altria to withdraw from the e-vapor market as a precondition to the investment. (FF ¶¶ 1126-32, 1152-61).

**Response to Proposed Conclusion No. 21**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is also contrary to the weight of the evidence. Complaint Counsel has demonstrated by a preponderance of the evidence that Respondents violated Section 1 of the Sherman Act by entering into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI. *See* (CCFF §§ VIII-IX); CC's Post-Trial Br. § III; CC's Post-Trial Reply Br. Discussion § I.A.

22. The Court will not accept snippets of phrases in early non-binding term sheets exchanged as part of a lengthy negotiation as evidence of a conspiracy especially in light of the uniform sworn denials of fact witnesses with personal knowledge of the events at issue. *See Azco*, 2015 WL 12516024, at \*5; *In re Ciprofloxacin*, 261 F. Supp. 2d at 217; *Lamb's Patio Theatre*, 582 F.2d at 1070.

### **Response to Proposed Conclusion No. 22**

The Proposed Conclusion is not supported by the cited cases, and indeed, finds no support in the law.

Neither *Azco* nor *In re Ciprofloxacin* involved sworn denials from fact witnesses. *Azco* is not even a Section 1 case. There, the court dismissed a breach of contract claim—not an antitrust claim—under California law because the parties' outward manifestations, including a missing price term, did not suggest that the parties intended to be bound by the term sheet at issue. 2015 WL 12516024, at \*4-5 (S.D. Cal. July 2, 2015). Further, the decision in *In re Ciprofloxacin Hydrochloride Antitrust Litig.* did not rest on any sworn denials from fact witnesses, but rather on the lack of evidence of an agreement beyond a non-binding term sheet. *See* 261 F. Supp. 2d 188, 217 (E.D.N.Y. 2003). In the discussion cited by Respondents, the court granted a motion to dismiss by an individual defendant that was not a party to the challenged agreements, reasoning that the existence of an unexecuted term sheet alone was “too speculative to support a cause of action” against that individual defendant. *Id.*

*Lamb's Patio Theatre Inc. v. Universal Film Exchanges, Inc.* is also inapposite. That case did not involve term sheets at all. Rather, the plaintiff in that case failed to produce sufficient evidence from which a reasonable trier of fact could infer an agreement, and instead attempted to build a case solely based on allegations of actions against self-interest and change in conduct. *See* 582 F.2d at 1069-70. In *Lamb's Patio*, the Seventh Circuit upheld the district court's award of summary judgment to the defendant, explaining that a “bald allegation of conspiracy” was not enough to refute the defendant's sworn affidavit denying the alleged conspiracy. *Id.* at 1070.

None of these cases support a conclusion of law that a reasonable trier of fact cannot accept the exchange of non-binding term sheets as evidence of an illegal agreement.

Further, the Proposed Conclusion is misleading for the reasons described in Responses to Proposed Conclusion No. 12 and No. 16.

Finally, Respondents incorrectly insinuate that Complaint Counsel is asking this Court to find a Section 1 agreement based solely on nonbinding term sheets. To the contrary, Complaint Counsel's position is that the *totality of the evidence* supports a finding of an agreement to exit. *See Apple*, 952 F. Supp. 2d at 689. The term sheets form *part* of that total body of evidence—which also includes witness testimony, ordinary course documents, and Altria's course of conduct in shutting down its e-cigarette business immediately prior to entering the transaction. *See American Tobacco*, 328 U.S. at 809 (conspiracy may be “found in a course of dealing or other circumstances as well as in an exchange of words”).

23. As a result, Complaint Counsel has not carried its burden of proving an agreement. *See Lamb's Patio*, 582 F.2d at 1070; *Exxon Mobil Corp.*, 429 F. Supp. at 130.

### **Response to Proposed Conclusion No. 23**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

Further, the Proposed Conclusion is misleading to the extent it implies the facts of the instant case are analogous to *Lamb's Patio* or *Exxon Mobil Corp.* In *Lamb's Patio*, the plaintiff failed to produce sufficient evidence from which a reasonable trier of fact could infer an agreement, and instead attempted to build a case solely based on allegations of actions against self-interest and change in conduct. *See* 582 F.2d at 1069-70. As the Commission itself has explained, cases such as *Lamb's Patio*, where plaintiffs failed to adduce evidence of conspiracy, are inapposite when Complaint Counsel has put forward “sufficient evidence from which a reasonable trier of

fact could infer an agreement.” *Benco*, 2018 WL 6338485, at \*18 and n.17 (distinguishing *Lamb’s Patio Theatre*, 582 F. 2d 1068); see *Trabert & Hoegger, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 481 (7th Cir. 1980) (observing that in *Lamb’s Patio*, “plaintiff had failed to produce any evidence of a conspiracy apart from the weakness of the defendant’s proffered explanation,” in contrast to the case before the *Trabert* court, in which “the record contained a plethora of additional evidence probative of the existence of a conspiracy”).

In *Exxon Mobil Corp.*, plaintiffs sought a preliminary injunction, alleging a conspiracy among gas-producing defendants based on consciously parallel behavior. See 429 F. Supp. 2d at 131. The district court denied the plaintiffs’ request for a preliminary injunction, reasoning that the plaintiffs failed to allege the necessary elements of a tacit collusion case. *Id.* at 131-34. Here, by contrast, Complaint Counsel has demonstrated by a preponderance of the evidence that Respondents violated Section 1 of the Sherman Act by entering into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI. See (CCFF §§ VIII-IX); CC’s Post-Trial Br. § III; CC’s Post-Trial Reply Br. Discussion § I.A.

24. Complaint Counsel has failed to prove an illegal agreement, and its Section 1 claim is dismissed. See *Twombly*, 550 U.S. at 553. As a result, and as Complaint Counsel conceded in its opening statement (Tr. 73), Complaint Counsel is left with only a potential actual competition claim under Section 7, which it cannot sustain.

#### **Response to Proposed Conclusion No. 24**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is also contrary to the weight of the evidence. Complaint Counsel has demonstrated by a preponderance of the evidence that Respondents violated Section 1 of the Sherman Act by entering into an unlawful agreement under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI. See (CCFF §§ VIII-IX); CC’s Post-Trial Br. § III; CC’s

Post-Trial Reply Br. § I.A. The second part of the agreement between Altria and JLI is embodied in a written non-compete in the transaction documents. *See* (CCFF ¶¶ 38-40, 995-1001). The existence of the non-compete is not in dispute, so there is no question that there was a “meeting of the minds” that Altria would not compete with JLI in the future. *See American Tobacco*, 328 U.S. at 810. As discussed in Complaint Counsel’s Post-Trial Brief and Reply Brief, Complaint Counsel should prevail even if the Court considers *only* the written non-compete. CC’s Post-Trial Br. § III.C; CC’s Post-Trial Reply Br. Discussion § III. With respect to the first part of the agreement, Complaint Counsel has put forward an extensive record of documentary and testimonial evidence that supports a finding that Altria and JLI had an “understanding, or a meeting of the minds” that Altria would exit its existing e-cigarette business as a condition of a deal with JLI. *American Tobacco*, 328 U.S. at 810.

Further, the Proposed Conclusion should be disregarded because Complaint Counsel has demonstrated that the transaction also violated Section 7 of the Clayton Act as an illegal combination between actual competitors. *See* (CCFF §§ VI, X, XIV); CC’s Post-Trial Br. § IV; CC’s Post-Trial Reply Br. Discussion § II.

The Proposed Conclusion is also misleading in its characterization of Complaint Counsel’s opening statement where Complaint Counsel stated: “Your Honor, you don’t need to reach our potential competition claim. The evidence will show that, but for the transaction, Altria would be competing in the U.S. e-cigarette market today. As a result, Altria’s exit from the market harmed both current and future competition. But even if you believe that Altria removed its existing e-cigarette products for reasons unrelated to its deal with JLI, the transaction still violates Section 7 of the Clayton Act.” (Tr. 73). Further, even if the Court finds that Complaint Counsel did not prove the existence of an illegal agreement under Section 1, Complaint Counsel’s Section 7 claim is still



valid. First, if the Court finds that, but for the transaction, Altria would not have exited the closed-system e-cigarette market, *see* (CCFF ¶¶ 409-544); CC’s Post-Trial Br. at 60-65; CC’s Post-Trial Reply Br. Discussion § I.C, the Court would treat Altria as an actual competitor under Section 7. *See In re Juul Labs, Inc. Antitrust Litig.*, 2021 WL 3675208, at \*21 (“Altria and JLI were *actual competitors* at the time the alleged antitrust Agreement was made. It does not alter Altria’s actual competitor status that, as part of the alleged antitrust Agreement, Altria left the market by the time the Agreement was fully effectuated and publicly disclosed.”) (emphasis added). Second, even if the Court credits Altria’s dubious claim that it would have shut down its Nu Mark subsidiary and exit the market even without the transaction, Complaint Counsel would still prevail on its Section 7 claim based on an actual potential competition theory. *See* (CCFF ¶¶ 1527-730); CC’s Post-Trial Br. § IV.E; CC’s Post-Trial Reply Br. Discussion § II.D.3.

Moreover, the Proposed Conclusion is misleading to the extent it implies the facts of the instant case are analogous to *Twombly*, for the reasons described in Response to Proposed Conclusion No. 8.

**C. Responses to “Complaint Counsel’s Failure To Sustain Its Theory Also Guts Its Section 7 Claim”**

25. The substantial evidence that Altria removed its products for independent business reasons also defeats Complaint Counsel’s claim under Section 7. Complaint Counsel offers only conjecture in response and that is not sufficient. *See McWane*, 2013 WL 8364918, at \*253.

**Response to Proposed Conclusion No. 25**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is also contrary to the weight of the evidence. Complaint Counsel has demonstrated by a preponderance of the evidence that Altria’s excuses for shutting down of

its e-cigarette business right before the JLI transaction are pretextual and implausible. *See* (CCFF § IX); CC’s Post-Trial Br. § III.A.2; CC’s Post-Trial Reply Br. Discussion § I.B.

Further, the Proposed Conclusion is misleading to the extent that it suggests that no agreement can be found where Respondents also point to some business justification consistent with their agreement. *McWane* stands for the proposition that “[w]here there is an independent business justification for a defendant’s behavior, an inference of conspiracy is not easily drawn.” 2013 WL 8364918, at \*253 (citing *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1456 (11th Cir. 1991)). It does not state that a claim of independent business justification ends the inquiry as to whether Respondents entered into an agreement. *See* CCCOL § III.D (“Claims of Independent Business Justification Are No Defense to an Unlawful Conspiracy”).

Finally, the Proposed Conclusion is misleading for the reasons described in Response to Proposed Conclusion No. 24.

26. Section 7 makes unlawful acquisitions that may have the “effect of . . . substantially . . . lessen[ing] competition.” 15 U.S.C. § 18.

**Response to Proposed Conclusion No. 26**

The Proposed Conclusion is incomplete and misleading. 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 competition, or to tend to create a monopoly.” 15 U.S.C. § 18.

27. The removal of Altria’s e-vapor products from the market, in October and December of 2018, was not an “effect” of the later-in-time investment in JLI. Thus, the investment is not actionable under Section 7. *Id.*

**Response to Proposed Conclusion No. 27**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is also contrary to the unambiguous text of Section 7. Section 7 of the Clayton Act prohibits an acquisition where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18.

Further, the Proposed Conclusion is contrary to the law and factually inaccurate. The transaction violates Section 7 as a merger between actual competitors. As the federal district court overseeing the ongoing private action based on the same transaction at issue here ruled with respect to plaintiffs’ Clayton Act Section 7 claims when it denied Altria and JLI’s motions to dismiss, “Altria and JLI were *actual competitors* at the time the alleged antitrust Agreement was made.” *In re Juul Labs, Inc. Antitrust Litig.*, 2021 WL 3675208, at \*21 (emphasis added).

Further, 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)). Moreover, Complaint Counsel demonstrated 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. *See* (CCFF ¶¶ 493-544, 1034-407). Thus, the *effect* of the transaction was the complete elimination of Altria as a competitive presence in the U.S. closed-system e-cigarette market. *See* (CCFF ¶¶ 944-1015). As the district court explained in *In re Juul Labs, Inc. Antitrust Litigation*, “[i]t does not alter Altria’s actual competitor status that, as part of the alleged antitrust Agreement, Altria left the market by the time the Agreement was fully effectuated and publicly disclosed.” 2021 WL 3675208, at \*21.

## II. RESPONSES TO “COMPLAINT COUNSEL FAILED TO PROVE SUBSTANTIAL ANTICOMPETITIVE EFFECTS”

28. Complaint Counsel bears the burden of demonstrating substantial anticompetitive effects under both Section 1 of the Sherman Act and Section 7 of the Clayton Act.

### Response to Proposed Conclusion No. 28

The Proposed Conclusion is misleading and incomplete. In analyzing an alleged violation of Section 1 under the rule of reason, courts use a burden-shifting framework. *Impax Labs. Inc. v. FTC*, 994 F.3d 484, 492 (5th Cir. 2021) (citing *Ohio v. Am. Express Co.*, 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 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 v. Alston*, -- U.S. --, 141 S. Ct. 2141, 2160 (2021).

Section 7 prohibits acquisitions that create a reasonable probability of anticompetitive effects. *See, e.g., FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991). “Congress used the words ‘*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 Co. v. United States*, 370 U.S. 294, 323 (1962)). 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.*, 150 F.T.C. 586, 2010 WL 9549988, at \*9 (F.T.C. Nov. 5, 2010). Under the burdening-shifting framework, Complaint Counsel 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); *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 207 (D.D.C. 2018). 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 that casts doubt on the significance or accuracy of” the government’s evidence. *Polypore*, 2010 WL 9549988, at \*9 (citing *Baker Hughes*, 908 F.2d at 985); *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.” *In re OSF Healthcare Sys.*, 2012 FTC LEXIS 76, \*46 (Apr. 4, 2012); *see also 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).

29. Under Section 1, Complaint Counsel must prove “the challenged restraint has a *substantial anticompetitive effect* that harms consumers in the relevant market.” *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (emphasis added).

### **Response to Proposed Conclusion No. 29**

Complaint Counsel does not dispute that Respondents have accurately quoted the cited case. The Proposed Conclusion is incomplete and misleading, however, for the reasons described in Response to Proposed Conclusion No. 28.

30. Under Section 7, Complaint Counsel must show that the effect of the transaction “may be *substantially to lessen competition.*” 15 U.S.C. § 18 (emphasis added); *see United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 101, 121-22 (1975) (affirming denial of injunctive relief where the challenged transactions “would not ‘lessen’ competition”).

### **Response to Proposed Conclusion No. 30**

Complaint Counsel does not dispute that Respondents have accurately quoted the cited authorities. The Proposed Conclusion is incomplete and misleading, however, for the reasons described in Response to Proposed Conclusion No. 28.

31. To demonstrate substantial anticompetitive effects, Complaint Counsel must demonstrate a “reasonable *probability* of a substantial impairment of competition”—a “mere *possibility* will not suffice.” *Fruehauf Corp. v. FTC*, 603 F.2d 345, 351 (2d Cir. 1979) (emphases added).

### **Response to Proposed Conclusion No. 31**

Complaint Counsel does not dispute that Respondents have accurately quoted the cited case. The Proposed Conclusion is incomplete and misleading, however, for the reasons described in Response to Proposed Conclusion No. 28.

The Proposed Conclusion is also incomplete because it omits the full discussion in *Fruehauf*—a vertical merger case—which reads:

Section 7 of the Clayton Act was intended to arrest a trade restraint or a substantial lessening of competition in its incipiency; it is not concerned with “certainties.” Requiring a plaintiff to prove that substantial lessening of competition is inevitable would thwart the express intent of Congress to nip anticompetitive practices in the bud before they blossom into a Sherman Act restraint of trade and would run counter to Congress’ view that neither the Commission nor the courts should be charged with possession of powers of prevision that no one else has achieved. Yet there must be “the reasonable probability” of a substantial impairment of competition to render a merger illegal under [Section] 7. A “mere possibility” will not suffice.

*Fruehauf Corp. v. FTC*, 603 F.2d 345, 351 (2d Cir. 1979) (citations omitted).

32. Complaint Counsel has not carried its burden to show a substantial anticompetitive effect flowing from the transaction, and therefore its claims under Section 1 of the Sherman Act and Section 7 of the Clayton Act are dismissed.

### **Response to Proposed Conclusion No. 32**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

The Proposed Conclusion is also contrary to the weight of the evidence. Complaint Counsel has demonstrated by a preponderance of the evidence that the transaction has harmed and will continue to harm consumers under both Section 1 and Section 7. *See* (CCFF ¶¶ 1408-730); CC's Post-Trial Br. §§ III.B, IV.B-C; CC's Post-Trial Reply Br. Discussion § II.

#### **A. Responses to “Post-Acquisition Evidence Is Properly Before The Court For Purposes Of Analyzing Both Of Complaint Counsel’s Claims”**

33. Under both Sections 1 and Section 7, post-transaction evidence is an “important indicator of the probability of anticompetitive effects.” *LektroVend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981) (Section 7); *see also Nat’l Coll. Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2144 (2021) (“*Alston*”) (requiring courts “to assess a challenged restraint’s *actual effect on competition*” under Section 1 (quotations omitted; emphasis added)).

### **Response to Proposed Conclusion No. 33**

The Proposed Conclusion is misleading and incomplete as it omits key language from the cited authority. In *Alston*, the Supreme Court explained that the rule of reason “generally requires a court to conduct a *fact-specific assessment of market power and market structure* to assess a challenged restraint’s actual effect on competition.” *Alston*, 141 S. Ct. at 2151 (citation and quotations omitted) (emphasis added). The Court did not state that assessing “actual effects” requires courts to consider post-transaction (or post-agreement) evidence under Section 1. In fact, courts have found the opposite. “[I]t is a basic antitrust principle that the impact of an agreement

on competition is assessed as of ‘the time it was adopted.’” *Impax*, 994 F.3d at 496 (quoting *Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.)). Thus, the court in *Impax* rejected the defendant’s argument that a challenged agreement “[did] not look anticompetitive in hindsight.” *Impax*, 994 F.3d at 496; see also *U.S. Department of Justice and Federal Trade Commission, Antitrust Guidelines For Collaboration Among Competitors* § 2.4 (2000) (stating that the agencies “assess the competitive effects of a relevant agreement as of the time of possible harm to competition”).

The Proposed Conclusion is also misleading to the extent it suggests that Complaint Counsel must show post-transaction harm. In reality, the Commission and courts have acknowledged that a showing of actual post-transaction harm is not required. Indeed, the Supreme Court in *General Dynamics* explained that the absence of “concrete anticompetitive symptoms . . . does not itself imply that competition has not already been affected.” 415 U.S. at 505. “Even in a consummated merger, 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). “And 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 incipiency would be frustrated.” *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. See *Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen



if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. *See* (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” *See* (CCFF ¶ 1759).

34. The Horizontal Merger Guidelines “consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition,” including “actual effects observed in consummated” transactions. U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 2 (2010) (hereinafter, “HMG”).

#### **Response to Proposed Conclusion No. 34**

Complaint Counsel does not dispute that Respondents have accurately quoted the *Horizontal Merger Guidelines*. The Proposed Conclusion is misleading, however, for the reasons described in Response to Proposed Conclusion No. 33.

Further, the Proposed Conclusion is incomplete and misleading because it omits language in the *Horizontal Merger Guidelines* explaining that “a consummated merger may be anticompetitive even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and moderating its conduct.” *Horizontal Merger Guidelines* § 2.1.1. Here, as an initial matter, Respondents have been aware that the transaction has been under federal antitrust scrutiny for over two years now, which raises the possibility that at least some of Respondents actions taken after the transaction was announced, such as JLI’s decision to pull its mint-flavored products from the market in November 2019, could have been subject to manipulation. *See* (CCRRFF ¶ 998). More importantly, even if post-transaction evidence is not subject to manipulation, it can still be distorted by external factors that render it less reliable. Indeed, the federal district court handling the private antitrust actions

against Altria and JLI recently held that the potential impact of JLI's withdrawal of its fruit flavors in response to public pressure meant that Altria and JLI could not prevail on their motion to dismiss the case simply by citing evidence that absolute prices declined after the deal. *In re JUUL Labs, Inc., Antitrust Litig.*, 2021 WL 3675208 at \*16-17.

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. See *Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. See (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” See (CCFF ¶ 1759).

35. Indeed, post-acquisition evidence may be “dispositive” where it shows “actual entry that has prevented the merged entity from maintaining its market share.” *United States v. Bazaarvoice, Inc.*, 2014 WL 203966, at \*73-74 (N.D. Cal. Jan. 8, 2014).

### **Response to Proposed Conclusion No. 35**

The Proposed Conclusion is misleading as to the relative importance of post-acquisition evidence. In the *Bazaarvoice* discussion cited by Respondents, the court explained that “the probative value of [post-merger] evidence is *extremely limited*.” 2014 WL 203966, at \*73 (citations and quotation omitted) (emphasis added). And as the Supreme Court has explained:

[T]he need for such a limitation is obvious. If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a [Section] 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.

*General Dynamics*, 415 U.S. at 504-05. Thus, “the essential question remains whether the probability of such *future* impact exists at the time of trial.” *Id.* at 505 (emphasis added). Consistent with *General Dynamics*, the probative value of post-acquisition evidence is particularly limited “whenever such evidence *could arguably* be subject to manipulation.” *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 435 (5th Cir. 2008) (emphasis in original). Further, in the case cited by Respondents, the court explained that “[t]his is especially true when the parties are aware of the government’s scrutiny and the potential for a court challenge.” *Bazaarvoice*, 2014 WL 203966 at \*73.

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. See *Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. See (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” See (CCFF ¶ 1759).

Finally, Respondents’ reliance on *Bazaarvoice* is factually misplaced, as new entry has not offset the competitive harm caused by the transaction. See (CCFF ¶¶ 1765-870); CC’s Post-Trial Br. § IV.D.1; CC’s Post-Trial Reply Br. Discussion § II.F.

