

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

In the Matter of

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

and

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

Respondents.

Docket No. 9393

**POST-TRIAL BRIEF OF RESPONDENTS
ALTRIA GROUP, INC. AND JUUL LABS, INC.**

TABLE OF CONTENTS

INTRODUCTION1

FACTS5

I. Background.....5

 A. Altria established Nu Mark in 2012 to compete in the innovative product space, but lacked innovation capabilities and struggled out of the gate.....5

 B. In 2015, JLI launched a pod-based e-vapor product that mimics the nicotine experience of cigarettes.8

 C. In 2016, FDA began to comprehensively regulate e-vapor products.11

II. Late 2017 – April 2018: Altria’s Nu Mark Subsidiary Attempted to Catch Up, but Problems Quickly Emerged14

 A. In 2017, Altria was caught flat-footed by rising consumer demand for pods.....14

 B. In February 2018, Nu Mark rushed Elite, its pod product, out to market and immediately faced headwinds.....18

 C. Despite increasingly heavy promotional efforts, Elite was not catching on with consumers.20

 D. MarkTen and Elite’s inability to convert smokers and other technical problems doomed their PMTA prospects.22

 E. Altria and JLI engaged in preliminary discussions about an investment but made little progress.....24

III. May 2018 – August 2018: Under New Leadership, Altria Undertook a Candid Assessment of the State of Its E-Vapor Business, and the Results Were Bleak.....25

 A. In May 2018, Altria restructured its leadership, appointing Brian Quigley the head of Nu Mark, Murray Garnick the head of Regulatory Sciences, and K.C. Crosthwaite as Chief Growth Officer.....25

 B. Soon after taking the job, Quigley experienced a “Eureka” moment precipitated by the findings of Altria’s scientists: Nu Mark’s products lacked the nicotine salts they needed to deliver nicotine satisfaction.....27

 C. In June 2018, Altria’s leadership concluded that Nu Mark’s products were fundamentally flawed based on the findings of Altria’s scientists and that the business was in dire need of change.29

 D. In July 2018, the Regulatory Affairs team began preparing an update for the Board that would convey the products’ dim hopes for FDA approval.32

 E. In August 2018, Quigley informed management that Elite was not competitive, and management updated the Board on Nu Mark’s challenges.....34

IV. August 2018: Altria and JLI Discussed a Possible Investment, but Negotiations Broke Down at the End of the Month.....37

 A. On July 30, 2018, JLI sent Altria an initial proposed term sheet, which Altria promptly rejected.....37

 B. The parties engaged in active negotiations throughout August 2018 and coalesced around a structure by which Altria would divest or contribute its e-vapor assets pursuant to HSR review.40

- C. Negotiations collapsed at the end of August for reasons unrelated to the noncompete.....43
- V. Early-to-Mid September 2018: After Coming to Grips with Nu Mark’s Challenges, Altria Decided to Downsize Nu Mark, Suspend Development Work, and Chart a New Course in E-Vapor—the Growth Teams.....44
- VI. Mid-to-Late September 2018: FDA Called on Altria to Combat Youth Use and Altria Decided to Pull Elite and Non-Traditional Cig-a-Like Flavors in Response46
 - A. FDA called for manufacturers to take prompt and forceful action to address youth vaping on September 12, 2018.46
 - B. At a leadership team meeting held on September 26, 2018, senior management conveyed that it would discontinue Elite and transition to the Growth Teams.....48
- VII. October 2018: Altria Pursued Parallel Paths in E-Vapor—The Growth Teams and an Investment in JLI.....49
 - A. Altria announced the Growth Teams.50
 - B. Altria sent JLI a letter, and negotiations resumed.....51
- VIII. October 25, 2018: Altria Pulled Its Pod Product and Non-Traditional Flavors in Response to FDA’s Concerns53
 - A. Altria discontinued Elite in response to FDA’s concerns.....53
 - B. To Altria’s surprise, JLI remained willing to continue negotiations.54
 - C. Shortly thereafter, JLI removed its own non-traditional flavored products from retail.55
- IX. December 7, 2018: Seeking Cost Savings for New Opportunities and Lacking Viable E-Vapor Products, Altria Discontinued Nu Mark’s Remaining Cig-A-Like Products.....56
- X. December 20, 2018: After Further Impasses that Nearly Scuttled the Deal in December, the Parties Executed the Transaction.....58
- XI. Post-Investment: Altria Provided Critical Regulatory Services to Assist JLI with Its PMTA Filing.....60
- XII. Post-Investment: Competition in the E-Vapor Category Flourished.....63
- DISCUSSION.....68
 - I. Complaint Counsel Failed to Prove an Agreement or that Altria Removed Its E-Vapor Products for Pretextual Reasons, Dooming Its Section 1 Claim and Gutting Its Section 7 Claim.....68
 - A. Complaint Counsel failed to prove that Altria removed its e-vapor products pursuant to an agreement with JLI.....68
 - 1. The negotiation history disproves Complaint Counsel’s theory.....69
 - 2. Complaint Counsel has not met its burden to overcome the uniform sworn denials of conspiracy.....76