36. Courts disregard post-acquisition evidence only where such evidence is the product of a conscious “decision [on the part of the transacting parties] to deliberately but temporarily refrain from anticompetitive actions.” *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 506 (1974); see also *United States v. Int’l Harvester Co.*, 564 F.2d 769, 780 (7th Cir. 1977)

(consideration of post-acquisition evidence was proper where “much of it was beyond the power of the parties to manipulate”).

### **Response to Proposed Conclusion No. 36**

The Proposed Conclusion is misleading and contrary to law. Respondents fashion a rule that courts disregard post-acquisition evidence *only* where there is evidence of manipulation by the parties. Neither of the cited cases support this proposition; indeed, the proposition finds no support in the law. In *General Dynamics*, the Supreme Court explained that the absence of “concrete anticompetitive symptoms . . . does not itself imply that competition has not already been affected.” 415 U.S. at 505. Thus, “the essential question remains whether the probability of such *future* impact exists at the time of trial.” *Id.* at 505 (emphasis added). In the discussion cited by Respondents, the Court cited evidence that the combined company was unable to compete effectively for future contracts, which “went directly to the question of whether future lessening of competition was probable” and was therefore appropriate for the district court to consider. *See id.* at 506. While the Court noted that the evidence could not have resulted from a decision by the parties to temporarily refrain from anticompetitive actions, the Court did not hold that it is proper to give weight to post-acquisition evidence whenever there is no evidence of manipulation.

The Proposed Conclusion is also incomplete and misleading with respect to its reliance on *Int’l Harvester*. In *Int’l Harvester*, the Seventh Circuit stated that: “[The district judge] did not overemphasize post-acquisition evidence because much of it was beyond the power of the parties to manipulate and because it was only part of the overall scene depicted in the 78 findings.” *Int’l Harvester Co.*, 564 F.2d at 780.

Finally, the Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. *See Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an

assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. *See* (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” *See* (CCFF ¶ 1759).

37. There is no evidence of such manipulation here, nor could there be. The increased competition and decreased market concentration have been driven by aggressive price competition and expansion by third parties such as Reynolds and NJOY. (FF ¶¶ 1285-1323). Neither Altria nor JLI has the ability to dictate those third parties’ decisions.

### **Response to Proposed Conclusion No. 37**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded because it is misleading and contrary to the weight of the evidence. The evidence in the record establishes that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } *See* (CCFF ¶¶ 1532-37; CCRRFF ¶¶ 1285-323). Moreover, Respondents’ arguments about the absolute changes to prices in the post-transaction world also omit a critical fact: those metrics can be influenced by a number of exogenous factors. *See* (CCFF ¶¶ 1830-31).

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. *See*

*Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. *See* (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” *See* (CCFF ¶ 1759).

Further, the Proposed Conclusion is misleading to the extent that it suggests that a showing of manipulation is required, for the reasons described in Responses to Proposed Conclusion No. 34 and No. 36.

38. As such, the post-acquisition evidence is properly before the Court not only for Section 1 purposes, but for Section 7 purposes as well. And because this post-transaction evidence prevents Complaint Counsel from meeting its burden to demonstrate anticompetitive effects, the Section 1 and Section 7 claims are dismissed.

### **Response to Proposed Conclusion No. 38**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has shown direct evidence, through documents, testimony and its expert’s economic analysis, that Respondents’ agreement and the challenged transaction harmed competition. *See* (CCFF §§ VIII.M, X.A-D).

Further, the Proposed Conclusion is misleading to the extent that it suggests that a showing of actual post-transaction harm is required. *See General Dynamics*, 415 U.S. at 505 (explaining

that the absence of “concrete anticompetitive symptoms . . . does not itself imply that competition has not already been affected.”).

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. See *Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. See (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” See (CCFF ¶ 1759).

Finally, the Proposed Conclusion is incomplete and misleading for all the reasons described in Responses to Proposed Conclusion No. 33 through No. 37.

**B. Responses to “The Post-Acquisition Evidence, All Of Which Is Undisputed, Devastates Complaint Counsel’s Effects Theory”**

39. Key indicia of anticompetitive effects include “increased prices,” “reduced output,” and increases in market concentration. *Am. Express Co.*, 138 S. Ct. at 2284; *United States v. Baker Hughes Inc.*, 908 F.2d 981, 984-86 (D.C. Cir. 1990).

**Response to Proposed Conclusion No. 39**

The Proposed Conclusion is misleading and incomplete to the extent that it suggests that a showing of increased prices, reduced output, or increased market concentration is required to demonstrate an anticompetitive effect.

In analyzing an alleged violation of Section 1 under the rule of reason, plaintiffs may meet their initial burden to show anticompetitive effects by showing either: (1) direct evidence of

anticompetitive effects, or (2) Respondents' market power along with the likely effect of the conduct. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011). Evidence of direct anticompetitive effects includes evidence "that the challenged restraints have resulted in, or are likely to result in, anticompetitive effects, in the form of higher prices, reduced output, degraded quality of products or services, retarded innovation, or other manifestations of harm to consumer welfare." *In re Realcomp II Ltd.*, No. 9320, 2007 WL 6936319, at \*31 (FTC Oct. 30, 2009), *aff'd* 635 F.3d 815; *see also, e.g., United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 241 (2d Cir. 2003) (affirmed district court's finding that challenged restraint harmed competition based on evidence that the restraint reduced output and stunted price and innovation competition). Where the plaintiff can show actual anticompetitive effects, a "full blown market analysis is not necessary." *Intel Corp. v. Fortress Investment 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)).

Respondents also conveniently overlook several important anticompetitive effects for a Section 7 analysis as they myopically focus only on price, output, and concentration while asking the Court to turn a blind eye to the transaction's substantial anticompetitive effects on innovation and product variety. The loss of innovation competition resulting from an anticompetitive merger is a significant form of competitive harm. *See Horizontal Merger Guidelines* § 6.4 ("Competition often spurs firms to innovate. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products."); *see also FTC v. Hackensack Meridian Health, Inc.*, No. CV 20-18140, 2021 WL 4145062, at \*24 (D.N.J. Aug. 4, 2021) ("If [the merging



parties] were no longer competitors, it would remove an incentive for both entities to continue to improve quality metrics and offer innovative medical technology.”) (citing *Horizontal Merger Guidelines* § 6.4). In their post-trial brief, Respondents do not even make any mention of the significant product research and development work that Altria was conducting, which is a telling sign that Respondents’ limited analysis ignores the innovation issue. *See* (CCFF ¶¶ 1566-68, 1574). Similarly, the loss of product variety and choice resulting from Altria’s complete exit from the market has harmed consumers who preferred Altria’s products. CCFF ¶¶ 1493-526. *See In re McWane, Inc.*, Docket No. 9351, 2014 WL 556261, at \*28 (F.T.C. Jan. 30, 2014) (explaining that “den[ying] its customers the ability to make a meaningful choice” is “another adverse impact on competition”) (citations omitted); *see also* Neil W. Averitt & Robert H. Lande, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 *Antitrust L. J.* 175 (2007).

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. *See Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. *See* (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” *See* (CCFF ¶ 1759).

40. “[P]roving an adverse effect on competition without showing increased price, reduced output, or reduced quality in the market has remained possible in theory but elusive in practice.” *MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 184 (2d Cir. 2016).

#### **Response to Proposed Conclusion No. 40**

Complaint Counsel does not dispute Respondents have accurately quoted the cited case. The Proposed Conclusion is misleading and incomplete, however, for the reasons described in Response to Proposed Conclusion No. 39.

41. In the nearly three years since the transaction, all the key indicia of competitive effects demonstrate that the market is highly competitive and was not made less competitive by Altria's minority investment in JLI.

#### **Response to Proposed Conclusion No. 41**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

The Proposed Conclusion is also contrary to the weight of the evidence. Complaint Counsel has demonstrated that Altria's shutdown of its e-cigarette business harmed consumers by instantly eliminating all forms of current and future competition from Altria, including price competition, innovation competition, and competition for shelf-space. *See* (CCFF §§ VIII.M, X.A-D). Further, it is misleading because Respondents' before-and-after comparison does nothing to answer the most fundamental antitrust question for assessing the competitive effects in this case: What would the competitive environment look like today if Altria continued to compete in the closed-system e-cigarette market instead of withdrawing from it completely? The evidence in the record establishes that but for the transaction, Altria would have competed vigorously on price, innovation and shelf space in the closed-system e-cigarette market and that competition, which benefitted and would have continued to benefit consumers, has been completely lost because of the transaction. *See* (CCFF ¶¶ 409-544, 1527-730); CC's Post-Trial Br. at 60-65; CC's Post-Trial Reply Br. Discussion § II.A.

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. See *Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. See (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” See (CCFF ¶ 1759).

### 1. Price

42. “To prove an *actual* adverse effect on price, [Complaint Counsel] must show just that—that prices actually increased.” *MacDermid Printing Solutions LLC v. Cortron Corporation*, 833 F.3d 172, 184 (2d Cir. 2016) (emphasis in original).

#### **Response to Proposed Conclusion No. 42**

Complaint Counsel does not dispute Respondents have accurately quoted the cited case; however, the Proposed Conclusion is misleading to the extent that it suggests that Complaint Counsel must demonstrate an actual adverse effect on price, for the reasons described in Response to Proposed Conclusion No. 39.

The Proposed Conclusion is also incomplete and misleading because citing only *MacDermid Printing*, which is a Section 1 case, does not provide a correct legal standard for what Complaint Counsel is required to prove in order to prevail on its Section 7 claim. As Judge Posner has observed, “Section 7 [of the Clayton Act] does not require proof that a merger . . . caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and

judgmental rather than demonstrable . . . is called for.” *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7<sup>th</sup> Cir. 1986) (Posner, J.).

Further, the Proposed Conclusion is irrelevant because Complaint Counsel has demonstrated that Altria’s shutdown of its e-cigarette business harmed consumers by completely eliminating all forms of current and future competition from Altria, including price competition, innovation competition, and competition for shelf-space. *See* (CCFF §§ VIII.M, X.A-D).

43. Here it is undisputed that prices have decreased significantly since the acquisition. (FF ¶¶ 1345-52). Complaint Counsel has failed to demonstrate that prices would have decreased even further if Altria would have stayed in the e-vapor market. (FF ¶¶ 1352-55).

### **Response to Proposed Conclusion No. 43**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

But even accepting Respondents’ erroneous contention that Complaint Counsel is required to prove that the transaction actually resulted in higher prices, Respondents gloss over the fact that pod prices have remained relatively stable despite all the negative publicity created by the 2019 vaping-related health crisis and the FDA’s flavor ban. *See* (CCRRFF ¶¶ 1476-79). This relative stability is the evidence of persistent pricing power by the market-leading e-cigarette companies like JLI. *See* (CCRRFF ¶ 1479); *see also Horizontal Merger Guidelines* § 5.3 (“If a firm has retained its market share even after its price has increased *relative to* those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm’s important rivals is eliminated due to a merger.”) (emphasis added). Respondents’ arguments about the absolute changes to prices in the post-transaction world also omit a critical fact: those metrics can be influenced by a number of exogenous factors, several of which Respondents’ expert failed to control for in his analysis. *See* (CCFF ¶¶ 1830-31; CCRRFF ¶¶ 1345-55).

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. See *Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. See (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” See (CCFF ¶ 1759).

It is also misleading and incomplete, for the reasons described in Response to Proposed Conclusion No. 42.

44. “[C]utting prices in order to increase business”—as third parties such as NJOY and Reynolds have since late 2018 (FF ¶¶ 1287-1307)—“often is the very essence of competition.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

#### **Response to Proposed Conclusion No. 44**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

Further, the Proposed Conclusion is misleading as it relies on inapposite legal support. *Matsushita* involved an alleged conspiracy among Japanese television set manufacturers to lower prices in the American market in order to drive out American competitors. *Matsushita*, 475 U.S. at 574. The Supreme Court found that “the evidence that bore directly on the alleged *price-cutting conspiracy* did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it.” *Id.* at 579. (emphasis added). Here, by contrast, Complaint Counsel does not allege any price-cutting conspiracy, but has demonstrated

that Altria’s shutdown of its e-cigarette business due to an agreement not to compete harmed consumers by instantly eliminating all forms of current and future competition from Altria, including price competition, innovation competition, and competition for shelf-space. *See* (CCFF §§ VIII.M, X.A-D). Actually, if Altria did not exit and continued to compete in the closed-system e-cigarette market, Altria would also have competed by “cutting prices in order to increase business” against the market leader JLI and other competitors. *Matsushita*, 475 U.S. at 594. Because of the transaction, the closed-system e-cigarette market completely lost this “very essence of competition” from Altria against JLI, NJOY, and Reynolds. *Id.*

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. *See Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. *See* (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” *See* (CCFF ¶ 1759).

45. The “intensified price competition subsequent to the . . . acquisition” undercuts any argument that Altria’s exit led to or will lead to a “substantial lessening of competition.” *United States v. Int’l Harvester Co.*, 1976 WL 1298, at \*18-19 (N.D. Ill. Aug. 17, 1976).

#### **Response to Proposed Conclusion No. 45**

The Proposed Conclusion is misleading to the extent it suggests that Complaint Counsel must show post-transaction harm under Section 7. In reality, the Commission and courts have acknowledged that a showing of actual post-transaction harm is not required. Indeed, the Supreme

Court in *General Dynamics* explained that the absence of “concrete anticompetitive symptoms . . . does not itself imply that competition has not already been affected.” 415 U.S. at 505. “Even in a consummated merger, 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). “And 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 incipiency would be frustrated.” *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

Further, the Proposed Conclusion is misleading as it relies on inapposite legal support. In *Int’l Harvester*, the district court relied on “the expanding nature of the markets” and “evidence that a number of other firms are likely to enter the industry in the future” when it stated that “[t]he evidence in this record furnishes no reason to believe that the intensely competitive situation which presently exists . . . will diminish in the future.” 1976 WL 1298, at \*18. However, it is undisputed here that barriers to entry in the e-cigarette market are high due to the FDA’s regulatory framework and the existing competition is expected to shrink because of the PMTA decisions. *See* (CCFF ¶¶ 1765-804). Moreover, in *Int’l Harvester*, “both Steiger and Harvester have become stronger competitors in the four-wheel drive tractor market as a result of the Harvester stock purchase [of 39% in Steiger],” *id.* at \*19 (emphasis added), whereas here Altria completely exited the market with the acquisition of 35% of JLI, instantly eliminating all forms of current and future competition from Altria, including price competition, innovation competition, and competition for shelf-space. *See* (CCFF §§ VIII.M, X.A-D).

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. See *Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. See (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” See (CCFF ¶ 1759).

## 2. Output

46. “[S]howings of increased output” can also “overcome claims of anticompetitive effects.” *In re AMR Corp.*, 625 B.R. 215, 250 (Bankr. S.D.N.Y. 2021) (citing *Am. Express Co.*, 138 S. Ct. at 2288).

### **Response to Proposed Conclusion No. 46**

Complaint Counsel does not dispute Respondents have accurately quoted the cited case; however, the Proposed Conclusion is misleading to the extent that it suggests that Complaint Counsel must demonstrate an actual adverse effect on output, for the reasons described in Response to Proposed Conclusion No. 39.

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. See *Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. See (CCFF ¶¶ 493-544,



1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” *See* (CCFF ¶ 1759).

Further, the Proposed Conclusion is irrelevant because Complaint Counsel has demonstrated that Altria’s shutdown of its e-cigarette business harmed consumers by completely eliminating all forms of current and future competition from Altria, including price competition, innovation competition, and competition for shelf-space. *See* (CCFF §§ VIII.M, X.A-D).

47. Expansion by existing competitors is “essentially equivalent to new entry.” *In the Matter of Otto Bock Healthcare N. Am., Inc.*, 2019 WL 2118886, at \*28 (F.T.C. May 6, 2019) (quotation marks omitted); *see also id.* (“The ability and willingness of current competitors to expand their foothold in the market and/or reposition greatly reduces the anticompetitive effects of a merger, and is essentially equivalent to new entry.” (internal quotation marks omitted)); HMG § 6.1 (recognizing that “repositioning” of competitors offsets anticompetitive effects).

#### **Response to Proposed Conclusion No. 47**

Complaint Counsel does not dispute Respondents have accurately quoted the cited case. The Proposed Conclusion is misleading, however, to the extent that it suggests that Complaint Counsel must demonstrate an actual adverse effect on output, for the reasons described in Response to Proposed Conclusion No. 39.

The Proposed Conclusion is also incomplete and misleading to the extent that Respondents argue that expansion by existing competitors has offset any harm caused by Altria’s exit. As this Court clearly stated in *Otto Bock*, it is “not sufficient to show that expansion would replace ‘some of the competition’ lost to the Acquisition. 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.” 2019 WL 2118886, at \*28 (citations omitted) (internal quotation marks omitted). Thus, Respondents must show that any

new entry or expansion will be timely, likely, and sufficient to replace the competition lost due to Altria's exit. The evidence in the record establishes that Respondents have failed to do so here. *See* (CCFF § XIII); CC's Post-Trial Br. § IV.D.1; CC's Post-Trial Reply Br. Discussion § II.F.

48. The record shows that, following Altria's withdrawal of Nu Mark's e-vapor products, output in the e-cigarette market *increased* substantially, as evidenced by both device sales and cartridge sales. (FF ¶ 1356). This expansion was many times greater than what was required to offset the loss of Nu Mark's e-vapor products. (FF ¶¶ 1357-63).

#### **Response to Proposed Conclusion No. 48**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be rejected for reasons stated in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1356-63). Further, it is misleading because Respondents' before-and-after comparison does nothing to answer the most fundamental antitrust question for assessing the competitive effects in this case: What would the competitive environment look like today if Altria continued to compete in the closed-system e-cigarette market instead of withdrawing from it completely? The evidence in the record establishes that but for the transaction, Altria would have competed vigorously on price, innovation and shelf space in the closed-system e-cigarette market and that competition, which benefitted and would have continued to benefit consumers, has been completely lost because of the transaction. *See* (CCFF ¶¶ 409-544, 1527-730); CC's Post-Trial Br. at 60-65; CC's Post-Trial Reply Br. Discussion § II.A.

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. *See Horizontal Merger Guidelines* § 1 ("Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not."). Respondents ignore evidence demonstrating that Altria would have continued to

compete in the closed-system e-cigarette market but-for the transaction. *See* (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” *See* (CCFF ¶ 1759).

49. In addition, retailers added new products to the shelves, broadening the product options available to consumers. (FF ¶¶ 1364-67).

#### **Response to Proposed Conclusion No. 49**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be rejected for reasons stated in Response to Proposed Conclusion No. 48 and in Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 1364-67).

### **3. Concentration**

50. Post-transaction evidence of market share is another relevant input into an anticompetitive effects analysis. *See, e.g., Lektro-Vend Corp.*, 660 F.2d at 276.

#### **Response to Proposed Conclusion No. 50**

The Proposed Conclusion is misleading and incomplete, for the reasons described in Response to Proposed Conclusion No. 39.

Further, Respondents’ reliance on *Lektro-Vend Corp.* is misplaced. In *Lektro-Vend Corp.*, “[b]etween 1959 and 1969, Vendo’s share of the candy vending machine manufacturing market dropped from 31% to 16%, and by 1972, Vendo was completely eliminated from the candy and cigarette vending machine business.” *Lektro-Vend Corp.*, 660 F.2d at 276 (7<sup>th</sup> Cir. 1981). Unlike *Lektro-Vend Corp.*, about almost three years away from the transaction, JLI still remains as the clear market leader and retains over 60% of the closed system e-cigarette market on a cartridge basis. *See* (CCRRFF ¶ 1479; CCFF ¶ 1748). Indeed, JLI’s continued leadership of the e-cigarette

market, despite negative press, multiple lawsuits, and enhanced regulatory scrutiny, suggests that the e-cigarette market is not quite as competitive as Respondents would have the Court believe. *See* (CCRRFF ¶¶ 1338-44).

51. The government's prima facie case depends on showing that the transaction "would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant *increase* in the concentration of firms in that market." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (emphasis added; quotation marks and alterations omitted).

### **Response to Proposed Conclusion No. 51**

Complaint Counsel does not dispute Respondents have accurately quoted the cited case, however, the Proposed Conclusion is misleading and incomplete. Under the rule of reason's burden-shifting framework, Complaint Counsel 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. *Heinz*, 246 F.3d at 715-16; *Tronox*, 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.

"Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anticompetitive." *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); *Aetna*, 240 F. Supp. 3d at 42-43. 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; *Horizontal Merger Guidelines* § 5.3.

52. Here, market concentration has significantly *decreased* in the wake of the transaction, while JLI has lost significant share in both devices and cartridges. (FF ¶¶ 1368-76).

**Response to Proposed Conclusion No. 52**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated an increase in market concentration as a result of the transaction. Evidence presented at the hearing shows that the transaction resulted in an HHI over 3,900 and an increase in HHI by over 650, well above the threshold for presumed harm. (CCFF ¶ 1754). 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 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 an increase in HHI of over 630, and a post-merger HHI of 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).

It should also be rejected for reasons stated in Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 1368-76).

53. Meanwhile, shares for other competitors, have surged. (FF ¶¶ 1315-20). Indeed, since the transaction, Reynolds has overtaken JLI as the market leader in devices. (FF ¶¶ 1315-16).

**Response to Proposed Conclusion No. 53**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 52 and Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 1315-20).

54. These share “fluctuat[ions] . . . over short periods of time” are evidence of a “very competitive” market. HMG § 5.3.

**Response to Proposed Conclusion No. 54**

The Proposed Conclusion is incomplete, misleading, and irrelevant. In citing the *Horizontal Merger Guidelines*, Respondents misrepresented what the Guidelines provide by leaving the key languages out of the quote, which reads in full:

If a firm has retained its market share even after its price has increased relative to those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm's important rivals is eliminated due to a merger. By contrast, even a highly concentrated market can be very competitive if market shares fluctuate substantially over short periods of time in response to changes in competitive offerings.

*Horizontal Merger Guidelines* § 5.3.