3.	Complaint Counsel’s theory is irreconcilable with JLI’s assessment of Altria’s products and JLI’s reaction to their withdrawal.	77
B.	The record confirms that Altria removed its products for independent business reasons, further gutting the Section 1 Claim.	79
1.	Complaint Counsel did not meet its burden to prove that Altria’s decision to pull the Elite pod product and non-traditional cig-a-like flavors was pretextual.	79
2.	Complaint Counsel did not meet its burden to prove that Altria’s decision to pull its remaining traditional cig-a-like flavors was pretextual.	84
C.	Complaint Counsel’s failure to sustain its secret agreement and pretext theory also guts its Section 7 claim.	88
II.	Complaint Counsel Failed to Prove Substantial Anticompetitive Effects	88
A.	Competition in the real world has intensified since the investment.	90
1.	Post-acquisition evidence is properly before the Court for purposes of analyzing both of Complaint Counsel’s claims.	90
2.	The post-acquisition evidence, all of which is undisputed, is devastating to Complaint Counsel’s effects theory.	91
B.	Complaint Counsel failed to carry its burden on market definition.....	96
1.	Complaint Counsel failed to prove a product market of closed-system e-vapor products.	96
2.	Complaint Counsel misapplies the hypothetical monopolist test.	100
C.	Complaint Counsel is not entitled to a presumption of anticompetitive harm.	101
1.	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.	102
2.	Complaint Counsel’s calculation of market concentration is methodologically flawed and cannot form the basis of a presumption of anticompetitive harm.	104
i.	Improper Calculation of Pre-Transaction Shares.....	104
ii.	Improper Calculation of Post-Transaction Shares	105
3.	Dr. Rothman’s HHI calculations are not a reliable indicator of anticompetitive effects in the context of this case.	107
D.	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.	108
1.	This Court should take account of the regulatory scheme.	109
2.	Altria would not have been a significant competitor with Nu Mark’s existing products.	110

3. With respect to products that Altria had not yet developed or commercialized, Complaint Counsel cannot satisfy the “actual potential competition” doctrine.113

 i. Complaint Counsel has not offered “clear proof” of future entry.114

 ii. Complaint Counsel cannot demonstrate that entry would occur in the “near future.”115

 iii. Complaint Counsel failed to prove that Altria was capable of developing a new, competitive product with which it could attempt to enter.116

 iv. Complaint Counsel failed to prove that Altria was likely to partner with PMI and enter with PMI’s VEEV product in the “near future.”118

4. Complaint Counsel did not show any harm to price competition, innovation competition, or shelf space competition.120

E. The conclusions of Complaint Counsel’s expert rest on indefensible assumptions and are due no weight.121

 1. Dr. Rothman’s opinion that Altria would have been a significant competitor is unreliable.121

 2. Dr. Rothman’s harm estimates rest on indefensible and illogical assumptions.123

 3. Dr. Rothman’s harm estimates are offset by expansion and the critical PMTA assistance Altria provided to JLI as a result of the transaction.126

III. Complaint Counsel Cannot Meet Its Burden to Prove that the Actual Noncompete Is Anticompetitive.....127

 A. The actual noncompete is ancillary to a legitimate business integration.128

 B. The actual noncompete is reasonable and facilitated Altria’s provision of unique and critical regulatory services to JLI in support of JLI’s PMTA.128

 C. Complaint Counsel has not proffered a viable, less restrictive alternative.131

IV. JLI Cannot Be Found to Have Violated Section 7 of the Clayton Act132

V. FTC Administrative Proceedings Are Unconstitutional133

 A. FTC Commissioners are unconstitutionally shielded from removal.133

 B. The Court is unconstitutionally shielded from removal.134

 C. The FTC’s enforcement regime violates Due Process and Equal Protection.136

VI. Complaint Counsel Is Not Entitled to the Remedy It Seeks138

CONCLUSION.....142

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Am. Acad. of Pediatrics v. FDA</i> , 399 F. Supp. 3d 479 (D. Md. 2019)	62
<i>Am. Key Corp. v. Cumberland Assocs.</i> , 579 F. Supp. 1245 (N.D. Ga. 1983)	77
<i>Am. Tobacco Co. v. United States</i> , 328 U.S. 781 (1946)	68
<i>Anaconda Co. v. Crane Co.</i> , 411 F. Supp. 1210 (S.D.N.Y. 1975)	141
<i>Axon Enter., Inc. v. FTC</i> , 986 F.3d 1173 (9th Cir. 2021)	136, 138
<i>Azco Biotech, Inc. v. Qiagen, N.V.</i> , 2015 WL 12516024 (S.D. Cal. July 2, 2015)	75
<i>Ballard v. Comm’r</i> , 544 U.S. 40 (2005)	137
<i>Beckles v. United States</i> , 137 S. Ct. 886 (2017)	137
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	68, 79, 127
<i>Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan</i> , 203 F.3d 1028 (8th Cir. 2000)	69
<i>BOC Int’l, Ltd. v. FTC</i> , 557 F.2d 24 (2d Cir. 1977)	115
<i>Brotech Corp. v. White Eagle Int’l Techs. Grp., Inc.</i> , 2004 WL 1427136 (E.D. Pa. June 21, 2004)	115
<i>Brown Shoe Co. v. United States</i> , 370 U.S. 294 (1962)	<i>passim</i>
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	135
<i>Chem-Nuclear Sys. v. Waste Mgmt.</i> , 1982 WL 1320 (W.D. Wash. July 16, 1982)	116, 117