Here, the evidence in the record established that pod prices and cartridge-based market shares have remained relatively stable despite all the negative publicity created by the 2019 vaping-related health crisis and the FDA flavor ban. *See* (CCRRFF ¶¶ 1476-79). In fact, this relative stability is the evidence of persistent pricing power by the market-leading e-cigarette companies like JLI and is consistent with the situation described in the first sentence quoted above from the *Horizontal Merger Guidelines*: “If a firm has retained its market share even after its price has increased relative to those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm's important rivals is eliminated due to a merger.” *Horizontal Merger Guidelines* § 5.3.

**C. Responses to “Complaint Counsel Failed To Carry Its Burden On Market Definition”**

55. Complaint Counsel bears the burden to define a relevant market. *Worldwide Basketball & Sport Tours, Inc. v. Nat'l Coll. Athletic Ass'n*, 388 F.3d 955, 962 (6th Cir. 2004) (Sherman Act); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (Clayton Act).

**Response to Proposed Conclusion No. 55**

The Proposed Conclusion is misleading and contrary to the law. The relevant market inquiry is part of an analysis under Section 7 of the Clayton Act, 15 U.S.C. § 18; however, for

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.*, 138 S. Ct. 2274, 2285 n.7 (2018)); *see also* *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460 (1986) (“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”).

Complaint Counsel proved that the sale of closed-system e-cigarettes is an appropriate relevant product market. *See* (CCFF ¶¶ 208-407); CC’s Post-Trial Br. § II; CC’s Post-Trial Reply Br. Discussion § II.B.

In stark contrast to Dr. Murphy, (*see* CCFF ¶¶ 2086-93), Dr. Rothman performed a hypothetical monopolist test to conclude that the relevant product market is the sale of closed-system e-cigarettes. *See* (CCFF ¶¶ 395-407). Dr. Murphy conceded that he did not express an opinion in his report on what the appropriate relevant product market is in this case. *See* (CCFF ¶ 2086). Likewise, Dr. Murphy did not reach an opinion on whether the relevant market includes open-system and closed-system e-cigarette products (*see* CCFF ¶ 2086), or whether there are separate relevant markets for cigalikes and pod-based products. *See* (CCFF ¶ 2087).

56. If Complaint Counsel fails to meet its burden on market definition, both its Section 1 and Section 7 claims fail. *See Se. Missouri Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 613 (8th Cir. 2011) (“Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition.”).

### **Response to Proposed Conclusion No. 56**

The Proposed Conclusion is misleading and contrary to the law for the reasons described in Response to Proposed Conclusion No. 55.

57. The overwhelming weight of the evidence adduced at trial demonstrates that Complaint Counsel has failed to carry its burden of demonstrating that all closed-system devices (including both pod-based and cig-a-likes) constitute the relevant market. To the contrary, the evidence demonstrates that pod-based devices and cig-a-likes are not close substitutes and should not be lumped together into a single market.

### **Response to Proposed Conclusion No. 57**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

The Proposed Conclusion is contrary to the weight of the evidence. The conclusion that the sale of closed-system e-cigarettes is an appropriate relevant product market. *See* (CCFF ¶¶ 208-407); CC’s Post-Trial Br. § II; CC’s Post-Trial Reply Br. Discussion § II.B.

#### **1. Responses to “Practical Indicia Show That Pod-Based Products And Cig-A-Likes Are Not Close Substitutes”**

58. Defining the relevant market requires examining “practical indicia,” such as a “product’s peculiar characteristics,” “distinct customers,” “distinct prices,” “sensitivity to price changes,” and “industry . . . recognition of the submarket.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

### **Response to Proposed Conclusion No. 58**

Complaint Counsel does not dispute Respondents have accurately quoted the Supreme Court’s decision in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); however, the Proposed Conclusion is incomplete and misleading.

In defining a relevant antitrust market, courts are guided by the Supreme Court’s decision in *Brown Shoe*. Courts also rely heavily on the *Horizontal Merger Guidelines*’ “hypothetical monopolist test.” *See, e.g., In re Otto Bock HealthCare N. America, Inc.*, Docket No. 9378, 2019 WL 5957363, at \*13 (F.T.C. Nov. 1, 2019); *FTC v. Peabody Energy Corp.*, 492 F. Supp. 3d 865,



886 (E.D. Mo. 2020); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 338 (3d Cir. 2016); *United States v. H&R Block*, 833 F. Supp. 2d 36, 51-52 (D.D.C. 2011).

“A [product] 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*, 370 U.S. at 325). Stated another way, a product market includes all goods that are “reasonable substitutes.” *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 25 (D.D.C. 2015) (citations omitted); *H & R Block*, 833 F. Supp. 2d at 51 (citation omitted).

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.” *Otto Bock*, 2019 WL 5957363, at \*13 (citing *Brown Shoe*, 370 U.S. at 325); *see also In re Polypore Int’l, Inc.*, Docket No. 9327, 2010 WL 9549988, at \*11 (F.T.C. Nov. 5, 2010).

The *Horizontal 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. *See* § 4.1.1.

Finally, the Proposed Conclusion is misleading and contrary to the law to the extent that it suggests that courts are “required” to examine the *Brown Shoe* factors in order to define a relevant product market. *See, e.g., Heinz*, 246 F.3d at 715-716 (applying the Herfindahl–Hirschman Index test for market definition).

59. Complaint Counsel failed to carry its burden to establish that the relevant market is all closed-system devices (including both pod-based and cig-a-likes). To the contrary, the evidence demonstrates that pod-based devices and cig-a-likes should be in separate markets: (1) the product segments have important functional differences, (2) they appeal to different consumer demographics, (3) they are priced independently, and (4) they exhibit distinct market trends and are analyzed separately by market participants. (FF ¶¶ 1387-1414).

### **Response to Proposed Conclusion No. 59**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is contrary to the weight of the evidence. The evidence supports the conclusion that the sale of closed-system e-cigarettes is an appropriate relevant product market. *See* (CCFF ¶¶ 208-407); CC's Post-Trial Br. § II; CC's Post-Trial Reply Br. Discussion § II.B.

Finally, it should also be rejected for the reasons described in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1387-414).

### **2. Responses to “Complaint Counsel Misapplies The Hypothetical Monopolist Test”**

60. Complaint Counsel also failed to show that the hypothetical monopolist test (“HMT”) supports its market definition.

### **Response to Proposed Conclusion No. 60**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because the evidence for both the “practical indicia” identified by the Supreme Court in *Brown Shoe* and the hypothetical monopolist test outlined in the *Horizontal Merger Guidelines* supports the conclusion that the sale of closed-system e-cigarettes

is an appropriate relevant product market. *See* (CCFF ¶¶ 208-407); CC’s Post-Trial Br. § II; CC’s Post-Trial Reply Br. Discussion § II.B.

61. *First*, in applying the HMT to a prospective closed-system market, Complaint Counsel’s expert relied on outdated elasticity studies that do not accurately reflect the market conditions in 2018, much less the market conditions today, invalidating his HMT results. (FF ¶¶ 1418-26).

**Response to Proposed Conclusion No. 61**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It is also incomplete and misleading because Dr. Rothman did not rely exclusively on academic elasticity studies that predate the rise of pod-products for his elasticities. In fact, Dr. Rothman expressly relied on [REDACTED]

[REDACTED] } *See* (CCFF ¶¶ 405-07; CCRRFF ¶¶ 1418, 1421-26). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } *See* (CCFF ¶¶ 406; CCRRFF ¶¶ 1418, 1421-26). [REDACTED]

[REDACTED]

[REDACTED] } *See* (CCFF ¶ 406; CCRRFF ¶¶ 1418, 1421-26).

62. *Second*, Complaint Counsel made no attempt to use the HMT to analyze whether pods and cig-a-likes were in distinct markets, (FF ¶¶ 1416-17), in contradiction of the “narrowest market principle,” under which “[t]he analysis begins by examining the most narrowly-defined product or group of products sold,” *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 26 (D.D.C. 2015) (quotation marks omitted); *see also United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 59 (D.D.C. 2011) (similar).

**Response to Proposed Conclusion No. 62**

The Proposed Conclusion is misleading to the extent that it suggests that Complaint Counsel is required to analyze every conceivable product market. “Complaint counsel bear the burden of proving a relevant market within which anticompetitive effects are likely as a result of

the acquisition.” *In the Matter of Chicago Bridge & Iron Co., et al.*, 138 F.T.C. 1024, 1320 (2004) (citation omitted) (emphasis added). The Commission and courts have made clear that Complaint Counsel must identify *a* product with which Respondents compete, and *a* geographic area where Respondents compete, with respect to that relevant product. There can be more than one relevant market, but Complaint Counsel need not prove every one. *See, e.g., In re Otto Bock*, 2019 WL 2118886, at \*17 (F.T.C. May 6, 2019) (Initial Decision) (“[O]nce a candidate set of products passes the test, the analysis can stop.” (emphasis added) (citing *Advocate*, 841 F.3d at 468)).

In a vain effort to compensate for their expert’s failure to conduct his own hypothetical monopolist test for *any* markets, Respondents attempt to distort the *Horizontal Merger Guidelines*’ smallest market principle into a criticism of Dr. Rothman’s sound approach to market definition in this case. The *Horizontal Merger Guidelines* make clear that the market definition exercise based on the hypothetical monopolist test does not lead to a single market. *See Horizontal Merger Guidelines* § 4.1.1 (“The hypothetical monopolist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market. The Agencies may evaluate a merger in *any relevant market satisfying the test*, guided by the overarching principle that the purpose of defining the market and measuring market shares is to illuminate the evaluation of competitive effects.” (emphasis added)). Dr. Rothman conducted an extensive analysis of the qualitative and quantitative evidence in this case to conclude that the market for closed-system e-cigarettes was an appropriate candidate market in which to analyze the effects of the transaction. *See* (CCFF ¶¶ 399-400); CC’s Post-Trial Br. at 23-24. Dr. Rothman then correctly applied the hypothetical monopolist test, which established that a market consisting of closed-system e-cigarettes is a properly defined relevant product market. *See* (CCFF ¶¶ 401-07).

The Proposed Conclusion should also be disregarded because other courts have endorsed Dr. Rothman's approach and evaluated competitive effects in markets broader than the smallest ones possible when appropriate. *E.g.*, *Otto Bock*, 2019 WL 2118886, at \*17 (Initial Decision) (citing *Advocate*, 841 F.3d at 468); *FTC v. Advocate Health Care Network*, 841 F.3d 460, 465-69, 473 (7th Cir. 2016) (“[I]n fact, the candidate market offers a hypothetical answer to that question; the hypothetical monopolist analysis then tests the hypothesis and adjusts the market definition if the results require it.”). As quoted above, the purpose of the *Horizontal Merger Guidelines* approach to market definition is to illuminate competitive effects. *Horizontal Merger Guidelines* § 4.1.1. Defining a product market to only include pod-based products (or cigalikes) would miss the competitive interaction that takes place between all closed-system e-cigarette products on not only price, but also innovation and shelf space. *See* (CCFF ¶¶ 1417-92). Complaint Counsel also notes that the Non-Compete between Altria and JLI, a primary source of the competitive effects flowing from the transaction, required Altria to stop competing with *any* e-cigarette (not just pod-based products). *See* (CCFF ¶ 324); CC's Post-Trial Br. at 22-23. Respondents' ordinary course documents also make this clear—they show that Respondents viewed pod-based products and cigalikes together when analyzing the market. *See* (CCFF ¶¶ 299-340); CC's Post-Trial Br. at 21-22.

63. Just as the FTC “would not include cars in [a] market in analyzing [a] motorcycle merger” “[u]nless motorcycles fail the [HMT],” Complaint Counsel cannot lump cig-a-likes and pods into the same market unless pod-based devices—the only segment in which Altria and JLI both had a product—fail the HMT. HMG § 4.1.1.

### **Response to Proposed Conclusion No. 63**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is also incomplete, misleading, and contrary to the weight of the evidence to the extent that it suggests that cigalikes and pod-based products are not in the same relevant product market. The evidence establishes that the sale of closed-system e-cigarettes, which includes both cigalikes and pod-based products, is a relevant product market. (CCFF ¶¶ 208-407).

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 62. Despite the evidence of the competitive interaction that takes place between *all* closed-system e-cigarette products, including cigalikes and pod-based products, Respondents ask this Court to ignore the evidence and conclude that the only relevant competitive interaction between Altria and JLI was the eight-month period between February 2018 and October 2018 when MarkTen Elite was on the market. But the evidence in the record shows that competition between Respondents was much more than the limited time during which MarkTen Elite and JUUL competed head-to-head. *See* (CCFF ¶¶ 299-310, 327-40). In sum, Complaint Counsel's economic expert, Dr. Rothman, faithfully applied the hypothetical monopolist test as prescribed in the *Horizontal Merger Guidelines* and concluded that a market of closed-system e-cigarette products passes the test. *See* (CCFF ¶¶ 395-407); CC' Post-Trial Br. at 26-27. With Respondents' expert, failing to offer any opinion that a market consisting only of pod-based products (or cigalikes) would pass the hypothetical monopolist test and that a market of closed-system e-cigarettes would fail the hypothetical monopolist test, Dr. Rothman's opinion on the relevant product market remains unrebutted.

**D. Responses to “Complaint Counsel Is Not Entitled To A Presumption Of Anticompetitive Harm”**

**1. Responses to “Even On Complaint Counsel’s Market Definition, Complaint Counsel Is Not Entitled To A Presumption Because Altria’s Unilateral Decisions To Discontinue Its E-Vapor Products Were Not “Effects” Of The Transaction”**

64. As noted above, Altria’s product withdrawals were not “effects” of the transaction and thus do not fall within the scope of Section 7 because those withdrawals are the result of independent business decisions, not a conspiracy with JLI. (FF ¶ 1428; *see* FF ¶¶ 917-59, 997-1007, 1074-98).

**Response to Proposed Conclusion No. 64**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 27 and in Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 1428, 917-59, 997-1007, 1074-98).

Further, the Proposed Conclusion is contrary to the law and factually inaccurate. The transaction violates Section 7 as a merger between actual competitors. As the federal district court overseeing the ongoing private action based on the same transaction at issue here ruled with respect to plaintiffs’ Clayton Act Section 7 claims when it denied Altria and JLI’s motions to dismiss, “Altria and JLI were *actual competitors* at the time the alleged antitrust Agreement was made. It does not alter Altria’s actual competitor status that, as part of the alleged antitrust Agreement, Altria left the market by the time the Agreement was fully effectuated and publicly disclosed.” *In re Juul Labs, Inc. Antitrust Litig.*, 2021 WL 3675208, at \*21 (emphasis added).

It should also be disregarded because even if the Court finds that Complaint Counsel did not prove the existence of an illegal agreement under Section 1 (i.e., Altria’s exit was the result of independent business decisions), Complaint Counsel’s Section 7 claim is still valid if the Court

finds that, but for the transaction, Altria would not have exited the closed-system e-cigarette market. In that scenario, the Court would treat Altria as an actual competitor and the transaction's competitive effects would encompass everything resulting from Altria's complete exit from the closed-system e-cigarette market, which amounts to a substantially lessening of competition. CCCOL ¶¶ 81-99; CC's Post-Trial Br. § IV.A-D. Second, even if the Court credits Altria's dubious claim that it would have shut down its Nu Mark subsidiary and exit the market even without the transaction, Complaint Counsel would still prevail on its Section 7 claim based on an actual potential competition theory. CCCOL ¶¶ 100-07; CC's Post-Trial Br. § IV.E; CC's Post-Trial Reply Br. Discussion § II.D.3.

65. Even assuming Altria removed its products in anticipation of the acquisition, such *pre-transaction* conduct is not an "effect" of the transaction within the meaning of Section 7.

#### **Response to Proposed Conclusion No. 65**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 27. 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. *See* (CCFF ¶¶ 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. *See* (CCFF ¶¶ 944-1015). As the federal district court explained in *In re Juul Labs, Inc. Antitrust Litigation*, "[i]t does not alter Altria's



actual competitor status that, as part of the alleged antitrust Agreement, Altria left the market by the time the Agreement was fully effectuated and publicly disclosed.” 2021 WL 3675208, at \*21.

Moreover, even if one were to assume that Altria discontinued its existing closed-system e-cigarette products independently of the transaction, the transaction still violates Section 7 under the actual potential competition doctrine. CCCOL ¶¶ 100-07; CC’s Post-Trial Br. § IV.E; CC’s Post-Trial Reply Br. Discussion § II.D.3.

66. Section 7 “is concerned with whether an acquisition or merger *itself* may cause antitrust injury.” *Geneva Pharms. Tech. v. Barr Labs.*, 386 F.3d 485, 511 (2d Cir. 2004) (emphasis in original). The “government’s proposed approach of simply ignoring the reality” that Altria had already discontinued its products by the time of the transaction and “pretend[ing] that the facts are frozen as they were” prior to discontinuation of the products is improper under Section 7. *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 79 (D.D.C. 2017). This is so regardless of the reason for the removal. *See id.* at 79.

#### **Response to Proposed Conclusion No. 66**

The Proposed Conclusion is contrary to the law and factually inaccurate for the reasons described in Responses to Proposed Conclusion No. 27 and No. 65.

Further, the Proposed Conclusion should also be disregarded because Respondents’ reliance on *Aetna* is particularly misleading as they omit key details of the *Aetna* court’s analysis of the competitive effects discussed in the same part of the district court opinion. First, the discussion of Aetna health insurance plans’ availability for 2017 in those counties should be understood in the context of that particular industry and the timing of the case. The *Aetna* case was tried in December 2016 and the district court’s decision was issued in January 2017. Because of the nature of health insurance enrollments, which are done *annually*, the *Aetna* court correctly ruled that because of Aetna’s decision to pull its 2017 plans from the 17 counties before the trial, the consumers in those markets could not buy any Aetna plan for their 2017 health coverage. *Aetna*, 240 F. Supp. 3d at 79-80. However, the district judge then proceeded to further analyze the competitive effects in those 17 counties for “2018, 2019, and 2020,” *id.* at 79 (“But the Court is

not limited to looking just at 2017.”) and found that the proposed merger would substantially lessen the competition in three counties in Florida. *Id.* at 90-93. Second, Respondents also avoid addressing a key ruling from the *Aetna* case by omitting any discussion of the fact that even after finding that Aetna was not offering plans in the 17 counties in 2017, the district judge ruled that Aetna was an *actual competitor* for the Section 7 analysis of the competitive effects in 2018, 2019, and 2020 in those 17 counties. *Aetna*, 240 F. Supp. 3d at 78, 93 (“The Court analyzes Aetna as an actual competitor, not an “actual potential competitor,” in the public exchanges because of its active participation in those markets even if it is not offering plans for 2017.”) (citations omitted).

67. This means that Complaint Counsel must take the market as it existed at the time of the investment—*i.e.*, December 20, 2018, (FF ¶ 1429), when Altria had stopped selling its e-vapor products. *See Aetna Inc.*, 240 F. Supp. 3d at 79-80.

#### **Response to Proposed Conclusion No. 67**

The Proposed Conclusion is misleading and contrary to the law for the reasons described in Responses to Proposed Conclusion No. 65 and No. 66.

Respondents’ assertion that “Complaint Counsel must take the market as it existed at time of the investment—*i.e.* December 20, 2018,” is wrong on the facts and wrong on the law, which is why the district court in the private antitrust action rejected this very argument. *See In re Juul Labs, Inc. Antitrust Litig.*, 2021 WL 3675208, at \*21, (“It does not alter Altria’s actual competitor status that, as part of the alleged antitrust Agreement, Altria left the market by the time the Agreement was fully effectuated and publicly disclosed.”). The proper analysis is to evaluate the market before Altria’s exit as the baseline and decide whether the transaction “create[d] an appreciable danger of [anticompetitive] consequences in the future.” *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) (citing *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 362 (1963)).

68. Because Complaint Counsel does not attempt to justify a presumption of anticompetitive effects based on market shares at the time of the transaction, it has not shown that it is entitled to any presumption.

**Response to Proposed Conclusion No. 68**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

Despite Respondents' claims to the contrary, Complaint Counsel's economic expert properly treated Altria as an existing competitor by analyzing the market that existed prior to when Altria began to take steps to shut down its product lines in anticipation of the deal with JLI: October 25, 2018. CC's Post-Trial Br. at 75-77; *see also* (CCFF ¶¶ 1749-51). With this proper baseline for calculating the market shares established, Dr. Rothman then proceeded to analyze how Altria's complete exit from the market affected competition in the closed-system e-cigarette market using concentration measures and additional evidence of likely competitive effects. *See* (CCFF ¶¶ 1752-64; CRRFF ¶ 1445). Given the circumstances of this case, Dr. Rothman's economic analysis using "the closest available approximation" of market shares from the most recent 12-month period before Altria's exit to calculate concentration levels (using the HHI) is economically sound and consistent with the *Horizontal Merger Guidelines*. *FTC v. PPG Indus.*, 798 F. 2d 1500, 1505 (D.C. Cir. 1986); *Horizontal Merger Guidelines* § 5.2 ("The Agencies measure market shares based on the best available indicator of firms' future competitive significance in the relevant market. This may depend upon the type of competitive effect being considered, and on the availability of data. Typically, *annual data* are used, but where individual transactions are large and infrequent so annual data may be unrepresentative, the Agencies may measure market shares over a longer period of time.") (emphasis added); *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 54 (D.D.C.

2015) (“The FTC need not present market shares and HHI estimates with the precision of a NASA scientist. The ‘closest available approximation’ often will do.” (citations omitted)); *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).

Respondents’ attack on Dr. Rothman’s selection of the market shares he used for his HHI calculation is without merit. Respondents’ maintain that Altria’s market share at the end of 2018 is the proper baseline for measuring Altria’s competitive significance. But this extremely narrow snapshot of Altria’s share is misguided and not supported by any precedent or economic literature. Dr. Rothman’s approach, however, finds ample support in the case law. For example, in *Aetna*, the district court accepted the government’s market concentration analysis to show that “the proposed merger leads to presumptively anticompetitive levels of market concentration in the three complaint counties in Florida [in 2018, 2019, and 2020].” *Aetna*, 240 F. Supp. 3d at 79, 90. In that case, the government’s economic expert used “the most recent 2016 market-share data available,” which is from the period *before* Aetna’s decision to pull its plans from those counties, to calculate the HHI levels and the district judge cited those HHI numbers approvingly in the opinion. *Id.* at 90.