Chi. Bridge & Iron Co. v. FTC,
534 F.3d 410 (5th Cir. 2008)90, 108

City of Moundridge v. Exxon Mobil Corp.,
429 F. Supp. 2d 117 (D.D.C. 2006)76

City of Pittsburgh v. W. Penn Power Co.,
147 F.3d 256 (3d Cir. 1998).....109, 115

Cnty. of Tuolumne v. Sonora Cmty. Hosp.,
236 F.3d 1148 (9th Cir. 2001)131

Collins v. Yellen,
141 S. Ct. 1761 (2021).....134

Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.,
720 F.2d 1553 (11th Cir. 1983)128

Dailey v. Quality School Plan, Inc.,
380 F.2d 484 (5th Cir. 1967)133

Eichorn v. AT&T Corp.,
248 F.3d 131 (3d Cir. 2001).....128

Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd.,
833 F.3d 680 (6th Cir. 2016)124

Esco Corp. v. United States,
340 F.2d 1000 (9th Cir. 1965)78

Fleming v. U.S. Dep’t of Agric.,
987 F.3d 1093 (D.C. Cir. 2021)136

Ford Motor Co. v. United States,
405 U.S. 562 (1972).....140

Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,
561 U.S. 477 (2010).....133, 135, 136

Fruehauf Corp. v. FTC,
603 F.2d 345 (2d Cir. 1979).....89

FTC v. Arch Coal, Inc.,
329 F. Supp. 2d 109 (D.D.C. 2004)96

FTC v. Atl. Richfield Co.,
549 F.2d 289 (4th Cir. 1977)103, 116, 117

FTC v. H.J. Heinz Co.,
246 F.3d 708 (D.C. Cir. 2001)106

FTC v. Steris Corp.,
133 F. Supp. 3d 962 (N.D. Ohio 2015).....115

FTC v. Sysco Corp.,
113 F. Supp. 3d 1 (D.D.C. 2015)101

FTC v. Wilh. Wilhelmsen Holding ASA,
341 F. Supp. 3d 27 (D.D.C. 2018).....96

Fuentes v. Shevin,
407 U.S. 67 (1972).....137

Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.,
386 F.3d 485 (2d Cir. 2004).....102

Gerlinger v. Amazon.com, Inc.,
311 F. Supp. 2d 838 (N.D. Cal. 2004)132

Hamdi v. Rumsfeld,
542 U.S. 507 (2004).....138

Highland Cap. Mgmt., L.P. v. Schneider,
551 F. Supp. 2d 173 (S.D.N.Y. 2008).....122

Humphrey’s Executor v. United States,
295 U.S. 602 (1935).....134

Impax Labs., Inc. v. FTC,
994 F.3d 484 (5th Cir. 2021)138

Impro Prods., Inc. v. Herrick,
715 F.2d 1267 (8th Cir. 1983)76

In re AMR Corp.,
625 B.R. 215 (Bankr. S.D.N.Y. 2021)91, 94

In re Baby Food Antitrust Litig.,
166 F.3d 112 (3d Cir. 1999)..... *passim*

In re Brand Name Prescription Drugs Antitrust Litig.,
288 F.3d 1028 (7th Cir. 2002)82

In re Ciprofloxacin Hydrochloride Antitrust Litig.,
261 F. Supp. 2d 188 (E.D.N.Y. 2003)75

In re Citric Acid Litig.,
191 F.3d 1090 (9th Cir. 1999)85

In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.,
174 F. Supp. 3d 911 (D.S.C. 2016).....122

In re Pool Prods. Distrib. Mkt. Antitrust Litig.,
158 F. Supp. 3d 544 (E.D. La. 2016)86

In the Matter of B.A.T. Indus., Ltd.,
1984 WL 565384 (F.T.C. Dec. 17, 1984)..... *passim*

In the Matter of Benco Dental Supply Co.,
2019 WL 5419393 (F.T.C. Oct. 15, 2019).....70

In the Matter of Evanston Nw. Healthcare Corp.,
2007 WL 2286195 (F.T.C. Aug. 6, 2007)138, 140

In the Matter of Golden Grain Macaroni Co.,
78 F.T.C. 63 (1971).....141 n. 779

In the Matter of Heublein, Inc.,
96 F.T.C. 385 (1980).....113, 115

In the Matter of Impax Labs., Inc.,
2018 WL 2336009 (F.T.C. May 18, 2018).....109

In the Matter of Impax Labs., Inc.,
2019 WL 1552939 (F.T.C. March 28, 2019).....137