## 2. Responses to “Complaint Counsel’s Calculation Of Market Concentration Is Methodologically Flawed”

69. Complaint Counsel is not entitled to a presumption of anticompetitive effect based on a market concentration calculation of Herfindahl-Hirschman Index (“HHI”) figures.

### **Response to Proposed Conclusion No. 69**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

The Proposed Conclusion is contrary to the weight of the evidence. The record evidence (including Dr. Rothman's analyses) and legal precedent support Complaint Counsel's conclusion that the transaction is presumptively anticompetitive. *See* (CCFF ¶¶ 1735-63); CCCOL ¶¶ 81-86; CC's Post-Trial Br. § IV.A-C; CC's Post-Trial Reply Br. Discussion § II.C.

It should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 67 and No. 68.

**a. Responses to “Improper Calculation Of Pre-Transaction Share”**

70. Dr. Rothman's *pre*-transaction HHI calculation, which is based on a *12-month period* from October 2017 to September 2018, cannot be credited because it biases the calculation in favor of a period well before the transaction when cig-a-likes accounted for close to half of e-vapor market share. (FF ¶¶ 1434-38).

**Response to Proposed Conclusion No. 70**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 67 and No. 68 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1434-38).

Despite Respondents' claims to the contrary, Complaint Counsel's economic expert properly treated Altria as an existing competitor by analyzing the market that existed prior to when Altria began to take steps to shut down its product lines in anticipation of the deal with JLI: October 25, 2018. CC's Post-Trial Br. at 75-77; *see also* (CCFF ¶¶ 1749-51). With this proper baseline for calculating the market shares established, Dr. Rothman then proceeded to analyze how Altria's complete exit from the market affected competition in the closed-system e-cigarette market using concentration measures and additional evidence of likely competitive effects. *See* (CCFF ¶¶ 1752-64; CCRRFF ¶ 1445). Given the circumstances of this case, Dr. Rothman's economic analysis

using “the closest available approximation” of market shares from the most recent 12-month period before Altria’s exit to calculate concentration levels (using the HHI) is economically sound and consistent with the *Horizontal Merger Guidelines*. *FTC v. PPG Indus.*, 798 F. 2d 1500, 1505 (D.C. Cir. 1986); *Horizontal Merger Guidelines* § 5.2 (“The Agencies measure market shares based on the best available indicator of firms’ future competitive significance in the relevant market. This may depend upon the type of competitive effect being considered, and on the availability of data. Typically, *annual data* are used, but where individual transactions are large and infrequent so annual data may be unrepresentative, the Agencies may measure market shares over a longer period of time.”) (emphasis added); *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 54 (D.D.C. 2015) (“The FTC need not present market shares and HHI estimates with the precision of a NASA scientist. The ‘closest available approximation’ often will do.” (citations omitted)); *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).

Respondents’ attack on Dr. Rothman’s selection of the market shares he used for his HHI calculation is without merit. Respondents’ maintain that Altria’s market share at the end of 2018 is the proper baseline for measuring Altria’s competitive significance. But this extremely narrow snapshot of Altria’s share is misguided and not supported by any precedent or economic literature. Dr. Rothman’s approach, however, finds ample support in the case law. For example, in *Aetna*, the district court accepted the government’s market concentration analysis to show that “the proposed merger leads to presumptively anticompetitive levels of market concentration in the three complaint counties in Florida [in 2018, 2019, and 2020].” *Aetna*, 240 F. Supp. 3d at 79, 90. In that case, the government’s economic expert used “the most recent 2016 market-share data available,” which is from the period *before* Aetna’s decision to pull its plans from those counties, to calculate

the HHI levels and the district judge cited those HHI numbers approvingly in the opinion. *Id.* at 90.

71. Dr. Rothman’s approach improperly inflates the market shares of market participants, such as Altria, who sold a disproportionately greater amount of cig-a-likes, even though cig-a-likes steadily lost share over the 12-month period. (FF ¶¶ 1439-43).

**Response to Proposed Conclusion No. 71**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 67 and No. 68 and in Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 1439-43).

72. This improper approach further undermines Complaint Counsel’s attempt to establish a presumption of anticompetitive effect.

**Response to Proposed Conclusion No. 72**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

The Proposed Conclusion is contrary to the weight of the evidence. The record evidence (including Dr. Rothman’s analyses) and legal precedent support Complaint Counsel’s conclusion that the transaction is presumptively anticompetitive. *See* (CCFF ¶¶ 1735-63); CCCOL ¶¶ 81-86; CC’s Post-Trial Br. § IV.A-C; CC’s Post-Trial Reply Br. Discussion § II.C.

**b. Responses to “Improper Calculation Of Post-Transaction Shares”**

73. Dr. Rothman’s *post*-transaction HHI calculation relies on the demonstrably incorrect assumption that, following Altria’s exit, its share was proportionally redistributed to the remaining competitors. That is, his calculation assumes that approximately half of Nu Mark’s

customers switched to JUUL (which had a 51 percent share as of late 2018), approximately a quarter switched to Vuse (which had a 23 percent share), and so on. (FF ¶ 1444).

### **Response to Proposed Conclusion No. 73**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

Further, the Proposed Conclusion is misleading and factually inaccurate to the extent that it suggests that Dr. Rothman's report only calculated post-transaction HHIs by proportionally reallocating Altria's shares to remaining competitors after Altria exited the market. In reality, 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. *See* (CCFF ¶ 1760). For example, if all of Altria's sales were to captured by Reynolds instead of being reallocated proportionally, the post-transaction HHI would be still at a highly concentrated level and the change in HHI would be 460, which satisfies the presumption. *See* (CCFF ¶ 1760). These statistics demonstrate the transaction is presumptively anticompetitive. *See Tronox*, 332 F. Supp. 3d at 207; *Staples II*, 190 F. Supp. 3d at 128; *Aetna*, 240 F. Supp. 3d at 42-43.

As Dr. Rothman carefully explained during his trial deposition and also in his rebuttal expert report, his calculation of the post-transaction market shares is the best available method to capture the "effect of Altria's exit on competition," which is "the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal." *See* (CCRRFF ¶ 1444).

74. Dr. Rothman admits that he made no attempt to test this arbitrary assumption of proportional diversion against real-world post-transaction evidence. (FF ¶ 1445).

### **Response to Proposed Conclusion No. 74**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.



It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 73 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶ 1445).

75. That real-world post-transaction evidence shows that JUUL did *not* pick up Altria's share; other competitors did. (FF ¶¶ 1445-47).

#### **Response to Proposed Conclusion No. 75**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. *See Horizontal Merger Guidelines* § 1 ("Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not."). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. *See* (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze "the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn't happen." *See* (CCFF ¶ 1759).

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 73 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1445-47).

76. Dr. Rothman's erroneous assumption of proportional diversion accounts for 94 percent of his calculated HHI increase. (FF ¶ 1450).

#### **Response to Proposed Conclusion No. 76**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 73 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶ 1450).

77. According to the market data showing what actually transpired, from October 2018 to September 2020, the HHI for *pod-based products* fell over 3,000 points and the HHI for all *closed-system e-vapor products* (i.e., Dr. Rothman's preferred market) decreased by nearly 500 points. (FF ¶¶ 1451-53).

### **Response to Proposed Conclusion No. 77**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded because the record evidence (including Dr. Rothman's analyses) and legal precedent support Complaint Counsel's conclusion that the transaction is presumptively anticompetitive. *See* (CCFF ¶¶ 1735-63); CCCOL ¶¶ 81-86; CC's Post-Trial Br. § IV.A-C; CC's Post-Trial Reply Br. Discussion § II.C.

Further, it should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 41 and No. 48 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1451-53). It is misleading because Respondents' before-and-after comparison does nothing to answer the most fundamental antitrust question for assessing the competitive effects in this case: What would the competitive environment look like today if Altria continued to compete in the closed-system e-cigarette market instead of withdrawing from it completely? The evidence in the record establishes that but for the transaction, Altria would have competed vigorously on price, innovation and shelf space in the closed-system e-cigarette market and that competition, which benefitted and would have continued to benefit consumers, has been completely lost because of the transaction. *See* (CCFF ¶¶ 409-544, 1527-730); CC's Post-Trial Br. at 60-65; CC's Post-Trial Reply Br. Discussion § II.A.

The Proposed Conclusion is also incomplete and misleading because it fails to apply the proper framework and appropriate analysis under the *Horizontal Merger Guidelines*. See *Horizontal Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but-for the transaction. See (CCFF ¶¶ 493-544, 1034-407). As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” See (CCFF ¶ 1759).

78. These additional failings confirm that Complaint Counsel has not established that it is entitled to a presumption of anticompetitive effect.

### **Response to Proposed Conclusion No. 78**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

The Proposed Conclusion is contrary to the weight of the evidence. The record evidence (including Dr. Rothman’s analyses) and legal precedent support Complaint Counsel’s conclusion that the transaction is presumptively anticompetitive. See (CCFF ¶¶ 1735-63); CCCOL ¶¶ 81-86; CC’s Post-Trial Br. § IV.A-C; CC’s Post-Trial Reply Br. Discussion § II.C.

### **3. Responses to “Even If The Court Were To Credit Dr. Rothman’s HHI Calculations, Altria’s Declining Business And Market Volatility Would Undermine Complaint Counsel’s Reliance On HHI”**

79. HHI thresholds are not a “rigid screen.” HMG § 5.3. Instead, market concentration analysis must account for “recent or ongoing changes in market conditions [that] indicate that the

current market share of a particular firm . . . overstates the firm’s future competitive significance.” HMG § 5.2.

### **Response to Proposed Conclusion No. 79**

The Proposed Conclusion is incomplete and misleading. Respondents attempt to avoid the well-established precedent regarding the structural presumption under Section 7 by asserting that Dr. Rothman’s market concentration analysis does not accurately reflect the competitive effects in this case. However, the totality of the record evidence demonstrates that the opposite is true: the market concentration analysis *understates* the full anticompetitive effects of this case because it does not reflect the dynamic harm caused by Altria’s exit including, but not limited to, the loss of innovation competition. CC’s Post-Trial Reply Br. Discussion § II.A.4; *see also* (CCFF ¶¶ 1463-92, 1538-730; CCRRFF ¶¶ 1492, 1601, 1649, 1666). Moreover, the strong presumption in this case is bolstered by the extensive evidence in the record detailing the competitive harm that the transaction has caused and will continue to cause. *See* (CCFF ¶¶ 1408-730); CC’s Post-Trial Br. § IV.C; CC’s Post-Trial Reply Br. Discussion § II. In seeking to avoid this unpleasant truth, Respondents go so far as to conspicuously omit the word “understates” in the following quote from the *Horizontal Merger Guidelines*: “recent or ongoing changes in market conditions may indicate that the current market share of a particular firm *either understates or overstates* the firm’s future competitive significance.” *Horizontal Merger Guidelines* § 5.2. (emphasis added). Unfortunately for Respondents, they cannot simply omit the evidentiary record in this case.

80. Here, even if the Court were to credit Dr. Rothman’s HHI calculations, any resulting presumption is rebutted by evidence showing that this calculation greatly overstates Altria’s “future competitive significance.” HMG § 5.2; *see also Gen. Dynamics Corp.*, 415 U.S. at 498 (looking at “other pertinent factors affecting the [relevant] industry and the business of the [parties to the transaction]”).

### **Response to Proposed Conclusion No. 80**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is contrary to the weight of the evidence. The record evidence (including Dr. Rothman's analyses) and legal precedent support Complaint Counsel's conclusions (i) that the transaction is presumptively anticompetitive, and (ii) that Respondents cannot rebut the strong presumption of harm. *See* (CCFF §§ X, XII-XIV); CC's Post-Trial Br. § IV.A-D; CC's Post-Trial Reply Br. Discussion § II.

Further, it should also be disregarded for the reasons described in Response to Proposed Conclusion No. 79.

81. *First*, 90 percent of Altria's e-vapor sales were in the persistently declining, and now largely irrelevant, cig-a-like segment. (FF ¶¶ 1459-63).

#### **Response to Proposed Conclusion No. 81**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be rejected for reasons stated in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1459-63).

82. *Second*, as the Horizontal Merger Guidelines recognize, unavailability of "new technology that is important to long-term competitive viability" to a particular firm can undermine the firm's "future competitive significance" of that firm. HMG § 5.2.

#### **Response to Proposed Conclusion No. 82**

The Proposed Conclusion is misleading and incomplete. The *Horizontal Merger Guidelines* start with the proposition that "[m]arket concentration and market share data are normally based on historical evidence." *Horizontal Merger Guidelines* § 5.2. The Commission may consider "recent or ongoing changes in market conditions," including, for example, "if a new technology that is important to long-term competitive viability is available to other firms in the

market, but is not available to a particular firm.” *Id.* Where this is the case, the Commission “*may* project historical market shares into the foreseeable future when this can be done reliably.” *Id.* (emphasis added).

83. Here, the e-vapor marketplace is dominated by pod-based products *with nicotine salts*. Altria did not have a pod-based product with nicotine salts and could not introduce such a product without first obtaining FDA approval—a process that would take at least five years given that Altria did not even have a product in development at the time of the investment. (FF ¶¶ 1464-69).

### **Response to Proposed Conclusion No. 83**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be rejected for reasons stated in Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 1464-69).

84. *Third*, FDA’s flavor ban would have forced all or nearly all of the cartridge offerings of MarkTen Elite, Altria’s pod-based device, off the market. (FF ¶¶ 1470-74).

### **Response to Proposed Conclusion No. 84**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be rejected for reasons stated in Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 1470-74).

85. *Fourth*, HHI calculations are notoriously unreliable where, as here, (FF ¶¶ 1475-79), “market share statistics are volatile and shifting,” *Baker Hughes*, 908 F. 2d at 986 (quotation marks omitted).

### **Response to Proposed Conclusion No. 85**

The Proposed Conclusion is misleading and contrary to the law. In *Baker Hughes*, the district court concluded only that market shares for market at issue in that case were “volatile and shifting” because that product was “esoteric and its market small.” 908 F. 2d at 986. As the court

explained, a single contract “could catapult a firm from last to first place.” *Id.* In that “unusual market,” the district court found that market share statistics were “easily skewed.” *Id.* Contrary to Respondent’s assertion, neither the district court nor the D.C. Circuit suggested that HHI calculations are “notoriously unreliable.”

Further, the Proposed Conclusion is misleading to the extent that it suggests the facts of this case are similar to the facts in *Baker Hughes*. As described above, the district court’s conclusion in *Baker Hughes* was based on the “unusual market” in that case. *Id.* Further, unlike this case, the plaintiff’s prima facie case in *Baker Hughes* relied on market shares alone, and the plaintiff did not produce additional evidence showing a probability of substantially lessened competition. *Id.* As a result, the D.C. Circuit affirmed the district court’s conclusion that the plaintiff failed to carry its ultimate burden of persuasion. *Id.* at 986-87. Here, by contrast, the record evidence (including Dr. Rothman’s analyses) and legal precedent support Complaint Counsel’s conclusions (i) that the transaction is presumptively anticompetitive, and (ii) that Respondents cannot rebut the strong presumption of harm. *See* (CCFF §§ X, XII-XIV); CC’s Post-Trial Br. § IV.A-D; CC’s Post-Trial Reply Br. Discussion § II.

It should also be rejected for reasons stated in Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 1475-79).

**E. Responses to “Any Presumption Of Harm Would Be Rebutted By The Substantial Evidence That Altria Would Not Have Been A Significant Competitor In The But-For World Regardless Of Market Definition”**

86. “[M]arket concentration simply provides a convenient starting point for a broader inquiry into future competitiveness.” *Baker Hughes*, 908 F.2d at 992. “[O]nly a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of” a transaction. *Gen. Dynamics Corp.*, 415 U.S. at 498 (quoting *Brown Shoe*, 370 U.S. at 322).

**Response to Proposed Conclusion No. 86**

Complaint Counsel does not dispute that Respondents have accurately quoted the cited case. The Proposed Conclusion is misleading and incomplete, however, for the reasons described in Response to Proposed Conclusion No. 51.

Further, the Proposed Conclusion is misleading to the extent that it suggests that market concentration is insufficient to establish a presumption of anticompetitive effects under the rule of reason's burden shifting framework. As the D.C. Circuit explained in the discussion cited by Respondents, "the government can establish a prima facie case through evidence on only one factor, market concentration . . . ." *Baker Hughes*, 908 F.2d at 984.

87. Even assuming that Complaint Counsel is entitled to a presumption of harm in connection with its Section 7 claim (it is not), Respondents have "rebut[ted] it by producing evidence to cast doubt on the accuracy of the Government's evidence as predictive of future anti-competitive effects." *Chicago Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 423 (5th Cir. 2008).

#### **Response to Proposed Conclusion No. 87**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded because the record evidence and legal precedent support Complaint Counsel's conclusions (i) that the transaction is presumptively anticompetitive, and (ii) that Respondents cannot rebut the strong presumption of harm. *See* (CCFF §§ X, XII-XIV); CC's Post-Trial Br. § IV.A-D; CC's Post-Trial Reply Br. Discussion § II.

#### **1. Responses to "This Court Must Take Account Of The Regulatory Scheme"**

88. The Supreme Court has cautioned that any antitrust analysis must "careful[ly] account" for "the pervasive federal and state regulation characteristic of [an] industry." *Verizon Commc 'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004); *see In the Matter of Impax Laboratories, Inc.*, 2018 WL 2336009, at \*70 (F.T.C. May 18, 2018) (initial decision) ("Antitrust inquiries must always be attuned to the particular structure and circumstances of the industry at issue.").

#### **Response to Proposed Conclusion No. 88**



Complaint Counsel has no specific response.

89. “The presence of [a] regulatory scheme and need for approval” may “convert[] what might have been deemed antitrust injury in a free market into only a speculative exercise,” especially where “[t]here are no facts . . . which permit [a court] to speculate as to the likelihood of” regulatory approval. *City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 267-68 (3d Cir. 1998).

### **Response to Proposed Conclusion No. 89**

The Proposed Conclusion is misleading to the extent that it suggests the facts of the instant case are similar to the facts in *City of Pittsburgh*. In *City of Pittsburgh*, there was no actual competition between the defendants, and future entry was dependent on regulatory approval. *See* 147 F.3d at 267-68. Because the plaintiff failed to allege any facts to suggest that regulatory approval was likely, the court concluded that the presence of the regulatory scheme “cut[] the causal chain and convert[ed] what might have been deemed antitrust injury in a free market into only a speculative exercise.” *Id.* Here, by contrast, Complaint Counsel has established that 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. *See* (CCFF ¶¶ 507-31, 1553-1730).

Further, the discussion in *City of Pittsburgh* is irrelevant because Complaint Counsel is not required to show antitrust injury, which was the relevant issue discussed in *City of Pittsburgh*. *See In re Juul Labs, Inc., Antitrust Litig.*, No. 20-CV-02345-WHO, 2021 WL 3675208, at \*15 (N.D. Cal. Aug. 19, 2021) (“Defendants note that injury is not a showing required for the FTC action, but is a key showing required of private parties.”) (citation omitted).

90. Here, it is undisputed that e-vapor products are regulated by FDA and that those products that were on the market by August 8, 2016 must receive FDA approval to *remain* on the market, while those products that are introduced or modified after August 8, 2016 must receive FDA approval to *enter* the market. (FF ¶¶ 59-66).

### **Response to Proposed Conclusion No. 90**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

Further, it is also incomplete and misleading for the reasons stated in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 63, 65-66).

It should also be disregarded because Altria's purported regulatory challenges are pretextual and inconsistent with the evidence. *See* (CCFF § IX); CC's Post-Trial Br. § III.A.2.

91. As a result, the ongoing sale of existing e-vapor products in the United States, as well as the sale of any newly developed products in the future, is "wholly a matter of governmental grace." *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 628 (1974).

### **Response to Proposed Conclusion No. 91**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded because Respondents ask the Court to conclude that Altria was uniquely incapable of succeeding in the e-cigarette market due to the FDA's regulatory regime while its smaller tobacco rivals such as Reynolds and ITG, were not. *See* CC's Post-Trial Reply Br. Discussion § II.D.1. This argument strains credulity and lacks support in the factual record. Indeed, Respondents apparently see no inherent contradiction between citing Altria's purported FDA assistance to JLI as the crux of their efficiencies defense while simultaneously portraying Altria as hopelessly inept at getting its own e-cigarettes to pass FDA muster. *Compare* Resps.' Post-Trial Br. at 110-112 *with* 127, 128-31.

### **2. Responses to "Altria Would Not Have Been A Significant Competitor With Nu Mark's Existing Products"**

92. Complaint Counsel failed to carry its burden of demonstrating that Altria would have been a significant competitor with Nu Mark's on-market products.

### **Response to Proposed Conclusion No. 92**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

The Proposed Conclusion is contrary to the weight of the evidence. The record evidence (including Dr. Rothman's analyses) and legal precedent support Complaint Counsel's conclusion that Altria would have continued to be a significant competitor in the e-cigarette market absent the transaction. *See* (CCFF ¶¶ 411-92, 1832-41); CC's Post-Trial Br. § IV.A-C; CC's Post-Trial Reply Br. Discussion § II.D.

93. The overwhelming majority of products in Nu Mark's portfolio were cig-a-like products. (FF ¶¶ 1460, 1504-05). The evidence demonstrated that these products were in a dying format, were not converting smokers, suffered from technical problems, and were unlikely to obtain FDA approval. (FF ¶¶ 1504-11).

#### **Response to Proposed Conclusion No. 93**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is contrary to the weight of the evidence. The record evidence (including Dr. Rothman's analyses) and legal precedent support Complaint Counsel's conclusion that Altria would have continued to be a significant competitor in the e-cigarette market absent the transaction. *See* CC's Post-Trial Br. § IV.A-C.

It should also be rejected for reasons stated in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1460, 1504-11).

94. Nu Mark's pod-based product, Elite, lacked the nicotine salts that were necessary for commercial success and conversion of smokers, and suffered from other technical problems. (FF ¶¶ 1512-16).