In the Matter of McWane, Inc.,
2013 WL 8364918 (F.T.C. May 1, 2013)..... *passim*

In the Matter of Otto Bock Healthcare N. Am., Inc.,
2019 WL 2118886 (F.T.C. May 6, 2019).....93, 126

Kendall v. Visa U.S.A., Inc.,
518 F.3d 1042 (9th Cir. 2008)79

Lamb’s Patio Theatre, Inc. v. Universal Film Exchs., Inc.,
582 F.2d 1068 (7th Cir. 1978)76

Lektro-Vend Corp. v. Vendo Co.,
660 F.2d 255 (7th Cir. 1981) *passim*

Lucia v. SEC,
138 S. Ct. 2044 (2018).....135

MacDermid Printing Sols. LLC v. Cortron Corp.,
833 F.3d 172 (2d Cir. 2016).....91, 92

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986).....69, 79, 93

Mercantile Tex. Corp. v. Bd. of Governors of Fed. Rsrv. Sys.,
638 F.2d 1255 (5th Cir. 1981)115, 116

Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984).....69, 79, 88

Morrison v. Olson,
487 U.S. 654 (1988).....134

Murdaugh Volkswagen, Inc. v. First Nat’l Bank of S.C.,
639 F.2d 1073 (4th Cir. 1981)69

N. Am. Soccer League, LLC v. U.S. Soccer Fed’n, Inc.,
883 F.3d 32 (2d Cir. 2018).....131

NCAA v. Alston,
141 S. Ct. 2141 (2021).....89, 90, 131

New York v. Deutsche Telekom AG,
439 F. Supp. 3d 179 (S.D.N.Y. 2020).....108, 139

Ohio v. Am. Express Co.,
138 S. Ct. 2274 (2018).....89, 91, 129

Perceptron, Inc. v. Sensor Adaptive Machs., Inc.,
221 F.3d 913 (6th Cir. 2000)128

Petruzzi’s IGA Supermarkets, Inc. v. Darling-Del. Co.,
998 F.2d 1224 (3d Cir. 1993).....77

Phonetele, Inc. v. Am. Tel. & Tel. Co.,
664 F.2d 716 (9th Cir. 1981), *modified* (9th Cir. Mar. 15, 1982).....109

Rickards v. Canine Eye Registration Found., Inc.,
704 F.2d 1449 (9th Cir. 1983)83

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,
792 F.2d 210 (D.C. Cir. 1986).....124, 126

Safeway Inc. v. Abbott Labs.,
761 F. Supp. 2d 874 (N.D. Cal. 2011).....99

Se. Mo. Hosp. v. C.R. Bard, Inc.,
642 F.3d 608 (8th Cir. 2011)96

SEC v. Tourre,
950 F. Supp. 2d 666 (S.D.N.Y. 2013).....121, 122, 123

Seila Law LLC v. CFPB,
140 S. Ct. 2183 (2020).....133, 134, 135

Tim W. Koerner & Assocs., Inc. v. Aspen Labs, Inc.,
492 F. Supp. 294 (S.D. Tex. 1980), *aff'd*, 638 F.2d 416 (5th Cir. 1982)133

Todorov v. DCH Healthcare Auth.,
921 F.2d 1438 (11th Cir. 1991)81

United States v. Aetna Inc.,
240 F. Supp. 3d 1 (D.D.C. 2017).....102, 103, 104, 113 n.695

United States v. Am. Tobacco Co.,
221 U.S. 106 (1911).....139

United States v. Anthem, Inc.,
236 F. Supp. 3d 171 (D.D.C. 2017)120

United States v. Arthrex, Inc.,
141 S. Ct. 1970 (2021).....135

United States v. Baker Hughes Inc.,
908 F.2d 981 (D.C. Cir. 1990).....102, 108

United States v. Bazaarvoice, Inc.,
2014 WL 203966 (N.D. Cal. Jan. 8, 2014).....90, 95, 98

United States v. Black & Decker Mfg. Co.,
430 F. Supp. 729 (D. Md. 1976).....117

United States v. Brown Univ.,
5 F.3d 658 (3d Cir. 1993).....130

United States v. Citizens & S. Nat’l Bank,
422 U.S. 86 (1975).....89

United States v. Coca-Cola Bottling Co. of Los Angeles,
575 F.2d 222 (9th Cir. 1978)132

United States v. E. I. du Pont de Nemours & Co.,
366 U.S. 316 (1961).....138, 140, 141

United States v. Gen. Dynamics Corp.,
415 U.S. 486 (1974).....90, 108

United States v. H & R Block, Inc.,
833 F. Supp. 2d 36 (D.D.C. 2011)101

United States v. Int’l Harvester Co.,
564 F.2d 769 (7th Cir. 1977)91

United States v. Int’l Harvester Co.,
1976 WL 1298 (N.D. Ill. Aug. 17, 1976)93

United States v. Marine Bancorporation, Inc.,
418 U.S. 602 (1974).....110

United States v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001)139

United States v. Siemens Corp.,
621 F.2d 499 (2d Cir. 1980).....88 n.600

United States v. Tracinda Inv. Corp.,
477 F. Supp. 1093 (C.D. Cal. 1979) 141 & n.779

Venzie Corp. v. United States Min. Prods. Co.,
521 F.2d 1309 (3d Cir. 1975).....76

Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP,
540 U.S. 398 (2004).....109

Wolfe v. McNeil-PPC, Inc.,
881 F. Supp. 2d 650 (E.D. Pa. 2012)122

Worldwide Basketball & Sport Tours, Inc. v. NCAA,
388 F.3d 955 (6th Cir. 2004)96

Yamaha Motor Co. v. FTC,
657 F.2d 971 (8th Cir. 1981)114 n.696

Z Techs. Corp. v. Lubrizol Corp.,
753 F.3d 594 (6th Cir. 2014)102

ZF Meritor LLC v. Eaton Corp.,
646 F. Supp. 2d 663 (D. Del. 2009).....125

Zobel v. Williams,
457 U.S. 55 (1982).....137

Constitutional Provisions, Statutes, Rules, and Regulations

16 C.F.R. § 3.21-43.....137

16 C.F.R. § 3.41-44.....135

16 C.F.R. § 3.51135, 137

16 C.F.R. § 3.52.....137

16 C.F.R. § 3.54(a).....137

5 U.S.C. § 1202(d)136

5 U.S.C. § 7521(a)136

15 U.S.C. § 1..... *passim*

15 U.S.C. § 18..... *passim*

15 U.S.C. § 21(c)137

15 U.S.C. § 41.....133, 136

15 U.S.C. § 45(b)136, 137

21 U.S.C. § 387a.....11 n.40

21 U.S.C. § 387g(a)(3)(B)(i).....12 n.49

21 U.S.C. § 387j..... *passim*

Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act,
81 Fed. Reg. 28,973 (May 10, 2016)..... *passim*

Family Smoking Prevention and Tobacco Control Act of 2009,
Pub. L. No. 111-31, 123 Stat. 1776 (2009)..... *passim*

Fed. R. Civ. Proc. 52(a)(6).....137

U.S. Const. Art. II, § 1, cl. 1133, 134

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Other Authorities

Joshua D. Wright, *Section 5 Revisited: Time for the FTC to Define the Scope of
Its Unfair Methods of Competition Authority* (Feb. 26, 2015)137

Medtronic, Inc.; Analysis to Aid Public Comment,
63 Fed. Reg. 53919 (Oct. 7, 1998).....142

Phillip E. Areeda & Herbert Hovenkamp,
Antitrust Law (4th and 5th eds. 2013-2020 & 2021 Cum. Supp.) *passim*

U.S. DOJ, *Memorandum: Guidance on Administrative Law Judges*135

U.S. DOJ & FTC, *Horizontal Merger Guidelines* *passim*

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United States v. The Gillette Co., Civil No. 90-0053-TFH (D.D.C.),
55 Fed. Reg. 28312 (July 10, 1990).....142

INTRODUCTION

Complaint Counsel seeks to undo an investment by which Respondent Altria Group, Inc., whose operating company is the largest manufacturer of combustible cigarettes in the United States, invested \$12.8 billion to acquire 35 percent of Respondent Juul Labs, Inc. (“JLI”), the maker of JUUL, a leading e-vapor product. The investment closed more than two-and-a-half years ago on December 20, 2018.

There is no dispute that the actual agreement between Altria and JLI included a limited noncompete, prohibiting Altria from developing new e-vapor products while providing services to JLI post-transaction. There is no dispute that since the investment, Altria has provided those valuable services, helping JLI seek critical FDA approval for its product—services that require access to JLI’s trade secrets and confidential information. There is also no dispute that, since the investment, pod-based products with nicotine salts have continued to be favored by almost all e-vapor customers, and that Altria both lacked such a product and could not attempt to launch one in any reasonable time frame given FDA’s stringent regulatory scheme. And there is no dispute that since the investment, the e-vapor category has become more and more competitive with prices falling, output rising, and JLI’s market share dramatically declining.

Complaint Counsel nonetheless presents these facts as antithetical to the antitrust laws, contending that Altria and JLI secretly conspired to remove Altria’s products as a precondition of the transaction and that Altria’s reasons for removing its on-market products amounted to pretext. In the complaint that initiated this action, the pretrial brief filed before the administrative hearing, and the opening statement before this Court, Complaint Counsel promised that it would prove this secret conspiracy.

Complaint Counsel failed to do so.

Take Complaint Counsel’s promise that it would show that Altria and JLI secretly agreed to a deal by which Altria would remove its products from the market as a precondition for entering into a transaction. At trial, this contention fell apart. Complaint Counsel skipped over parts of the negotiating history and then, when the actual individuals involved came to testify about the

negotiations, avoided asking them what was said across the table. But Respondents' Counsel did—and every witness confirmed, under oath, that there was no such secret agreement.