#### **Response to Proposed Conclusion No. 94**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is contrary to the weight of the evidence. The record evidence (including Dr. Rothman's analyses) and legal precedent support Complaint Counsel's conclusion that Altria would have continued to be a significant competitor in the e-cigarette market absent the transaction. *See* CC's Post-Trial Br. § IV.A-C.

It should also be rejected for reasons stated in Complaint Counsel's corresponding Reply Findings. *See* (CCRFF ¶¶ 1512-16).

95. In addition, substantial evidence shows that Elite could not obtain FDA approval necessary to stay on the market. (FF ¶¶ 510-27, 610-37).

### **Response to Proposed Conclusion No. 95**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

The Proposed Conclusion is contrary to the weight of the evidence. The record evidence (including Dr. Rothman's analyses) and legal precedent support Complaint Counsel's conclusion that Altria would have continued to be a significant competitor in the e-cigarette market absent the transaction. *See* CC's Post-Trial Br. § IV.A-C. Further, it should be disregarded because Altria's purported regulatory challenges are pretextual and inconsistent with the evidence. *See* (CCFF § IX); CC's Post-Trial Br. § III.A.2.

It should also be rejected for reasons stated in Complaint Counsel's corresponding Reply Findings. *See* (CCRFF ¶¶ 510-27, 610-37).

### **3. Responses to “With Respect To Products That Altria Had Not Yet Developed Or Commercialized, Complaint Counsel Cannot Satisfy The “Actual Potential Competition” Doctrine”**

96. Nor can Complaint Counsel carry its burden of demonstrating that Altria would have been a “significant competitor” with a future product.

**Response to Proposed Conclusion No. 96**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

The Proposed Conclusion is incomplete and misleading. Complaint Counsel demonstrated that Altria has significant capabilities and plans, which clearly show that Altria had the ability to compete through its own products, its partnership with PMI, or other acquisitions of technologies. *See* (CCFF ¶¶ 409-544, 1527-730). After all, if Altria had no ability to compete in e-cigarettes, JLI would have had no reason to demand a non-compete as a condition to the transaction. *See* (CCFF ¶¶ 867-1015).

It should also be disregarded because Complaint Counsel has demonstrated that, even evaluating the transaction under an actual potential competition theory, the transaction is likely to result in substantial anticompetitive effects. *See* CCCOL ¶¶ 100-07; CC's Post-Trial Br. § IV.E; CC's Post-Trial Reply Br. Discussion § II.D.3.

97. New entry must be assessed under the "actual potential competition" doctrine. *In the Matter of Heublein, Inc.*, 96 F.T.C. 385, 583 (1980) (initial decision) (applying the doctrine to assess whether a company selling imported wines would have, but for a merger, enhanced competition by selling domestic wines).

**Response to Proposed Conclusion No. 97**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

Further, it should also be disregarded because it is incomplete, misleading and contrary to the law. *See In re Juul Labs, Inc. Antitrust Litig.*, 2021 WL 3675208, at \*21 ("Altria and JLI were *actual competitors* at the time the alleged antitrust Agreement was made. It does not alter Altria's

actual competitor status that, as part of the alleged antitrust Agreement, Altria left the market by the time the Agreement was fully effectuated and publicly disclosed.”) (emphasis added).

98. Under that doctrine, Complaint Counsel is required to show “future competitive conditions” of the market into which those products might enter, namely: (1) that it will be “concentrated”; (2) that there is “a substantial likelihood” that independent entry would “produc[e] deconcentration”; and (3) that Altria is “one of only a few equally likely actual potential entrants.” *In the Matter of B.A.T. Indus., Ltd.*, 1984 WL 565384, at \*7-8 (F.T.C. 1984).

### **Response to Proposed Conclusion No. 98**

The Proposed Conclusion is misleading and contrary to the law as Respondents’ reliance on *B.A.T. Industries* is misplaced. In the Commission’s more recent application 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 \*32-35 (F.T.C. Jan. 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 Motor Co. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981) as support for the “reasonably probable” standard. *Id.* Finally, 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.” *B.A.T. Indus., Ltd.*, Docket No. 9135, 1984 WL 565384, at \*26 (F.T.C. Dec. 17, 1984) (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. *See* (CCFF ¶¶ 409-544, 1527-730; CCRRFF ¶¶ 1540-632).

99. Complaint Counsel must also present (4) “clear proof” that independent entry “would have occurred within the *near future*” but for the acquisition. *Id.* at \*9 (emphasis added).

### **Response to Proposed Conclusion No. 99**

The Proposed Conclusion is misleading and contrary to the law as Respondents' reliance on the "clear proof" standard from *B.A.T. Industries* is misplaced. In the Commission's more recent application 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 \*32-35 (F.T.C. Jan. 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 Motor Co. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981) as support for the "reasonably probable" standard. *Id.* Finally, 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." *B.A.T. Indus., Ltd.*, Docket No. 9135, 1984 WL 565384, at \*26 (F.T.C. Dec. 17, 1984) (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. See (CCFF ¶¶ 409-544, 1527-730; CCRRFF ¶¶ 1540-632).

100. This final condition is particularly important because "even if all the conditions of the doctrine are . . . satisfied, there is no guarantee that these conditions will persist until the future time at which independent entry might occur." *Id.* at \*10.

#### **Response to Proposed Conclusion No. 100**

The Proposed Conclusion is misleading and contrary to the law for the reasons described in Responses to Proposed Conclusion No. 98 and No. 99.

101. Complaint Counsel has not satisfied this standard here.

#### **Response to Proposed Conclusion No. 101**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required

by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

The Proposed Conclusion is misleading and contrary to the law for the reasons described in Responses to Proposed Conclusion No. 98 and No. 99.

It should also be disregarded because Complaint Counsel has demonstrated that, even evaluating the transaction under an actual potential competition theory, the transaction is likely to result in substantial anticompetitive effects. *See* CCCOL ¶¶ 100-07; CC’s Post-Trial Br. § IV.E; CC’s Post-Trial Reply Br. Discussion § II.D.3.

It should also be rejected because the record clearly shows that Altria { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] } *See* (CCFF ¶¶ 1638-93, 1708-10; CCRRFF ¶¶ 1627, 1630). { [REDACTED] }  
[REDACTED] } *See* (CCRRFF ¶¶ 1551, 1620-22; CCFF ¶ 1709). This is not wild speculation by Complaint Counsel, but [REDACTED] { [REDACTED] }  
[REDACTED] } *See* (CCFF ¶¶ 1677-81, 1697, 1704-10; CCRRFF ¶¶ 1551, 1620-22, 1625, 1627, 1630). In fact, { [REDACTED] }  
[REDACTED]  
[REDACTED]  
[REDACTED] }  
*See* (CCFF ¶¶ 1698-710).



In addition, it is undisputed that Altria has the unrivaled “ability (unlike other potential entrants) to reenter the market given its extensive background, regulatory experience, and ample funds.” *In re Juul Labs, Inc. Antitrust Litigation*, 2021 WL 3675208, at \*21 (N.D. Cal. Aug. 19, 2021). Therefore, the evidence provides more than enough support to Complaint Counsel’s case even under the most stringent reading of the actual potential competition doctrine.

**a. Responses to “Complaint Counsel Cannot Demonstrate “Clear Proof” Of Future Entry”**

102. Complaint Counsel has not proven, much less “clear[ly]” proven, that any future e-vapor product Altria developed would be approved by FDA.

**Response to Proposed Conclusion No. 102**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

The Proposed Conclusion is misleading and contrary to the law as Respondents’ reliance on the “clear proof” standard from *B.A.T. Industries* is misplaced. In the Commission’s more recent application 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 \*32-35 (F.T.C. Jan. 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 Motor Co. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981) as support for the “reasonably probable” standard. *Id.* Finally, 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.”

*B.A.T. Indus., Ltd.*, Docket No. 9135, 1984 WL 565384, at \*26 (F.T.C. Dec. 17, 1984) (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. *See* (CCFF ¶¶ 409-544, 1527-730; CCRRFF ¶¶ 1540-632).

It should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 98, No. 99, and No. 101.

103. It is undisputed that the standards for obtaining a PMTA are “very demanding” and that the outcome is highly uncertain. (FF ¶¶ 1540-43).

### **Response to Proposed Conclusion No. 103**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated that, even evaluating the transaction under an actual potential competition theory, the transaction is likely to result in substantial anticompetitive effects. *See* CC’s Post-Trial Br. § IV.E. Here, (1) the closed-system e-cigarette market is highly concentrated, (*see* (CCFF ¶¶ 1737-61)); (2) Altria would have continued to compete in the relevant market absent the transaction, (*see* (CCFF ¶¶ 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, (*see* (CCFF ¶¶ 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 (*see* (CCFF ¶¶ 493-506)). Therefore, the evidence provides more than enough support to Complaint Counsel’s case even under the actual potential competition theory.

It should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 98, No. 99, and No. 101 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1540-41).

104. Complaint Counsel has offered neither fact nor expert testimony on whether any hypothetical future Altria product could have obtained regulatory approval. *See City of Pittsburgh*, 147 F.3d at 262, 267-68; *Brotech Corp. v. White Eagle Int'l Techs. Grp.*, 2004 WL 1427136, at \*6 (E.D. Pa. June 21, 2004).

#### **Response to Proposed Conclusion No. 104**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 98, No. 99, No. 101 and No. 103.

Further, the Proposed Conclusion is misleading to the extent that it suggests the facts of the instant case are similar to the facts in *City of Pittsburgh* or *Brotech*. In *City of Pittsburgh*, there was no actual competition between the defendants, and future entry was dependent on regulatory approval. *See* 147 F.3d at 267-68. Because the plaintiff failed to allege any facts to suggest that regulatory approval was likely, the court concluded that the presence of the regulatory scheme "cut[] the causal chain and convert[ed] what might have been deemed antitrust injury in a free market into only a speculative exercise." *Id.* Similarly, in *Brotech*, the plaintiff failed to allege facts establishing the defendant's intent or preparedness to enter the market, or that FDA approval was probable, and the court therefore concluded that the plaintiff failed to allege antitrust injury. *See* 2004 WL 1427136 at \*6. Here, by contrast, Complaint Counsel has established that 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. *See* (CCFF ¶¶ 507-31, 1553-1730).

Further, the discussions in *City of Pittsburgh* and *Brotech* are irrelevant because Complaint Counsel is not required to show antitrust injury, which was the relevant issue discussed in both cases. *See In re Juul Labs, Inc., Antitrust Litig.*, No. 20-CV-02345-WHO, 2021 WL 3675208, at \*15 (N.D. Cal. Aug. 19, 2021) (“Defendants note that injury is not a showing required for the FTC action, but is a key showing required of private parties.”) (citation omitted).

**b. Responses to “Complaint Counsel Cannot Demonstrate That Entry Would Occur In The “Near Future””**

105. The lengthy lead time required to develop an e-vapor product, prepare a PMTA, and await FDA review, which collectively require at least five years, precludes any showing that entry would occur in the “near future.” *B.A.T. Indus.*, 1984 WL 565384, at \*9.

**Response to Proposed Conclusion No. 105**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be rejected because the record clearly shows that Altria { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } *See* (CCFF ¶¶ 1638-93, 1708-10; CCRRFF ¶¶ 1627, 1630). { [REDACTED]

[REDACTED] } *See*

(CCRRFF ¶¶ 1551, 1620-22; CCFF ¶ 1709). This is not wild speculation by Complaint Counsel,

but [REDACTED] { [REDACTED]

[REDACTED] } *See* (CCFF ¶¶ 1677-81, 1697, 1704-10;

CCRRFF ¶¶ 1551, 1620-22, 1625, 1627, 1630). In fact, { [REDACTED]

[REDACTED]

[REDACTED]

See (CCFF ¶¶ 1698-710).

In addition, it is undisputed that Altria has the unrivaled “ability (unlike other potential entrants) to reenter the market given its extensive background, regulatory experience, and ample funds.” *In re Juul Labs, Inc. Antitrust Litigation*, 2021 WL 3675208, at \*21 (N.D. Cal. Aug. 19, 2021).

It should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 98, No. 99, No. 101 and No. 103.

106. Complaint Counsel concedes, indeed emphasizes, that the time required for entry is protracted and constitutes a significant barrier to entry. (FF ¶¶ 1547, 1549). The substantial evidence demonstrates that it would have taken Altria five to seven years, if not longer, to bring a competitive product to market. (FF ¶¶ 1545-52).

#### **Response to Proposed Conclusion No. 106**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in the Response to Proposed Conclusion No. 105.

107. Courts are occasionally willing to accept predictions of the economic effects of an acquisition on entry “one to three years” out. *See, e.g., Heublein*, 96 F.T.C. at 565 (initial decision). But “[a]t some point,” certainly by “five years,” “the degree of concentration in the market becomes so inherently unpredictable that the entire predictive enterprise should be abandoned.” *Mercantile Texas Corp. v. Bd. of Governors of Fed. Rsrv. Sys.*, 638 F.2d 1255, 1271-72 (5th Cir. 1981); *see also BOC Int’l, Ltd. v. FTC*, 557 F.2d 24, 29 (2d Cir. 1977) (similar); *FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 977-78 (N.D. Ohio 2015) (similar).

#### **Response to Proposed Conclusion No. 107**

Complaint Counsel objects to the word “occasionally.” In *Heublein*, the court held only that the defendant’s intent to expand in a one to three-year time frame was sufficient to establish that it was an actual potential competitor. *See In the Matter of Heublein, Inc.*, 96 F.T.C. 385, 565.

It did not hold that courts will only “occasionally” accept evidence that entry will occur in that time frame.

Further, Respondents misquote *Mercantile Texas* to suggest that entry within “five years” is irrelevant, but that is not what *Mercantile Texas* says. Instead, *Mercantile Texas* specifically explains that “[a] market’s structure *may or may not* be predictable for five years. . . .” *Mercantile Texas Corp. v. Bd. of Governors of Fed. Rsrv. Sys.*, 638 F.2d 1255, 1272 (emphasis added). As a result, “[t]he amount of time needed for successful entry is relevant *only* if entry will be so delayed that the structure of the market will have changed by the time [the potential competitor] actually enters.” *Mercantile Texas Corp.*, 638 F.2d at 1271 (emphasis added).

The Proposed Conclusion is also misleading to the extent that it suggests the facts of the instant case are similar to the facts in the cited cases. Unlike the cases relied on by Respondents—which did not involve competitors that had exited the market pursuant to an illegal agreement—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. *See* (CCFF ¶¶ 93-108, 409-92, 532-44).

It is also incomplete and misleading for the reasons described in Response to Proposed Conclusion No. 105. The evidence in the record clearly shows that Altria { [REDACTED] [REDACTED] [REDACTED] [REDACTED] } *See* (CCFF ¶¶ 1638-93, 1708-10; CCRRFF ¶¶ 1627, 1630). { [REDACTED] [REDACTED] } *See* (CCRRFF ¶¶ 1551, 1620-22; CCFF ¶ 1709). This is not wild speculation by Complaint Counsel, but [REDACTED]

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[REDACTED] } [REDACTED]

[REDACTED] } See (CCFF ¶¶ 1677-81, 1697, 1704-10; CCRRFF ¶¶ 1551, 1620-22, 1625, 1627, 1630). In fact, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } See (CCFF ¶¶ 1698-710).

In addition, it is undisputed that Altria has the unrivaled “ability (unlike other potential entrants) to reenter the market given its extensive background, regulatory experience, and ample funds.” *In re Juul Labs, Inc. Antitrust Litigation*, 2021 WL 3675208, at \*21 (N.D. Cal. Aug. 19, 2021).

108. Any far-reaching predictions would be particularly tenuous in “a heavily regulated industry,” like the e-vapor industry, where “regulatory change can alter”—and has altered—“the structure of the market.” *Mercantile Texas Corp.*, 638 F.2d at 1272.

#### **Response to Proposed Conclusion No. 108**

The Proposed Conclusion is misleading and irrelevant for the reasons described in Response to Proposed Conclusion No. 107.

The Proposed Conclusion is also misleading to the extent that it suggests the facts of the instant case are similar to the facts in *Mercantile Texas*. 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. See (CCFF ¶¶ 93-108, 409-92, 532-44).

**c. Responses to “Complaint Counsel Failed To Prove That Altria Was Capable Of Developing A New, Competitive Product With Which It Could Attempt To Enter The Market”**

109. Complaint Counsel fails to carry its burden of demonstrating that Altria would have succeeded in developing a competitive product.

**Response to Proposed Conclusion No. 109**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated that, even evaluating the transaction under an actual potential competition theory, the transaction is likely to result in substantial anticompetitive effects. *See* CCCOL ¶¶ 100-07; CC’s Post-Trial Br. § IV.E.2; CC’s Post-Trial Reply Br. Discussion § II.D.3.

It is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. *See* (CCRRFF ¶ 1553). { [REDACTED] }  
 { [REDACTED] } *See* (CCRRFF ¶ 1553). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. *See* (CCRRFF ¶ 1553).

It is also incomplete and misleading for the reasons described in Responses to Proposed Conclusion No. 105 and No. 107. The evidence in the record clearly shows that Altria { [REDACTED] }



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[REDACTED] } See (CCFF ¶¶ 1638-93, 1708-10; CCRRFF ¶¶ 1627, 1630). { [REDACTED]

[REDACTED] } See (CCRRFF ¶¶ 1551, 1620-22; CCFF ¶ 1709). This is not wild speculation by Complaint Counsel, but [REDACTED] { [REDACTED]

[REDACTED] } See (CCFF ¶¶ 1677-81, 1697, 1704-10; CCRRFF ¶¶ 1551, 1620-22, 1625, 1627, 1630). In fact, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

See (CCFF ¶¶ 1698-710).

In addition, it is undisputed that Altria has the unrivaled “ability (unlike other potential entrants) to reenter the market given its extensive background, regulatory experience, and ample funds.” *In re Juul Labs, Inc. Antitrust Litigation*, 2021 WL 3675208, at \*21 (N.D. Cal. Aug. 19, 2021).

110. That Altria “is a leading figure in the [tobacco] industry as a whole” is insufficient to satisfy Complaint Counsel’s burden. *Chem-Nuclear Sys. v. Waste Mgmt.*, 1982 WL 1320, at \*3 (W.D. Wash. July 16, 1982) (holding that such a “conclusion requires too much speculation on the part of the Court”).

### **Response to Proposed Conclusion No. 110**

The Proposed Conclusion is misleading to the extent that it suggests that the facts of the instant case are similar to the facts in *Chem-Nuclear Systems*. In *Chem-Nuclear Systems*, the plaintiff argued only that the acquired company was a “leading figure in the waste disposal industry” that had “shown some interest in the past in entering the field of radioactive waste disposal.” 1982 WL 1320 at \*3.

The evidence in the record clearly shows that Altria { [REDACTED] }  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] } See (CCFF ¶¶ 1638-93, 1708-10; CCRRFF ¶¶ 1627, 1630). { [REDACTED] }  
 [REDACTED] } See (CCRRFF ¶¶ 1551, 1620-22; CCFF ¶ 1709). This is not wild speculation by Complaint Counsel, but [REDACTED]  
 [REDACTED] } [REDACTED]  
 [REDACTED] } See (CCFF ¶¶ 1677-81, 1697, 1704-10; CCRRFF ¶¶ 1551, 1620-22, 1625, 1627, 1630). In fact, { [REDACTED] }  
 [REDACTED]  
 [REDACTED]  
 [REDACTED] } See (CCFF ¶¶ 1698-710).

In addition to [REDACTED], Altria also had internal pipeline projects in place—including Elite 2.0 and 3.0 (with nicotine salts)—and other contingency plans that were prepared in case the JLI transaction did not happen. See (CCFF ¶¶ 1281-300, 1538-87, 1717-30). Moreover, it is undisputed that Altria has the unrivaled “ability (unlike other potential entrants) to reenter the market given its extensive background, regulatory experience, and ample funds.” *In re Juul Labs, Inc. Antitrust Litigation*, 2021 WL 3675208, at \*21 (N.D. Cal. Aug. 19, 2021). As a result, the evidence provides ample support for Complaint Counsel’s Section 7 case even under the strictest reading of the actual potential competition doctrine. See CCCOL ¶¶ 100-07; CC’s Post-Trial Br. § IV.E.; CC’s Post-Trial Reply Br. Discussion § II.D.3.

111. Uncontroverted evidence establishes that Altria lacks the competencies, talent, and expertise needed to develop an innovative electronic product. *See FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 295 (4th Cir. 1977) (rejecting FTC’s potential competition claim where entry into relevant market was “extremely difficult,” would take years to accomplish, and required “a certain level of technical expertise” that respondent lacked); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 758 (D. Md. 1976) (rejecting potential competition claim despite fact that acquirer “clearly desired” to enter the market because it “lacked the expertise” to do so).

### **Response to Proposed Conclusion No. 111**

The Proposed Conclusion is misleading to the extent that it suggests that the facts of the instant case are similar to the facts in *Atlantic Richfield* or *Black & Decker*. Unlike the cases relied on by Respondents—which did not involve competitors that had exited the market pursuant to an illegal agreement—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, would have continued to be a significant competitor. *See In re Juul Labs, Inc. Antitrust Litigation*, 2021 WL 3675208, at \*21 n.21 (N.D. Cal. Aug. 19, 2021) (distinguishing “the cases relied on by defendants – that did not involve *agreements* that reduced the number of competitors in the market or otherwise altered concentration levels” such as *FTC v. Atl. Richfield Co.*) (emphasis in original); *see also* (CCFF ¶¶ 93-108, 409-92, 532-44). Further, Complaint Counsel has demonstrated that (1) the closed-tank e-cigarette market is highly concentrated (*see* (CCFF ¶¶ 1737-61)); (2) Altria would have continued to compete in the relevant market absent the transaction (*see* (CCFF ¶¶ 437-40, 1390-407)); (3) Altria is well-positioned to participate again in the closed-system e-cigarette market because there are few other companies that possess Altria’s resources, experience, partnerships, and R&D capabilities (*see* (CCFF ¶¶ 507-31, 1553-730)); and (4) no other potential market participant could leverage anything close to Altria’s tobacco/nicotine portfolio to gain distribution and retail access for its products (*see* (CCFF ¶¶ 493-506)). This evidence provides

more than enough support for Complaint Counsel’s case under an actual potential competition theory.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 110.