The same is true for Complaint Counsel's claim that Altria's reasons for removing its products were all pretextual. Complaint Counsel said it would show that there was a "sudden" shift within Altria—after JLI supposedly demanded the market exit—from believing in its existing products and innovative tobacco product subsidiary, Nu Mark, to giving up on them. Complaint Counsel even went so far as to say it would show that a presentation to Altria's Board of Directors about the problems with Nu Mark's products was an intentionally false attempt to paper the record after Altria concluded it would need to pull those products to complete the deal with JLI. Again, these baseless contentions fell flat at trial. Complaint Counsel ignored Altria's long struggles in developing an innovative product—struggles recognized internally before negotiations with JLI took off. Complaint Counsel ignored Altria's "Eureka moment" in June 2018—again, before negotiations heated up—when Altria's scientists and, in turn, leadership discovered that the products lacked what they needed to compete. And Complaint Counsel ignored the fact that the Board materials were prepared by regulatory personnel and scientists who had no involvement in the negotiations, long before the exchange of term sheets that Complaint Counsel alleges is evidence of a secret agreement.

Finally, there is Complaint Counsel's attempt to stitch together a theory of anticompetitive effect in the face of falling prices, rising output, and a far less concentrated market. Here Complaint Counsel relies most heavily on its economic expert—but once again is forced to resort to inventions and misdirection. Complaint Counsel's economic model and Section 7 theory rely on a claim that Altria had at least a 10 percent market share in Complaint Counsel's alleged market at the time of the transaction. Putting aside that Altria had exited prior to the signing of the transaction agreements, Complaint Counsel's numbers don't add up. Complaint Counsel contends that cig-a-likes and pods appeal to the same consumers and thus are in the same market, defying both the government's own practice of defining the market by reference to the narrowest product market and extensive testimony and evidence that market participants viewed these product segments as separate. Complaint Counsel also relies on Altria's average share from October 2017 to

September 2018 when the best evidence—cited by Complaint Counsel itself—shows that Altria’s share was steadily plummeting before the transaction, was well below 10 percent in the market alleged by Complaint Counsel, and was only about one percent or less in a narrower pod-based product market. And Complaint Counsel and its expert ignore the readily available real-world evidence of increased competition post-transaction, even to test the assumptions used in its expert’s model.

The Court had the chance to hear directly from the executives who negotiated Altria’s investment in JLI, the businesspeople responsible for marketing the products at issue, the scientists and regulatory personnel who advised them on the prospects for commercial and regulatory success in this highly regulated market, and third-party market participants. Their evidence overwhelmingly confirms there was no antitrust violation and that Altria’s exit from the market was justified by independent business reasons. And, once the products were discontinued, the market did not miss them. To accept Complaint Counsel’s theory, the Court would have to conclude that every one of these witnesses was lying under oath.

The senior-most individuals responsible for negotiating the transaction appeared before the Court. For Altria, the Court heard directly from Howard Willard, Altria’s former CEO, and Billy Gifford, its then-CFO, along with Altria’s general counsel, Murray Garnick. For JLI, the Court heard directly from Nicholas Pritzker and Riaz Valani, two directors personally involved in the negotiations. These witnesses confirmed for the Court that there was no secret agreement. Similarly, JLI’s former CEO Kevin Burns confirmed at his deposition that there was no such agreement. Instead, the documentary record of the negotiation means exactly what it says: all parties expected and assumed that the transaction would be reviewed by the FTC, that any divestiture or other disposition of Altria’s products as a result of the transaction would take place only after the transaction closed, and that until then Altria could continue marketing its existing products.

Business executives with responsibility for marketing and distributing the products in question also came before the Court, both for Altria and for JLI. For Altria, the Court heard directly from Brian Quigley, who oversaw Nu Mark in the critical period in 2018; Jody Begley, Quigley’s

predecessor; Craig Schwartz, Nu Mark's head of operations; and Scott Myers, the leader of Altria's distribution company. For JLI, the Court heard directly from Joseph O'Hara, who oversaw competitive analysis and intelligence for JLI in 2018, and Bob Robbins, who was head of sales for JLI in 2018. The Altria executives explained how Nu Mark struggled for years to develop a competitive e-vapor product in the cig-a-like segment, unaware that Nu Mark's existing products lacked the key attributes necessary to compete in the emerging pod-based market that relied on nicotine salts. And the JLI executives explained how JLI did not view Altria's products as a threat. Indeed, Nu Mark's challenges were so significant that as a result of a 100-day review process begun in June 2018 and thus before the key period of negotiations with JLI, Altria determined to downsize Nu Mark, suspend development work, and start over with "Growth Teams"—teams that would try to come up with leapfrog products that Altria could potentially market five to ten years down the line (a tall order given Altria's poor track record with innovation).

The Court also heard from key scientists and regulatory officials. Richard Jupe, Altria's Vice President of Product Development, Dr. Bill Gardner, Altria's then-Senior Principal Scientist, and Joe Murillo, Altria's then-Senior Vice President of Regulatory Affairs, testified at length about the significant issues Nu Mark products faced that made it highly unlikely they could obtain regulatory approval. Murillo, who became JLI's Chief Regulatory Officer after the transaction, also explained the significance of FDA's regulatory scheme and how Altria provided invaluable assistance to JLI in seeking to meet FDA's requirements.