112. Every reduced risk product Altria has attempted in the last thirty years has been a commercial flop, every internal development project Nu Mark pursued failed to bear fruit, and every product Nu Mark launched was acquired from another company. (FF ¶¶ 1553-1611).

**Response to Proposed Conclusion No. 112**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 1553-611).

It is also incomplete and misleading to the extent that it suggests that the only viable path to success in the closed-system e-cigarette market is to introduce “internally developed” products. Several successful e-cigarette products, { [REDACTED] } were acquired from other manufacturers. *See* (CCRRFF ¶ 1553). { [REDACTED] }  
 { [REDACTED] }  
 { [REDACTED] } *See* (CCRRFF ¶ 1553). Imperial Brands also acquired its “blu” e-cigarette brand from another e-cigarette manufacturer in 2015. *See* (CCRRFF ¶ 1553).

It is also incomplete and misleading for the reasons described in Response to Proposed Conclusion No. 105. The evidence in the record clearly shows that Altria { [REDACTED] }  
 { [REDACTED] }  
 { [REDACTED] }  
 { [REDACTED] } *See* (CCFF ¶¶ 1638-93, 1708-10; CCRRFF ¶¶ 1627, 1630). { [REDACTED] }

[REDACTED] } See (CCRRFF ¶¶ 1551, 1620-22; CCFF ¶ 1709). This is not wild speculation by Complaint Counsel, but [REDACTED] [REDACTED] } [REDACTED] [REDACTED] } See (CCFF ¶¶ 1677-81, 1697, 1704-10; CCRRFF ¶¶ 1551, 1620-22, 1625, 1627, 1630). In fact, [REDACTED] [REDACTED] [REDACTED] } See (CCFF ¶¶ 1698-710).

In addition, it is undisputed that Altria has the unrivaled “ability (unlike other potential entrants) to reenter the market given its extensive background, regulatory experience, and ample funds.” *In re Juul Labs, Inc. Antitrust Litigation*, 2021 WL 3675208, at \*21 (N.D. Cal. Aug. 19, 2021).

**d. Responses to “Complaint Counsel Failed To Prove That Altria Was Likely To Partner With PMI And Enter The Market With PMI’s VEEV Product In The “Near Future””**

113. Complaint Counsel cannot show that Altria would have entered the market by partnering with PMI on VEEV.

**Response to Proposed Conclusion No. 113**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 105, No. 107 and No. 110. The evidence in the record clearly shows that Altria

{ [REDACTED]

[REDACTED]

[REDACTED] } See (CCFF ¶¶ 1638-93, 1708-10; CCRRFF ¶¶ 1627, 1630). { [REDACTED]

[REDACTED]

[REDACTED] } See (CCRRFF ¶¶ 1551, 1620-22; CCFF ¶ 1709). This is not wild speculation by Complaint Counsel, but [REDACTED]

{ [REDACTED] } See (CCFF ¶¶ 1677-81, 1697, 1704-10; CCRRFF ¶¶ 1551, 1620-22, 1625, 1627, 1630). In fact, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } See (CCFF ¶¶ 1698-710).

In addition, it is undisputed that Altria has the unrivaled “ability (unlike other potential entrants) to reenter the market given its extensive background, regulatory experience, and ample funds.” *In re Juul Labs, Inc. Antitrust Litigation*, 2021 WL 3675208, at \*21 (N.D. Cal. Aug. 19, 2021).

114. There is no evidence that Altria could have commercialized VEEV in the “near future.” *B.A.T. Indus.*, 1984 WL 565384, at \*9. { [REDACTED]

[REDACTED] }

**Response to Proposed Conclusion No. 114**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It is also contrary to the weight of the evidence for the reasons described in Response to Proposed Conclusion No. 113 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1621-24).

115. In addition, whether Altria and PMI would have agreed to terms necessary for Altria to commercialize VEEV in the United States, and whether Altria would have even wanted to commercialize VEEV, is pure speculation. (FF ¶¶ 1628-31). And even if Complaint Counsel could show likely entry, neither Complaint Counsel nor its expert witness have tried to explain how that likely entry would affect the marketplace.

#### **Response to Proposed Conclusion No. 115**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It is also contrary to the weight of the evidence for the reasons described in Response to Proposed Conclusion No. 113 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1628-31).

#### **4. Responses to “Complaint Counsel Did Not Show Any Harm To Price Competition, Innovation Competition, Or Shelf Space Competition”**

116. Nor can Complaint Counsel demonstrate any competitive effects with respect to competition for price, innovation, or shelf space.

#### **Response to Proposed Conclusion No. 116**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated that Altria's shutdown of its e-cigarette business harmed consumers by instantly eliminating all forms of current and future competition from Altria, including price competition, innovation competition, and

competition for shelf-space. *See* (CCFF §§ VIII.M, X.A-D); CC's Post-Trial Br. §§ III.B, IV.C; CC's Post-Trial Reply Br. Discussion § II.D.4.

117. Complaint Counsel introduced no evidence that Altria's products constrained price. Its expert Dr. Rothman did not analyze whether Altria constrained JLI's pricing and the witness testimony uniformly confirms that JLI never altered its price in response to Altria. (FF ¶¶ 1639-46).

**Response to Proposed Conclusion No. 117**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1639-46).

118. There is also no evidence of reduced innovation; to the contrary, JLI has accelerated its innovation activity since the transaction. (FF ¶¶ 1647-50).

**Response to Proposed Conclusion No. 118**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1647-50).

119. As for shelf space, the evidence shows that Altria's exit actually *created* opportunities for smaller brands to get on the shelf at major retailers. (FF ¶¶ 1651-64). Market participants confirm that competition for shelf space remains robust. (FF ¶ 1657).

**Response to Proposed Conclusion No. 119**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1651-64, 1657).



**F. Responses to “The Conclusions Of Complaint Counsel’s Expert Rest On Indefensible Assumptions And Are Due No Weight”**

120. The analysis by Complaint Counsel’s expert, Dr. Rothman, is not “traceable to a reliable [economic] methodology.” *SEC v. Tourre*, 950 F. Supp. 2d 666, 675 (S.D.N.Y. 2013).

**Response to Proposed Conclusion No. 120**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

Further, the cited case is irrelevant. *SEC v. Tourre* held only that “mere narration” that is not “traceable to a reliable methodology” fails to fulfill *Daubert*’s requirements for expert testimony. *See SEC v. Tourre*, 950 F. Supp. 2d 666, 675. Unlike *Tourre*, Dr. Rothman’s rigorous economic analysis hardly qualifies as “mere narration.” In addition to analyzing the qualitative evidence, Dr. Rothman employed the Antitrust Logit Model (“ALM”), which is a well-accepted tool frequently used by antitrust economists to analyze two sources of harm from the transaction—higher prices and loss of consumer choice. *See* (CCRRFF ¶¶ 1672-73).

To the extent this Proposed Conclusion addresses the admissibility of expert testimony, it is misleading and irrelevant. “[T]he Supreme Court instructed that district courts are to perform a “gatekeeping” role concerning the admission of expert scientific testimony. However, because this is a non-jury trial, the gatekeeping purpose of *Daubert* is not implicated.” *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 616 F. Supp. 2d 1250, 1256 & n.4 (citing *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000) (“Most of the safeguards provided for in *Daubert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury.”)). “There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.” *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005).

Additionally, any attempt to exclude Dr. Rothman's testimony from consideration under *Daubert* is time barred by the Court's March 4, 2021 Second Revised Scheduling Order, at 3. Consequently, it should be disregarded.

**1. Responses to "Dr. Rothman's Opinion That Altria Would Have Likely Been A Significant Competitor Is Unreliable"**

121. Dr. Rothman's opinion that Altria would have likely been a significant competitor cannot be credited because it lacks a reliable methodology.

**Response to Proposed Conclusion No. 121**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated that Altria would have likely been a significant competitor absent the transaction. *See* (CCFF §§ VI, X.A-D); CC's Post-Trial Br. §§ III.B, IV.C-E; CC's Post-Trial Reply Br. Discussion § II.D.

It should also be disregarded because for the reasons described in Response to Proposed Conclusion No. 120.

122. Dr. Rothman flouts the foundational principle that it is "inappropriate for experts to become a vehicle for factual narrative." *Toure*, 950 F. Supp. 2d at 675 (barring expert from "narrating facts and testimony from the record" to the jury). Dr. Rothman opines on "lay matters that the [Court] is capable of understanding and deciding without [expert] testimony." *Highland Cap. Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173, 180 (S.D.N.Y. 2008) (excluding expert's proffered "factual narrative of events" to the jury). Indeed, Dr. Rothman's opinions address intent, (FF ¶ 1486), which "is not a proper subject for expert testimony." *Wolfe v. McNeil-PPC, Inc.*, 881 F. Supp. 2d 650, 661-62 (E.D. Pa. 2012) (quotations omitted).

**Response to Proposed Conclusion No. 122**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 120.

Further, it should be disregarded because all of the cases cited by Respondents are the trial courts' rulings on *Daubert* motions, which involve the particular framework and standard laid out by the trilogy of the Supreme Court's cases—*Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999)—which are not applicable here.

123. Dr. Rothman's assertion that Altria would not have discontinued Nu Mark but for the investment in JLI and would have been a "significant competitor" is premised on "cherry picked" documents—relying solely on exhibits offered by Complaint Counsel and skipping over critical documents like the August 19 Term Sheet, (FF ¶¶ 1487-88)—which renders his opinion unreliable. *See In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig.*, 174 F. Supp. 3d 911, 931-32 (D.S.C. 2016).

### **Response to Proposed Conclusion No. 123**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 120 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1487-88). In particular, it is false, misleading, and disingenuous for Respondents to claim that Dr. Rothman relied "solely on exhibits offered by Complaint Counsel." Under the Court's March 4, 2021 Second Revised Scheduling Order, at 2-3, Respondents did not provide Complaint Counsel with their final proposed exhibit list and copies of their exhibits until April 22, 2021, nearly two months after Dr. Rothman submitted his expert report on February 15, 2021, and nearly one month after Dr. Rothman submitted his rebuttal report on March 26, 2021. *See* (CCRRFF ¶ 1488). Thus, Dr. Rothman could not possibly cite any of Respondents' "RX" exhibits in either of his reports. Notwithstanding the foregoing, the claim that Dr. Rothman relied only on Complaint Counsel's

exhibits is false and misleading because Dr. Rothman relied on hundreds of ordinary course documents produced by Respondents and third parties, and all testimony taken in this matter. *See* (CCRRFF ¶ 1488).

In addition, Respondents have not provided any explanation for why the “August 19 Term Sheet” is a “critical” document. *See* (CCFF ¶¶ 732-34, 957; CCRRFF ¶¶ 824-33, 1487); CC’s Pre-Trial Br. at 24; CC’s Post-Trial Br. at 35-36.

124. And, for all his attempts to analyze the facts, Dr. Rothman cannot explain *how* Altria would have been a significant competitor in a but-for world without the acquisition. He cannot identify what products Altria would have sold at any point, which products would have received FDA approval, how Altria could have increased its sales, what the performance of MarkTen cig-a-like and the Elite would have been, or how other competitors would have behaved differently had Altria remained in the market. (FF ¶¶ 1489-500).

#### **Response to Proposed Conclusion No. 124**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated that Altria would have likely been a significant competitor absent the transaction. *See* (CCFF §§ VI, X.A-D); CC’s Post-Trial Br. §§ III.B, IV.C-E; CC’s Post-Trial Reply Br. Discussion § II.D.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 120 and in Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 1489-500).

#### **2. Responses to “Dr. Rothman’s Harm Estimates Rest On Indefensible And Illogical Assumptions”**

125. As for Dr. Rothman’s model of consumer harm, it turns on at least five unsupported factual and economic assumptions that render the model unreliable.

#### **Response to Proposed Conclusion No. 125**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required

by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 120.

126. *First*, approximately 80 percent of Dr. Rothman's calculated consumer harm is manufactured by assuming—without evidence—that consumers were unhappy with their alternatives to the MarkTen cig-a-like and Elite, the so-called red-bus blue-bus problem well-recognized in the economic literature. (FF ¶¶ 1671-77). But “a loss of consumer choice is often anything but anti-competitive.” *Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd.*, 833 F.3d 680, 690 (6th Cir. 2016).

### **Response to Proposed Conclusion No. 126**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 120 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1671-77). In particular, the analogy to a “red-bus blue-bus” is entirely misleading and inappropriate because, as Respondents have acknowledged and Dr. Rothman has pointed out, closed-system e-cigarettes are differentiated products, unlike a “red bus” which is obviously not differentiated from a “blue bus.” *See* (CCRRFF ¶ 1674).

It is also incomplete and misleading because the Commission recognized that “den[ying] its customers the ability to make a meaningful choice” is “another adverse impact on competition” *In re McWane, Inc.*, Docket No. 9351, 2014 WL 556261, at \*28 (F.T.C. Jan. 30, 2014) (citations omitted); *see also* Neil W. Averitt & Robert H. Lande, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 *Antitrust L. J.* 175 (2007).

127. *Second*, as with his flawed HHI calculation, Dr. Rothman's model rests on an assumption of proportional diversion, contrary to what actually happened after the transaction, and thereby grossly overstates both the extent to which JLI benefited from Altria's exit and the associated consumer harm. (FF ¶¶ 1680-83).

**Response to Proposed Conclusion No. 127**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 120 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1680-83).

128. *Third*, Dr. Rothman unreasonably premises his estimate of harm on the assumption that "Altria would have maintained its 10 percent [market] share," which is implausible for all the reasons this share overstates Altria's competitive significance. (FF ¶¶ 1685-88). His alternative calculation, which assumes Altria would have "grown its share to 20 percent by 2020," is based on an outdated and disproven projection that was prepared before Elite even entered the market and well before its subsequent commercial flop. (FF ¶¶ 1689-94). Courts often exclude expert opinions that rely on internal estimates without examining "the[ir] validity," as Dr. Rothman did here. *ZF Meritor LLC v. Eaton Corp.*, 646 F. Supp. 2d 663, 667-68 (D. Del. 2009).

**Response to Proposed Conclusion No. 128**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 120 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1685-94). In particular, the insinuation that Dr. Rothman relied "on internal estimates without examining 'the[ir] validity'" is false and misleading. Dr. Rothman testified that he did not just rely on internal estimates but developed his own share estimates for use with his model. *See* (CCRRFF ¶ 1689).

129. *Fourth*, Dr. Rothman assumes a closed-system market including both cig-a-like and pod-based products, which is problematic in light of the significant differentiation between these product categories. (FF ¶¶ 1695-98).

**Response to Proposed Conclusion No. 129**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 120 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1695-98).

It should also be disregarded because the evidence supports the conclusion that the sale of closed-system e-cigarettes is an appropriate relevant product market. *See* (CCFF ¶¶ 208-407); CC's Post-Trial Br. § II; CC's Post-Trial Reply Br. Discussion § II.B.

130. *Fifth*, Dr. Rothman inflates the alleged harm by assuming Altria's profit margin was 27 percent, rather than the actual 2 percent, without explaining how it would be possible for Altria to grow its margin more than tenfold in a market where the leading competitors were offering steep discounts. (FF ¶¶ 1699-706).

### **Response to Proposed Conclusion No. 130**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 120 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1699-706).

### **3. Responses to "Dr. Rothman's Harm Estimates Are Offset By Expansion And The Increased Probability That JLI Will Obtain PMTA Approval As A Result Of The Transaction"**

131. *First*, NJOY and Reynolds have already expanded more than *twice* the amount necessary to offset Dr. Rothman's predicted harm, a fact for which Complaint Counsel has no credible response. (FF ¶¶ 1709-16).

### **Response to Proposed Conclusion No. 131**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 120 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1709-16).

132. *Second*, and independently, any purported consumer loss from Altria's exit would be readily offset by the benefit of the regulatory services Altria provided to JLI, services that enabled a timely and improved PMTA for JUUL, thereby enabling a vastly more popular

product, with significant conversion potential among adult smokers, to remain on the market. (FF ¶¶ 1717-27).

### **Response to Proposed Conclusion No. 132**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 120 and in Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 1717-27).

### **III. RESPONSES TO “COMPLAINT COUNSEL FAILED TO PROVE THAT THE ACTUAL NONCOMPETE IS ANTICOMPETITIVE”**

#### **A. Responses to “Noncompete Agreements Are Generally Permissible Unless Anticompetitive And Overbroad”**

133. “The recognized benefits of reasonably enforced noncompetition covenants are by now beyond question.” *Lektro-Vend Corp.*, 660 F.2d at 265.

### **Response to Proposed Conclusion No. 133**

The Proposed Conclusion is incomplete and misleading to the extent that it suggests that the Non-Compete at issue in this case is one of “reasonably enforced noncompetition covenants.” *Lektro-Vend Corp.*, 660 F.2d at 265. As the Seventh Circuit noted, “the legality of noncompetition covenants ancillary to a legitimate transaction must be analyzed under the rule of reason.” *Id.* A restraint is only ancillary where it is “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) (emphasis added). “[E]ven restraints ancillary in form are illegal if they are part of a general plan” to violate the antitrust laws. *Id.* (citing *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-83 (6th Cir. 1898), *aff’d* 175 U.S. 211 (1899)). The Non-Compete between Respondents is not an “ancillary” restraint, but even if it hypothetically were ancillary to a legitimate transaction, the written Non-Compete still violates Section 1 under the rule of reason. *See* CCCOL ¶¶ 71-75; CC’s Post-Trial Br. § III.C.; CC’s Post-Trial Reply Br. Discussion § III.A-B.



134. “[C]ovenants not to compete are valid if (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 interests.” *Id.* at 265.

#### **Response to Proposed Conclusion No. 134**

Complaint Counsel has no specific response.

135. Courts uphold noncompete agreements under the rule of reason “[s]o long as the[] covenant[] [is] reasonable in scope.” *Eichorn v. AT&T Corp.*, 248 F.3d 131, 144-45 (3d Cir. 2001); *Syntex Labs., Inc. v. Norwich Pharmacal Co.*, 315 F. Supp. 45, 56 (S.D.N.Y. 1970) (“[I]t is hornbook law that a covenant not to compete ancillary to the sale of a business (or part of a business), when reasonably limited to time and territory, does not fall within the prohibitions of the Sherman Act.”), *aff’d*, 437 F.2d 566 (2d Cir. 1971).

#### **Response to Proposed Conclusion No. 135**

The Proposed Conclusion is incomplete. 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 interest 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, 280 (6th Cir. 1898), *aff’d* 175 U.S. 211 (1899)). 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 280). Accordingly, any restraint in furtherance of a Section 1 or Section 7 violation cannot properly be considered an “ancillary” restraint. *Id.*

Further, 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 Storage*, 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).

136. As Complaint Counsel acknowledges, Compl. ¶ 79, its Section 1 challenges to noncompete agreements must be “examined under the rule of reason.” *Eichorn*, 248 F.3d at 144-45; *see also Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1560-61 (11th Cir. 1983) (“There has been an unbroken line of cases holding that the validity of covenants not to compete under the Sherman Act must be analyzed under the rule of reason.”).

### **Response to Proposed Conclusion No. 136**

The Proposed Conclusion is incomplete and misleading. As the federal district court in *In re Juul Labs, Inc. Antitrust Litigation* noted recently, “the intended scope of the express, written non-compete agreements . . . and plaintiffs’ allegations regarding the non-written agreement to withdraw in whole from the market need to be considered together and tested on an evidentiary basis.” 2021 WL 3675208, at \*32 (N.D. Cal. Aug. 19, 2021). Thus, a non-compete agreement alleged to be part of a *per se* market allocation scheme does not automatically qualify for rule of reason treatment.

137. It is “well established that any rule of reason analysis requires a showing of anticompetitive market effect.” *Lektro-Vend Corp.*, 660 F.2d at 268. “To hold otherwise would ignore the very purpose of the antitrust laws which were enacted for the protection of competition, not competitors.” *Id.*

### **Response to Proposed Conclusion No. 137**

The Proposed Conclusion is incomplete. In analyzing an alleged violation of Section 1 under the rule of reason, courts use a burden-shifting framework. *See, e.g., Impax Labs. Inc. v. FTC*, 994 F.3d 484, 492 (5th Cir. 2021) (citing *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018)). 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 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.” *Id.* (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.” *Alston*, 141 S. Ct. at 2160.

138. “A showing of adverse market impact has been required in [Section] 1 cases specifically involving noncompetition covenants.” *Id.* at 269.

### **Response to Proposed Conclusion No. 138**

Complaint Counsel does not dispute that Respondents have accurately quoted the cited case; however, the Proposed Conclusion is incomplete for the reasons described in Response to Proposed Conclusion No. 137.

139. Therefore, under the first step of a Section 1 rule of reason analysis, it is Complaint Counsel’s burden to introduce evidence of actual anticompetitive effects. *See United States v. Brown Univ.*, 5 F.3d 658, 668-69 (3d Cir. 1993).

### **Response to Proposed Conclusion No. 139**

The Proposed Conclusion is misleading and incomplete. Under the rule of reason, plaintiffs may meet their initial burden by showing either: (1) direct evidence anticompetitive effects, or (2) Respondents’ market power along with the likely effect of the 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 Investment 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)).

140. If Complaint Counsel meets this standard, in the second step of the rule of reason analysis, the burden shifts to the Respondents to show that the challenged conduct promotes a sufficiently pro-competitive objective. *Id.* at 669.

**Response to Proposed Conclusion No. 140**

Complaint Counsel has no specific response.

141. If Respondents show the challenged conduct promotes a sufficiently pro-competitive objective, in the third step of the rule of reason analysis, Complaint Counsel “must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.” *Id.*

**Response to Proposed Conclusion No. 141**

Complaint Counsel has no specific response.

142. “To determine if a restraint is reasonably necessary, courts must examine first whether the restraint furthers the legitimate objectives, and then whether comparable benefits could be achieved through a substantially less restrictive alternative.” *Id.* at 679. Complaint Counsel “cannot just point to” a hypothetical alternative without demonstrating “equivalent viability of the alternative[] proffered.” *N. Am. Soccer League, LLC v. U.S. Soccer Fed’n, Inc.*, 883 F.3d 32, 45 (2d Cir. 2018).

**Response to Proposed Conclusion No. 142**

The Proposed Conclusion cites *North American Soccer League* in a misleading fashion by suggesting that the Second Circuit rejected a hypothetical alternative put forward by the plaintiff. In reality, the plaintiff in that case challenged professional soccer league standards as anticompetitive, and argued that earlier standards (not a hypothetical alternative) were less restrictive. *See* 883 F.3d at 45. The Second Circuit upheld a district court’s order denying a preliminary injunction, reasoning *inter alia* that the plaintiffs failed to show that the earlier standards could accomplish the same competitive benefits as the new standards. *Id.*

143. As the Supreme Court recently emphasized, “[f]irms deserve substantial latitude to fashion agreements that serve legitimate business interests,” including agreements, along the lines of those at issue here, “aimed at introducing a new product into the marketplace.” *Alston*, 141 S. Ct. at 2163.

**Response to Proposed Conclusion No. 143**

The Proposed Conclusion is irrelevant because Respondents did not produce evidence that the transaction’s Non-Compete was “aimed at introducing a new product into the marketplace.” *Alston*, 141 S. Ct. at 2163. To the contrary, the Non-Compete *prevents* Altria from releasing any

new e-cigarette in the U.S. market or from engaging in any R&D on its own or with a partner [REDACTED]

[REDACTED]. *See* (CCFF ¶ 1694).

**B. Responses to “Complaint Counsel Failed To Prove That The Noncompete Violates Section 1”**

144. Complaint Counsel has failed to prove that the noncompete agreement at issue in this case—which prohibited Altria from developing new e-vapor products while it was providing services to JLI—is anticompetitive.

**Response to Proposed Conclusion No. 144**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated by a preponderance of the evidence that the Non-Compete violated Section 1 of the Sherman Act. *See* CCCOL ¶¶ 71-75; CC’s Post-Trial Br. § III.C.; CC’s Post-Trial Reply Br. Discussion § III.A-B.

145. Applying a rule of reason analysis here shows that Complaint Counsel’s claim must fail.

**Response to Proposed Conclusion No. 145**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated that the anticompetitive effects of the Non-Compete substantially outweigh any procompetitive benefits, and therefore that the Non-Compete therefore fails under the rule of reason. *See* CCCOL ¶¶ 71-75; CC’s Post-Trial Br. § III.C.; CC’s Post-Trial Reply Br. Discussion § III.A-B.

146. Complaint Counsel's claim fails at the first step of the rule of reason analysis because, as explained above, competition flourished in the wake of the transaction, (FF ¶¶ 1284-376), and Complaint Counsel has failed to show actual anticompetitive effects, (FF ¶¶ 1427-727).

**Response to Proposed Conclusion No. 146**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1284-376, 1427-727).

It should also be disregarded because Complaint Counsel has shown direct evidence, through documents, testimony, and its expert's economic analysis, that Respondents' agreement and the challenged transaction (including the Non-Compete) harmed competition. *See* (CCFF §§ VIII.M, X.A-D).

147. Moreover, as explained above, Complaint Counsel cannot show that Altria would have had a competitive product on the market in a timely manner. (FF ¶¶ 1501-632).

**Response to Proposed Conclusion No. 147**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1501-632).

148. Specifically, in the years following Altria's December 2018 investment in JLI, with regard to pod-based devices: (1) average prices have decreased; (2) output has increased; (3) market concentration has decreased; and (4) JLI's market share has fallen by more than half. (FF ¶¶ 1338-76). In the face of this real-world evidence, Complaint Counsel has failed to carry its burden of demonstrating that the market would somehow have been even more competitive had Altria not withdrawn Nu Mark's products.

**Response to Proposed Conclusion No. 148**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1338-76).

149. Even if Complaint Counsel did not fail at the first step of the rule of reason analysis, and reached the second step, Respondents have shown that the challenged conduct promotes a sufficiently pro-competitive objective, such that the burden would shift back to Complaint Counsel to demonstrate that the restraint is not reasonably necessary to achieve the stated objective.

#### **Response to Proposed Conclusion No. 149**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Respondents cannot show how the Non-Compete benefitted consumers or competition. *See* (CCFF §§ XI, XIV); CC's Post-Trial Br. § III.C.2; CC's Post-Trial Reply Br. Discussion § III.B. Thus, Respondents cannot offer any "pro-competitive redeeming virtues" sufficient to save the anticompetitive agreement. *See Clorox*, 117 F.3d at 59. As an anticompetitive agreement without offsetting benefits, Respondents' Non-Compete violates Section 1 of the Sherman Act.

150. Respondents demonstrated that the noncompete enabled Altria to provide regulatory services in support of JLI's PMTA. (FF ¶¶ 1178-88, 1243-46). These services made it possible for JLI to file a timely PMTA and made it more likely that JLI's PMTA will be approved by FDA. (FF ¶¶ 1247-64). If JLI's PMTA were denied, JLI would be legally required to remove JUUL from the market, resulting in less competition. (FF ¶¶ 1221-22).

#### **Response to Proposed Conclusion No. 150**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded because it misstates the factual record. Against clear competitive harm demonstrated by Complaint Counsel, Respondents have offered mere

speculation about Altria's ability to assist and accelerate JLI's PMTA efforts. *See* (CCFF ¶¶ 1898-911). Respondents have not demonstrated how Altria's services to JLI have benefited consumers or competition. *See* (CCFF ¶ 1733, 1891-917, 1956-95). As an anticompetitive agreement without offsetting benefits, Respondents' Non-Compete violates Section 1 of the Sherman Act.

It should also be disregarded for the reasons described in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1178-88, 1221-22, 1243-64).

151. Respondents demonstrated further that because of the noncompete agreement, Altria's scientists and regulatory experts could work on the PMTA for JUUL and view JLI's confidential information as necessary, without risk that Altria could use that confidential information to develop new products to compete against JLI. (FF ¶¶ 1178-88, 1270-74).

#### **Response to Proposed Conclusion No. 151**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 150 and in Complaint Counsel's corresponding Reply Findings. *See* (CCRRFF ¶¶ 1178-88, 1270-74).

152. Complaint Counsel's claim would also fail at the third step of the rule of reason analysis because it has not identified a viable less restrictive alternative.

#### **Response to Proposed Conclusion No. 152**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

Further, it is also incomplete and misleading to the extent that it suggests that Complaint Counsel must demonstrate a viable less restrictive alternative. Under the rule of reason, if Respondents "successfully prove procompetitive benefits, then the FTC can demonstrate that any



procompetitive effects could be achieved through less anticompetitive means.” *Impax Labs. Inc. v. FTC*, 994 F.3d 484, 492 (5th Cir. 2021). If the FTC does not demonstrate a viable less restrictive alternative, then “the court must balance the anticompetitive and procompetitive effects of the restraint.” *Id.* 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.*

153. To carry its burden at the third step, Complaint Counsel must prove that its proffered alternative is “viable,” “substantially less restrictive[,] and virtually as effective in serving the legitimate objective *without significantly increased cost.*” *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159-60 (9th Cir. 2001) (emphasis in original).

#### **Response to Proposed Conclusion No. 153**

The Proposed Conclusion is incomplete and misleading to the extent that it suggests that Complaint Counsel must demonstrate a viable less restrictive alternative, for the reasons described in Response to Proposed Conclusion No. 152.

154. Complaint Counsel at trial raised the possibility of non-disclosure agreements, firewalls, or the use of third-party contractors as alternatives, but failed to demonstrate that any of these alternatives would have “equivalent viability.” *U.S. Soccer Fed’n, Inc.*, 883 F.3d at 45. Nor did Complaint Counsel rebut sworn testimony from fact witnesses that the theoretical alternatives would *not* be viable. (FF ¶¶ 1269-83).

#### **Response to Proposed Conclusion No. 154**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 150 and No. 152, and in Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 1269-83).

155. Respondents have also introduced substantial evidence that the noncompete agreement went no further than necessary because the noncompete was limited to the period in which Altria is providing services and only applies to Altria’s e-vapor products, and not other products such as IQOS or oral nicotine products. (FF ¶ 1129).

**Response to Proposed Conclusion No. 155**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded because it misstates the factual record. Complaint Counsel demonstrated that the Non-Compete precludes Altria from participating in all aspects of the e-cigarette business, including R&D and any collaboration with third-parties (including PMI) for an initial term of six years, which is indefinitely extendable by three-year increments if not terminated by either party. *See* (CCFF ¶¶ 38-40, 995-1015).

It should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 150 and No. 152.

156. In sum, the noncompete agreement is reasonable in scope and not anticompetitive. Therefore, Complaint Counsel's antitrust claim regarding the noncompete agreement is dismissed.

**Response to Proposed Conclusion No. 156**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated by a preponderance of the evidence that the Non-Compete violated Section 1 of the Sherman Act. *See* CCCOL ¶¶ 71-75; CC's Post-Trial Br. § III.C.; CC's Post-Trial Reply Br. Discussion § III.A-B.

**IV. RESPONSES TO "JLI CANNOT BE FOUND TO HAVE VIOLATED SECTION 7 OF THE CLAYTON ACT"**

157. Section 7 provides that no person "shall acquire" the stock or assets of "*another* person" where the effect of the acquisition may be substantially to lessen competition. 15 U.S.C. § 18 (emphasis added).

**Response to Proposed Conclusion No. 157**

Complaint Counsel has no specific response.

158. Courts have consistently held that Section 7 provides no basis to find a violation by the seller in a transaction. *See, e.g., United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 227 (9th Cir. 1978); *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 852 (N.D. Cal. 2004); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 488 (5th Cir. 1967).

**Response to Proposed Conclusion No. 158**

The Proposed Conclusion is incomplete, misleading and contrary to the law. In fact, the Ninth Circuit in *Coca-Cola Bottling* acknowledges that sellers can be proper Section 7 defendants where their “presence would be necessary to fashion complete relief.” *Coca-Cola Bottling*, 575 F.2d at 228. As the court observed, “the fact that sellers are not violators of § 7 of the Clayton Act does not force courts to close their eyes to the fact that the sellers are parties to an acquisition which is prohibited by law,” and further, “the necessity of broad equity powers to enforce the antitrust laws has often been declared.” *Id.* at 227-28, 229; *see also Fricke-Parks Press, Inc. v. Fang*, 149 F. Supp. 2d 1175, 1185 (N.D. Cal. 2001) (“sellers may be joined in a section 7 action against a purchaser when the plaintiff seeks rescission or divestiture and the court needs jurisdiction over both the buying and selling company to fashion such equitable relief.”); *Palmer News, Inc. v. ARA Servs. Inc.*, 476 F. Supp. 1176, 1193 (D. Kan. 1979) (“A court can maintain as a Clayton § 7 defendant any party whose presence is necessary to effectuate relief.”). Here, Complaint Counsel is seeking equitable relief in the form of a divestiture, and jurisdiction over both Altria and JLI is necessary to fashion that relief. *See Fricke-Parks Press*, 149 F. Supp. 2d at 1185 (noting that while a seller’s liability for damages under Section 7 “may be open to question,” the authority to join a seller for purposes of obtaining equitable relief is clear). The remainder of the cases cited by Respondents concern liability for monetary damages and are therefore inapplicable. *See Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 852 (N.D. Cal. 2004) (“a

Section 7 claim *for monetary damages*, as a matter of law, does not exist against the person or entity selling the assets but rather must be brought against the acquiring person or entity.”) (emphasis added); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 488 (5th Cir. 1967). Accordingly, JLI is a proper respondent to Complaint Counsel’s Section 7 claim. *See also In re Juul Labs, Inc. Antitrust Litig.*, Case No. 20-cv-02345-WHO, 2021 WL 3675208, at \*22 (N.D. Cal. Aug. 19, 2021) (concluding JLI is appropriately named as a defendant for purposes of Section 7 in private lawsuit concerning the transaction).

159. Accordingly, JLI, the seller in this transaction, cannot be found to have violated Section 7.

**Response to Proposed Conclusion No. 159**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 158.

**V. RESPONSES TO “FTC ADMINISTRATIVE PROCEEDINGS ARE UNCONSTITUTIONAL”**

**A. Responses to “These Proceedings Are Unconstitutional Under Article II Of The Constitution”**

**1. Responses to “The President Must Have The Ability To Remove Key Decisionmakers At Federal Agencies”**

160. Article II of the Constitution vests all “executive Power” in the President, who alone is charged with executing the laws. U.S. Const. Art. II, § 1, cl. 1; *id.* Art. II, § 3.

**Response to Proposed Conclusion No. 160**

The Proposed Conclusion is incomplete and misleading. Article II does not vest “all executive power” in the President, but rather contains certain qualifications. *See, e.g.*, U.S. Const.

Art. II, § 2 (granting power to make treaties and appointments subject to advice and consent of the Senate). Nor is the President “alone” charged with executing the laws. *See id.* (providing for Congress to enable Heads of Departments to appoint inferior officers).

Unembellished, the Constitution actually states: “The executive Power shall be vested in a President of the United States of America.” *Id.* § 1.

161. The President therefore must have “the authority to remove those who assist him in carrying out his duties,” including principal officers who head Executive departments. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513-14 (2010).

### **Response to Proposed Conclusion No. 161**

The Proposed Conclusion is incomplete and misleading. Respondents invoke *Free Enterprise Fund* to no avail, because its holding was expressly limited to the Public Company Accounting Oversight Board (“PCAOB”). *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 508 (2010) (“The only issue in this case is whether Congress may deprive the President of adequate control over the Board . . .”). The Supreme Court held that members of the Board, which is supervised by the SEC, were unconstitutionally insulated by two layers of tenure protection and so the SEC needed to be able to remove Board members at will. *Id.* at 509, 513. Importantly, the Supreme Court made clear that the PCAOB was unusual if not unique in being itself an independent agency, unlike this Court: “The parties have identified only a handful of isolated positions in which inferior officers might be protected by two levels of good-cause tenure. . . . They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency.” *Id.* at 505-06 (internal citations and quotation marks omitted).

Further, the Supreme Court in *Free Enterprise Fund* expressly rejected the assertion in the dissent (561 U.S. at 542-43 (Breyer, J., dissenting)) that the decision would apply to ALJs: “The dissent here suggests that other such positions might exist, and complains that we do not resolve their status in this opinion. . . . [But] the dissent fails to support its premonitions of doom; none

of the positions it identifies are similarly situated to the Board.” *Id.* at 506 (internal citations and quotation marks omitted). In short, *Free Enterprise Fund* provides no basis to rule that this Court is unconstitutional.

162. The Supreme Court has held unconstitutional the structure of the Consumer Financial Protection Bureau, which was headed by a single director removable only for inefficiency, neglect of duty, or malfeasance. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191-92 (2020).

### **Response to Proposed Conclusion No. 162**

The Proposed Conclusion is incomplete and misleading. The Supreme Court in *Seila Law* also distinguished the structure of the CFPB from that of the FTC, and expressly declined to overturn *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), which directly addressed and upheld the constitutionality of the FTC’s structure. 140 S. Ct. 2183, 2192 (2020). The Commission has also directly addressed *Seila Law*, highlighting the distinctions that the *Seila Law* Court drew between the structure of the CFPB—with a single director who might be appointed by a prior president and not removable by a current president—and the multimember bipartisan commission that heads the FTC, to which the concerns articulated in *Seila Law* do not apply. *In re CID to Beam Fin’l, Inc.*, “Order Denying In Part and Granting In Part Petition to Quash or Modify Civil Investigative Demand,” FTC File No. 182-3177, at 3-4 (Aug. 17, 2020), *available at* [https://www.ftc.gov/system/files/documents/petitions-quash/beam-financial/1823177beamfinancial\\_comorderptq.pdf](https://www.ftc.gov/system/files/documents/petitions-quash/beam-financial/1823177beamfinancial_comorderptq.pdf).

163. Whenever “an agency does important work,” its leaders must be removable by the President, regardless of the agency’s “size or role.” *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021).

### **Response to Proposed Conclusion No. 163**

The Proposed Conclusion is incomplete and misleading. Respondents pin their hopes on dicta from *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), which plainly affords this Court no basis on which to overturn *Humphrey’s Executor*—something the Supreme Court itself expressly

declined to do in *Seila Law. Id.* at 2192. The Commission has also directly addressed *Seila Law*, highlighting the distinctions that the *Seila Law* Court drew between the structure of the CFPB—with a single director who might be appointed by a prior president and not removable by a current president—and the multimember bipartisan commission that heads the FTC, to which the concerns articulated in *Seila Law* do not apply. *In re CID to Beam Fin'l, Inc.*, “Order Denying in Part and Granting In Part Petition to Quash or Modify Civil Investigative Demand,” FTC File No. 182-3177, at 3-4 (Aug. 17, 2020). The same distinction renders *Collins v. Yellen* inapposite: “A straightforward application of our reasoning in *Seila Law* dictates the result here. The FHFA (like the CFPB) is an agency led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President’s removal power.” 141 S. Ct. 1761, 1784 (2021).

**2. Responses to “These Proceedings Are Unconstitutional Because Key Decisionmakers At The FTC Are Removable Only For Cause”**

164. Here, because the FTC Commissioners are removable only for cause, they are unconstitutionally shielded from removal, and that renders the FTC’s structure and these proceedings unconstitutional and void.

**Response to Proposed Conclusion No. 164**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

Further, it should also be rejected because *Humphrey’s Executor*, 295 U.S. 602, flatly rejects the theory that FTC commissioners are unconstitutionally shielded from removal. The Supreme Court in *Seila Law* also distinguished the structure of the CFPB from that of the FTC, and expressly declined to overturn *Humphrey’s Executor*, which directly addressed and upheld the constitutionality of the FTC’s structure. 140 S. Ct. 2183, 2192 (2020).

165. Similarly, and independently, because the Court is removable only for cause, it is unconstitutionally shielded from removal, and that renders the FTC's structure and these proceedings unconstitutional and void.

### **Response to Proposed Conclusion No. 165**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

Respondents cite no authority to support this proposition. On the contrary, because the decisions of this Court are reviewable by the Commission, there is no constitutional infirmity with for-cause removal restrictions on FTC ALJs. *Cf. United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1981 (2021). *Free Enterprise Fund*, 561 U.S. at 506; *id.* at 542-43 (Breyer, J., dissenting), expressly rejected the proposition that all ALJs as a general matter are unconstitutionally shielded from removal.

The Proposed Conclusion is also incomplete, misleading and contrary to the law. The Supreme Court recently explained, in holding that the decisions of administrative patent judges ("APJs") must be reviewable by the Director of the U.S. Patent and Trademark Office, that "restrictions on review relieve the Director of responsibility for the final decisions rendered by APJs purportedly under his charge." *Arthrex, Inc.*, 141 S. Ct. at 1981. Rejecting the idea that stripping the APJs of tenure would be an appropriate remedy, *id.* at 1978, 1982, 1987, the Supreme Court stated: "It certainly is the norm for principal officers to have the capacity to review decisions made by inferior adjudicative officers. . . . To take one example recently discussed by this Court in *Free Enterprise Fund*, the Public Company Accounting Oversight Board can issue sanctions in disciplinary proceedings, but such sanctions are reviewable by its superior, the Securities and Exchange Commission." *Id.* at 1984 (internal citations and quotation marks omitted). Accordingly,



the remedy in *Arthrex* was to make the decisions of the Patent Trial and Appeal Board (“PTAB”), on which APJs sit, reviewable by the Director. *Id.* at 1986-87. The decisions of this Court are already reviewable by the Commission, so the Court’s administrative structure comports with the teachings of *Arthrex*. *See id.* at 1988.

This Court’s structure also aligns with the teachings of *SEC v. Lucia*, 138 S. Ct. 2044 (2018), because the Commission appoints FTC ALJs. In *Lucia*, the Supreme Court held that Securities and Exchange Commission (“SEC”) ALJs were principal officers subject to the Appointments Clause. *Id.* at 2049. Accordingly, only the President, Courts of Law, or Heads of Departments could appoint ALJs. *Id.* at 2050. The constitutional defect in *Lucia* was that the appointment of ALJs was left to SEC staff. *Id.* That problem does not exist here. Because the Commission appoints FTC ALJs, and “the Commission itself counts as a Head of Department,” *Lucia* further confirms the constitutionality of this Court’s structure. *Id.* (internal quotation marks and brackets omitted).

**B. Responses to “These Proceedings Unconstitutionally Deprive Respondents Of Due Process And Equal Protection”**

**1. Responses to “The Constitution Guarantees Litigants Due Process And Equal Protection”**

166. Due process demands some scrutiny of how the government makes consequential decisions. *Cf. Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (“[T]he Due Process Clause prohibits the Government [from depriving property under a law] so standardless that it invites arbitrary enforcement.”); *Ballard v. Comm’r*, 544 U.S. 40, 46 (2005) (holding Tax Court cannot exclude special trial judge reports from the record on appeal); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (holding government has a “duty” to “follow a fair process of decisionmaking when it acts to deprive a person of his possessions”). Relatedly, equal protection requires that the government make non-arbitrary decisions as to the forum for pursuing an antitrust claim, and not arbitrarily subject parties to different legal standards. *Cf. Zobel v. Williams*, 457 U.S. 55, 58-64 (1982) (drawing arbitrary lines between citizens based on length of residency in the state violates the Equal Protection Clause).

**Response to Proposed Conclusion No. 166**

The Proposed Conclusion is incomplete and misleading. In their post-trial brief, Respondents suggest that judicial review of cease and desist orders is limited and inadequate to protect their rights (*see* Resps.' Post-Trial Br. at 137-38), but ignore repeated court holdings that the availability of judicial review of Commission orders fully protects such interests. As the Ninth Circuit recently explained, “the FTC statutory scheme ultimately allows [Respondent] to present its constitutional challenges to a federal court of appeals after the administrative proceeding, [so Respondent] has not suffered any cognizable harm.” *Axon Enter. v. FTC*, 986 F.3d 1173, 1177 (9th Cir. 2020). In *FTC v. Louisiana Real Estate Appraisers Board*, 976 F.3d 597 (5th Cir. 2020), the Court similarly held that a Commission cease and desist order can be effectively reviewed by an appellate court. *Id.* at 605. For this reason, appellate courts have consistently rejected attacks on the adequacy of the FTC Act’s judicial review scheme. *See Axon Enter.*, 986 F.3d at 1177.