The Court also heard from Willard and Gifford about their decisions to withdraw Nu Mark's products from the market. They explained that they decided to remove Elite, the company's pod-based product, and non-traditional flavors of MarkTen cig-a-like in response to FDA's letter raising concerns about those products, and in light of the significant regulatory and commercial issues confronting the products. As for the later decision to shut down Nu Mark and remove the remaining traditional-flavored cig-a-likes, it was made in connection with annual budgeting, after years of losses and with no prospects of profitability in the future. Complaint Counsel offers nothing but conjecture in response. In all cases, these decisions were independent of any potential transaction with JLI and made without any input from JLI or with any notice to JLI. Every JLI

witness involved in the negotiations confirmed that the company had no prior discussions with Altria about these decisions, nor were they aware of Altria's actions until they became public. Complaint Counsel offered no evidence to the contrary.

Lastly, the Court heard from third-party market participants, including competitors whose nicotine salts-based products have enjoyed far greater success than Altria's Elite pod product and which have engaged in aggressive price competition in the pod-based market since the transaction. These third parties all made clear that the market is highly competitive today and that Elite was an inferior product.

No matter the point of view, the record is clear: Altria's products were no competitive threat to JLI, their removal did not make the market less competitive, and the market remains highly competitive today.

Complaint Counsel failed to meet its burden. The Court should dismiss the complaint in its entirety.

FACTS

I. Background

A. **Altria established Nu Mark in 2012 to compete in the innovative product space, but lacked innovation capabilities and struggled out of the gate.**

Altria Group, Inc. is the parent of multiple tobacco companies, including Philip Morris USA, the largest cigarette company in the United States and the manufacturer of Marlboro.¹ As numerous witnesses testified at trial, Altria has been aware for many years of the secular decline of cigarette use and the importance of offering existing cigarette consumers alternatives that do not depend on burning tobacco to deliver nicotine and that may therefore pose lower health risks than cigarettes.² But as numerous witnesses also testified, Altria has a poor track record in developing such alternatives.³ Some of the early failures, even before the emergence of e-vapor products,

¹ FF ¶¶ 127-31.

² FF ¶¶ 140-41 (Willard (Altria) Tr. 1320, 1325; Jupe (Altria) Tr. 2212; Gifford (Altria) Tr. 2709).

³ FF ¶¶ 1558, 1560-61 (Schwartz (Altria) Tr. 1913 (product innovation is not a "core competency" for Altria)); FF ¶ 191 (Murillo (Altria/JLI) Tr. 2940-41 (every internal development project that Nu Mark pursued over the course of five years had failed to "yield[] fruit.")); FF ¶ 1561 (Jupe (Altria)

included an ultra-low nicotine cigarette called De-Nic and a battery-powered device called Accord that heated rather than burned sticks of tobacco.⁴ In particular, as witnesses involved in Altria’s development efforts over the years made clear, despite considerable investment, Altria repeatedly found that it was not having “success with [its] internally developed products.”⁵

In 2012, Altria established a new operating company—Nu Mark—devoted to developing and marketing innovative tobacco products for adult tobacco consumers, in particular e-cigarettes.⁶ One year after its formation, Nu Mark introduced its first “e-vapor” product in the form of a cig-a-like, a type of e-vapor product intended to “emulate the look of the cigarette.”⁷ Nu Mark branded its cig-a-like offering as the MarkTen King Size.⁸ But the product was not “satisfying enough to drive conversion from a traditional cigarette.”⁹

In April 2014, Nu Mark acquired the e-vapor business of Green Smoke, Inc. and incorporated Green Smoke’s technology into a new iteration of the MarkTen brand, the “MarkTen XL,” also a cig-a-like.¹⁰ But that product struggled, too.¹¹ And, by “early 2015,” it was clear to Nu Mark leadership, including Joe Murillo, then President and General Manager of Nu Mark, that

Tr. 2213 (“[W]e make very good cigarettes . . . but to significantly reduce the risk, I would say we have not had that innovation success.”)).

⁴ FF ¶¶ 146-54 (Jupe (Altria) Tr. 2207 (noting that consumers “rejected [Accord] based on [its] taste, flavor,” and bulky size; “they were smoking a cigarette out of a pager”)).

⁵ FF ¶ 144 (Willard (Altria) Tr. 1332-33); *see also* FF ¶¶ 1560-61 (Jupe (Altria) Tr. 2213).

⁶ FF ¶ 132 (Murillo (Altria/JLI) Tr. 2898).

⁷ FF ¶ 7 (Jupe (Altria) Tr. 2136); *see also* FF ¶ 195. A “cig-a-like” is a type of “closed system” product. FF ¶ 9. Closed systems use device-specific cartridges that are prefilled with a liquid nicotine solution (called “e-liquid”) that the device vaporizes when in use. These systems are referred to as “closed” because their cartridges are not “refillable” by the consumer. FF ¶ 9. “Open system” products, by contrast, have open tanks that users manually fill with an e-liquid that may be produced by any number of suppliers. FF ¶¶ 19, 23-24.