Moreover, the FTC process affords extensive protections throughout the investigation and litigation of a matter, belying Respondents’ hyperbolic characterization (*see* Resps.’ Post-Trial Br. at 137) of the Commission as “judge, jury, and executioner.” *See* 16 C.F.R. §§ 2.1-2.51, 3.1-3.83. Firms before the FTC have the opportunity to “present their views of the law, facts, and economics to the Commission before it determines whether there is ‘reason to believe’ that a violation occurred.” Maureen K. Ohlhausen, “Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?”, *J. Comp. Law & Econ.* 1, 34 (2016). If a decision is made to issue a complaint, it is true that Congress gave the FTC an option to proceed in administrative court. But the ALJ “is independent of the Commission,” respondents “can cross-examine witnesses and experts,” and “the Commissioners remain cordoned off from the case until the parties argue on appeal from the ALJ.” *Id.* Tellingly, Respondents fail to identify any specific rule or ruling of

this Court that purportedly prejudiced them through some deviation from the “stringent evidentiary and procedural rules [] obtained in federal court.” Resps.’ Post-Trial Br. at 137.

There also is no equal protection issue here because it is entirely within the prosecutorial discretion of the FTC to investigate and litigate a matter that DOJ has declined to investigate and litigate, and vice versa, where the matter is within the statutory remit of both agencies. It is well established that “prosecutorial discretion [is] immune from review in the courts.” *Johns v. DOJ*, 653 F.2d 884, 893 (5th Cir. 1981); *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”). For example, in *United States v. Kay*, 961 F.2d 1505 (10th Cir. 1992), the defendant lodged a due process challenge to being sentenced under federal rather than state law, because “his arrest, the search of his home, and the subsequent investigation were carried out by local law enforcement officials and [] only later was his case referred to federal authorities.” *Id.* at 1505-06. The court rejected that contention, explaining that “the ultimate decision whether to charge a defendant, and what charges to file, rests solely with state and federal prosecutors.” *Id.* at 1506 (citation and internal ellipsis omitted).

167. Due process also requires that parties be given a “fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

### **Response to Proposed Conclusion No. 167**

The Proposed Conclusion is incomplete and misleading. The FTC process affords extensive protections throughout the investigation and litigation of a matter, belying Respondents’ hyperbolic characterization (*see* Resps.’ Post-Trial Br. at 137) of the Commission as “judge, jury, and executioner.” *See* 16 C.F.R. §§ 2.1-2.51, 3.1-3.83. Firms before the FTC have the opportunity to “present their views of the law, facts, and economics to the Commission before it determines whether there is ‘reason to believe’ that a violation occurred.” Maureen K. Ohlhausen,

“Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?”, *J. Comp. Law & Econ.* 1, 34 (2016). If a decision is made to issue a complaint, it is true that Congress gave the FTC an option to proceed in administrative court. But the ALJ “is independent of the Commission,” respondents “can cross-examine witnesses and experts,” and “the Commissioners remain cordoned off from the case until the parties argue on appeal from the ALJ.” *Id.* Tellingly, Respondents fail to identify any specific rule or ruling of this Court that purportedly prejudiced them through some deviation from the “stringent evidentiary and procedural rules [] obtained in federal court.” Resps.’ Post-Trial Br. at 137. Respondents moreover have been represented by a plethora of experienced counsel throughout the entirety of this litigation and the investigation that preceded it. Whereas in *Hamdi*, following military interrogation, the petitioner “received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive’s factual assertions before a neutral decisionmaker” *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004). The comparison is unavailing.

## 2. Responses to “These Proceedings Unconstitutionally Deprive Respondents Of Due Process And Equal Protection”

168. The government’s enforcement scheme is unconstitutional because it precludes scrutiny of how the government is making consequential decisions. For example, the decision of whether the FTC or Department of Justice will lead an antitrust investigation or matter under Section 1 or Section 7 is largely devoid of scrutiny. The same is true for cases where the FTC is leading and decides whether to proceed internally within the agency or in federal court.

### **Response to Proposed Conclusion No. 168**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It is also incomplete, misleading and contrary to the well-established law. Contrary to Respondents' naked assertion (without any support), there is no equal protection issue here because it is entirely within the prosecutorial discretion of the FTC to investigate and litigate a matter that DOJ has declined to investigate and litigate, and vice versa, where the matter is within the statutory remit of both agencies. It is well established that "prosecutorial discretion [is] immune from review in the courts." *Johns v. DOJ*, 653 F.2d at 893; *Marbury v. Madison*, 5 U.S. at 170 ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."). For example, in *Kay*, 961 F.2d 1505, the defendant lodged a due process challenge to being sentenced under federal rather than state law, because "his arrest, the search of his home, and the subsequent investigation were carried out by local law enforcement officials and [] only later was his case referred to federal authorities." *Id.* at 1505-06. The court rejected that contention, explaining that "the ultimate decision whether to charge a defendant, and what charges to file, rests solely with state and federal prosecutors." *Id.* at 1506 (citation and internal ellipsis omitted).

169. The government's enforcement scheme is unconstitutional because the FTC Commissioners are the judge, jury, and executioner of any given case. Forcing parties to go through a convoluted litigation that allows the Commission to attain its preferred outcome regardless of the preceding steps does not comport with due process. *See Hamdi*, 542 U.S. at 533.

#### **Response to Proposed Conclusion No. 169**

The Proposed Conclusion is incomplete and misleading. The FTC commissioners are not the "judge, jury, and executioner of any given case." The FTC process affords extensive protections throughout the investigation and litigation of a matter, belying Respondents' hyperbolic characterization of the Commission as "judge, jury, and executioner." Resps.' Post-Trial Br. at 137. Firms before the FTC have the opportunity to "present their views of the law, facts, and economics to the Commission before it determines whether there is 'reason to believe'

that a violation occurred.” Maureen K. Ohlhausen, “Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?”, *J. Comp. Law & Econ.* 1, 34 (2016). If a decision is made to issue a complaint, it is true that Congress gave the FTC an option to proceed in administrative court. But the ALJ “is independent of the Commission,” respondents “can cross-examine witnesses and experts,” and “the Commissioners remain cordoned off from the case until the parties argue on appeal from the ALJ.” *Id* If the Commission reaches a decision adverse to respondents, they then have extraordinary latitude to select a federal court of appeals in which to challenge that decision. Respondents moreover have been represented by a plethora of experienced counsel throughout the entirety of this litigation and the investigation that preceded it. Whereas in *Hamdi*, following military interrogation, the petitioner “received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive’s factual assertions before a neutral decisionmaker” *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004). The comparison is unavailing.

170. The FTC Commissioners’ ability to overturn all factual findings of this Court is further evidence that that these proceedings deprive respondents of a meaningful opportunity to respond to allegations against them and lack a neutral decisionmaker as required by due process.

#### **Response to Proposed Conclusion No. 170**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

Further, the Proposed Conclusion is incomplete, misleading and contrary to the law. The Supreme Court recently explained, in holding that the decisions of administrative patent judges (“APJs”) must be reviewable by the Director of the U.S. Patent and Trademark Office, that

“restrictions on review relieve the Director of responsibility for the final decisions rendered by APJs purportedly under his charge.” *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1981 (2021). Rejecting the idea that stripping the APJs of tenure would be an appropriate remedy, *id.* at 1978, 1982, 1987, the Supreme Court stated: “It certainly is the norm for principal officers to have the capacity to review decisions made by inferior adjudicative officers. . . . To take one example recently discussed by this Court in *Free Enterprise Fund*, the Public Company Accounting Oversight Board can issue sanctions in disciplinary proceedings, but such sanctions are reviewable by its superior, the Securities and Exchange Commission.” *Id.* at 1984 (internal citations and quotation marks omitted). Accordingly, the remedy in *Arthrex* was to make the decisions of the Patent Trial and Appeal Board (“PTAB”), on which APJs sit, reviewable by the Director. *Id.* at 1986-87. The decisions of this Court are already reviewable by the Commission, so the Court’s administrative structure comports with the teachings of *Arthrex*. *See id.* at 1988.

It should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 167, No. 168, and No. 169.

171. While federal court review is available, the federal court reviews only “the Commission’s ruling, not the ALJ’s” and is deferential to the Commission’s “factfinding.” *Impax Labs., Inc. v. FTC*, 994 F.3d 484, 491 (5th Cir. 2021) (affirming Commission decision to reverse ALJ decision in favor of respondent).

#### **Response to Proposed Conclusion No. 171**

The Proposed Conclusion is incomplete and misleading. Respondents suggest that judicial review of cease and desist orders is limited and inadequate to protect their rights, but ignore repeated court holdings that the availability of judicial review of Commission orders fully protects such interests. As the Ninth Circuit recently explained, “the FTC statutory scheme ultimately allows [Respondent] to present its constitutional challenges to a federal court of appeals after the administrative proceeding, [so Respondent] has not suffered any cognizable harm.” *Axon Enter.*,

986 F.3d at 1177. In *FTC v. Louisiana Real Estate Appraisers Board*, 976 F.3d 597 (5th Cir. 2020), the Court similarly held that a Commission cease and desist order can be effectively reviewed by an appellate court. *Id.* at 605. For this reason, appellate courts have consistently rejected attacks on the adequacy of the FTC Act’s judicial review scheme. *See Axon Enter.*, 986 F.3d at 1177.

Moreover, the FTC process affords extensive protections throughout the investigation and litigation of a matter, belying Respondents’ hyperbolic characterization (*see* Resps.’ Post-Trial Br. at 137) of the Commission as “judge, jury, and executioner.” *See* 16 C.F.R. §§ 2.1-2.51, 3.1-3.83. Firms before the FTC have the opportunity to “present their views of the law, facts, and economics to the Commission before it determines whether there is ‘reason to believe’ that a violation occurred.” Maureen K. Ohlhausen, “Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?”, *J. Comp. Law & Econ.* 1, 34 (2016). If a decision is made to issue a complaint, it is true that Congress gave the FTC an option to proceed in administrative court. But the ALJ “is independent of the Commission,” respondents “can cross-examine witnesses and experts,” and “the Commissioners remain cordoned off from the case until the parties argue on appeal from the ALJ.” *Id.* Tellingly, Respondents fail to identify any specific rule or ruling of this Court that purportedly prejudiced them through some deviation from the “stringent evidentiary and procedural rules [] obtained in federal court.” Resps.’ Post-Trial Br. at 137.

172. These proceedings and the enforcement scheme at issue are unconstitutional and the Complaint must be dismissed.

### **Response to Proposed Conclusion No. 172**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.



It should also be disregarded for the reasons described in Responses to Proposed Conclusion No. 160 through No. 171. For the reasons described above, these proceedings and the FTC's enforcement system are constitutional as Respondents fail to establish any constitutional infirmity with the FTC commissioners, the ALJ, or the due process afforded to respondents by the FTC Act.

## VI. RESPONSES TO “REMEDY”

### A. Responses to “Antitrust Remedies Must Comport With Law And Fact”

173. The lynchpin of an antitrust remedy must be “restor[ing] competition,” not “punish[ing] antitrust violators.” *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). “Thus, [courts] attempt to craft a remedy that will create a competitive environment that would have existed in the absence of the violations.” *In the Matter of Evanston Nw. Healthcare Corp.*, 2007 WL 2286195, at \*77 (F.T.C. Aug. 6, 2007).

#### **Response to Proposed Conclusion No. 173**

The Proposed Conclusion is misleading because it is incomplete. 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 Horizontal Merger Guidelines* § 13. As the Supreme Court has explained, “complete divestiture is peculiarly 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 Proposed Conclusion is also misleading to the extent that it suggests that the facts of this case are similar to the facts in *Evanston*. In the case cited by Respondents, the Commission explained that structural remedies are preferred for Section 7 violations, but that *Evanston* presented a “highly unusual case” where a conduct remedy was more appropriate. 2007 WL 2286195, at \*77-78. The Commission noted that its rationale for not requiring a divestiture in *Evanston* “is likely to have little applicability . . . in a future challenge to an unconsummated merger,” and that its reasoning would not “necessarily apply to consideration of the appropriate remedy in a future challenge to a consummated merger.” *Id.* at \*79. The Commission went on to explain that “[d]ivestiture is the preferred remedy for challenges to unlawful mergers, regardless of whether the challenge occurs before or after consummation.” *Id.*

174. “[A]bsent some measure of confidence that there has been an actual loss to competition that needs to be restored, wisdom counsels against adopting radical structural relief.” *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 230 n.23 (S.D.N.Y. 2020) (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 80 (D.C. Cir. 2001)).

#### **Response to Proposed Conclusion No. 174**

The Proposed Conclusion is misleading to the extent that it suggests that Complaint Counsel has not demonstrated an actual loss of competition. Complaint Counsel has demonstrated that Altria’s partial acquisition of JLI harmed consumers by completely eliminating all forms of current and future competition from Altria, including price competition, innovation competition, and competition for shelf-space. *See* (CCFF §§ VIII.M, X.A-D).

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 173.

175. Antitrust remedies should come “with as little injury as possible to the interest of the general public.” *United States v. American Tobacco Co.*, 221 U.S. 106, 185 (1911).

**Response to Proposed Conclusion No. 175**

The Proposed Conclusion is misleading to the extent that it suggests that a divestiture of Altria’s equity stake in JLI and the immediate termination of all agreements associated with the transaction would injure the public interest. In reality, 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. 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).

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. CC’s Post-Trial Br. § V and Attachment A (Proposed Order); CC’s Post-Trial Reply Br. Discussion § VI.

176. The “current situation is always relevant to the question of equitable relief.” Areeda & Hovenkamp, *Antitrust Law* ¶ 1205e.

**Response to Proposed Conclusion No. 176**

The Proposed Conclusion is misleading for the reasons described in Responses to Proposed Conclusion No. 174 and No. 175.

177. The “solely for investment” exemption provides that minority investments do not implicate the Clayton Act, so long as they are not accompanied by efforts to direct or control the company whose stock is being acquired. See *United States v. Tracinda Inv. Corp.*, 477 F. Supp. 1093, 1098-1102 (C.D. Cal. 1979) (dismissing government’s Section 7 claim because defendant’s acquisition of 19 percent of stock fell within the “solely for investment” exemption); *Anaconda Co. v. Crane Co.*, 411 F. Supp. 1210, 1212, 1218-19 (S.D.N.Y. 1975) (holding “solely for investment” exemption applied to defendant’s acquisition of 22.6 percent of target’s stock).

### **Response to Proposed Conclusion No. 177**

The Proposed Conclusion is incomplete, misleading and contrary to the weight of the evidence. Looking to the structure of the transaction, which included granting Altria seats on JLI’s board, it is clear that Altria sought more than a passive investment in JLI, the current self-enforced “decision” to pause voting rights notwithstanding. See (CCFF ¶¶ 47-49). Indeed, pursuant to the transaction, Altria committed to participate in the e-cigarette business exclusively through JLI. See (CCFF ¶ 107). This commitment is inconsistent with an investment “solely for investment” purposes. See *In the Matter of Golden Grain Macaroni Co.*, 78 F.T.C. 63, 73 (1971) (“In other words, when an acquisition will necessarily affect the competitive behavior of the two involved firms, it cannot be said that the *sole* purpose of the acquisition was for investment.”). Further, the “solely for investment” exemption to the Clayton Act only applies where the parties to the acquisition, are “not using [the acquisition] by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition.” See *United States v. Tracinda Inv. Corp.*, 477 F. Supp. 1093, 1098 n.4 (C.D. Cal. 1979) (citing 15 U.S.C. § 18) (emphasis added). Therefore, the exemption is not applicable here where the evidence of a substantial lessening of competition stemming from the transaction is clear. Pursuant to the transaction, Altria agreed to exit the U.S. closed-system e-cigarette market in exchange for a share of JLI’s profits thus resulting in the complete elimination of all competition from Altria both now and in the future. Accordingly, the statutory exemption Respondent’s claim does not apply here.

The Proposed Conclusion is also irrelevant. 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 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. *See also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1203 (4th Ed. 2013-2018) (“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.”); *Horizontal Merger Guidelines* § 13.

Further, 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.” *Du Pont*, 353 U.S. at 592 ; *see also Yamaha Motor Co.*, 657 F.2d at 947 (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. *See* (CCFF ¶ 1525). Indeed, this is precisely the same concern outlined in the *Horizontal 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.” *Horizontal 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. *See*

(CCFF ¶¶ 944-1015). Thus, it is appropriate and necessary to treat this transaction like any other horizontal merger.

**B. Responses to “Complaint Counsel’s Proposed Remedy Is Not Reasonable, Legally Or Factually”**

178. Complaint Counsel is not entitled to a remedy because it did not prove a violation of law.

**Response to Proposed Conclusion No. 178**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because Complaint Counsel has demonstrated by a preponderance of the evidence that Respondents violated Section 5 of the FTC Act by entering into an unlawful agreement under Section 1 of the Sherman Act, under which Altria exited the U.S. e-cigarette market in exchange for its stake in JLI. *See* (CCFF §§ VI-IX); CC’s Post-Trial Br. § III. Further, it should be disregarded because Complaint Counsel has also demonstrated that the transaction violated Section 7 of the Clayton Act. *See* (CCFF §§ VI, X, XIV); CC’s Post-Trial Br. § IV.

179. Even were the Court to find a violation, Complaint Counsel has not shown that its proposed remedy—an order that the parties terminate the noncompete and Altria divest its stake in JLI—is warranted under the law and facts of the case.

**Response to Proposed Conclusion No. 179**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court’s June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 173.

180. Complaint Counsel has not shown that Altria’s divesting its interest in JLI and terminating the noncompete would create a competitive environment that would have existed in the absence of the violations. Altria does not have any grandfathered e-vapor products that it could market in the absence of a PMTA. (FF ¶¶ 60-66, 119). And even assuming that Altria could develop a viable e-vapor product from scratch years from now, there is no basis to assume that product would garner FDA approval. (FF ¶¶ 1539-52). Divestiture and termination of the noncompete will not change those realities.

**Response to Proposed Conclusion No. 180**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded for the reasons described in Response to Proposed Conclusion No. 173 and in Complaint Counsel’s corresponding Reply Findings. *See* (CCRRFF ¶¶ 60-66, 119, 1539-52).

Further, it should be disregarded because it is factually inaccurate. Complaint Counsel has demonstrated that 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, (*see* CCFF ¶¶ 507-31, 1553-730); and that 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. *See* (CCFF ¶¶ 493-506).

It should also be rejected because the evidence in the record clearly shows that Altria {  
[REDACTED]  
[REDACTED]  
[REDACTED]} *See* (CCFF ¶¶ 1638-93, 1708-10; CCRRFF ¶¶ 1627, 1630). {  
[REDACTED]  
[REDACTED]

█ } See (CCRRFF ¶¶ 1551, 1620-22; CCFF ¶ 1709). This is not wild speculation by Complaint Counsel, but █

█ } See (CCFF ¶¶ 1677-81, 1697, 1704-10; CCRRFF ¶¶ 1551, 1620-22, 1625, 1627, 1630). In fact, {█

█ } See (CCFF ¶¶ 1698-710).

In addition, it is undisputed that Altria has the unrivaled “ability (unlike other potential entrants) to reenter the market given its extensive background, regulatory experience, and ample funds.” *In re Juul Labs, Inc. Antitrust Litigation*, 2021 WL 3675208, at \*21 (N.D. Cal. Aug. 19, 2021).

181. Complaint Counsel has not shown with any measure of confidence that there has been an actual loss to competition because, as explained above (FF ¶¶ 1284-376), competition flourished in the wake of the transaction.

### **Response to Proposed Conclusion No. 181**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

Further, the Proposed Conclusion is inaccurate and misleading to the extent that it suggests that Complaint Counsel has not demonstrated an actual loss of competition. Complaint Counsel has demonstrated that Altria’s partial acquisition of JLI harmed consumers by instantly eliminating all forms of current and future competition from Altria, including price competition, innovation competition, and competition for shelf-space. *See* (CCFF §§ VIII.M, X.A-D).

182. Complaint Counsel has not shown that divestiture and terminating the noncompete would minimize injury to the interest of the general public. To the contrary, given the critical and ongoing regulatory support and guidance that Altria is providing to JLI, divestiture and



termination of the noncompete could be a serious detriment to JLI's efforts to secure regulatory approval for a product that could benefit public health.

**Response to Proposed Conclusion No. 182**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because it is misleading and factually inaccurate for the reasons described in Response to Proposed Conclusion No. 175.

183. Under the "current situation" and unique circumstances of this case, where competition has flourished in the wake of the transaction at issue, it would be unfair and punitive to require Altria to divest its stake in a fire-sale type setting that would likely further diminish any return on an investment that has already been written down by over \$11 billion (almost 90 percent), (FF ¶¶ 1141-50), and to terminate the noncompete that enables JLI and consumers to benefit from Altria's regulatory expertise, (FF ¶¶ 1717-27).

**Response to Proposed Conclusion No. 183**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Consequently, it should be disregarded.

It should also be disregarded because it is misleading for the reasons described in Response to Proposed Conclusion No. 173.

184. Finally, because Altria's investment is currently passive, it is punitive, incoherent, and untethered from the text of the Clayton Act for Complaint Counsel to demand a remedy that would proscribe what Congress expressly permitted.

**Response to Proposed Conclusion No. 184**

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority or record evidence as required by the Court's June 28, 2021 Order on Post-Trial Filings, at 2-3. Consequently, it should be disregarded.

It should also be disregarded because it is contrary to the law for the reasons described in Response to Proposed Conclusion No. 177.

**PUBLIC**

Dated: October 19, 2021

Respectfully submitted,

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**PUBLIC****CERTIFICATE OF SERVICE**

I hereby certify that on October 19, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell  
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I also certify that I delivered via electronic mail a copy of the foregoing document to:

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