⁸ FF ¶ 195.

⁹ FF ¶ 198 (RX0175 (Altria) at 003).

¹⁰ FF ¶¶ 199-200.

¹¹ FF ¶ 283 (Gifford (Altria) Tr. 2734 (noting that MarkTen sales “increase[ed] slightly through time” but never took off)); FF ¶ 760 (O’Hara (JLI) Tr. 624 (the MarkTen XL was “[a]bsolutely not” “successful”)); FF ¶ 283 (RX0562 (Altria) at 007 (MarkTen XL sales, starting at a low baseline, actually declined throughout most of 2015)).

“cig-a-like products were not going to be of sufficiently deep and broad appeal . . . to convert large numbers of [smokers].”¹² As a general matter, the thin, cylindrical cig-a-like format was “underpowered” and ineffective at “deliver[ing] . . . nicotine to the consumer.”¹³

Nu Mark’s bottom line bore that out: From 2014 to 2016, Nu Mark lost over \$500 million.¹⁴ And Nu Mark’s late 2016 introduction of MarkTen Bold—another cig-a-like with moderately higher nicotine content—did not stem the financial bleeding.¹⁵

Nu Mark tried to improve its e-vapor portfolio by launching a series of internal development efforts. But innovation is easier said than done, and Altria came to abandon these internal efforts well before the transaction.¹⁶ As Richard Jupe, Altria’s Vice President of Product Design and Development, explained to the Court, as a company focused on selling rolled tobacco leaves in a highly regulated environment, Altria simply “didn’t have the right talent, the right skills, the right experiences” to succeed in developing innovative products.¹⁷ Or as Brian Quigley, the President of Nu Mark, put it, “we had . . . a long history of failure trying to do anything other than what we had proven to do successfully for decades.”¹⁸

Indeed, by 2017, Jody Begley, who headed Nu Mark from mid-2015 until the spring of 2018, recognized that without “substantial volume growth in the cig-a-like form,” Altria was “going

¹² FF ¶ 289 (PX7007 Murillo (Altria/JLI) IHT at 117).

¹³ FF ¶ 11.

¹⁴ FF ¶ 1077.

¹⁵ FF ¶ 1505 (Jupe (Altria) Tr. 2228-29 (explaining that Bold ultimately “was not satisfying” because it did not have “enough salt”)); FF ¶ 295 (RX0746 (Altria) at 019 (showing that Bold had 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)).

¹⁶ FF ¶ 1581 (Murillo (Altria/JLI) Tr. 2940 (noting that Project Panama was discontinued after Altria came to the conclusion it lacked “the bandwidth and knowledge base to develop that sort of a product”)); FF ¶ 1589 (PX7016 Jupe (Altria) Dep. at 60 (Project Hudson never got “to a point where [Altria] thought [it] would commercialize it”)).

¹⁷ FF ¶ 848 (Jupe (Altria) Tr. 2319).

¹⁸ FF ¶ 848 (PX7041 Quigley (Altria) Dep. at 148-49).

to continue to lose \$70 million a year on the [MarkTen] cigalike.”¹⁹ But far from seeing volume growth, the cig-a-like segment was “stagnant.”²⁰ As Begley testified, there simply was not “a lot of incremental interest among adult smokers” in e-vapor.²¹ That would come to change by late 2017, however, as adult smokers turned en masse to a new product format—pods.

B. In 2015, JLI launched a pod-based e-vapor product that mimics the nicotine experience of cigarettes.

Respondent Juul Labs, Inc., founded in 2007 by two Stanford students, is a Silicon Valley-style technology company.²² Its mission: “[T]ransition the world’s one billion smokers off of combustible cigarettes and eliminate their use.”²³ Fueled by that objective and its start-up culture, JLI assembled “a deep bench” of innovation talent at its San Francisco headquarters.²⁴

In 2015, JLI introduced a pioneering pod product into the stagnant closed-system e-vapor category.²⁵ While most of the U.S. 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 product,” which it called JUUL.²⁶ Critically, as depicted below and as the Court saw firsthand with the samples provided during the hearing, JUUL was not shaped like a cigarette. As Altria would later come to learn, “smokers who want[] to convert to non-combustible tobacco products d[o] not want to appear to be smoking a cigarette,” which makes the cig-a-like form “just wrong for conversion.”²⁷ JUUL, with its sleek aesthetic, “resolved for at least many adult smokers . . . the social friction of being viewed as a smoker, . . . allow[ing] them to leave some of that baggage on

¹⁹ FF ¶ 392 (PX7022 Begley (Altria) Dep. at 225).

²⁰ FF ¶ 291 (Begley (Altria) Tr. 1055).

²¹ FF ¶ 281 (Begley (Altria) Tr. 1066).

²² FF ¶¶ 204-05, 215. JLI was originally incorporated as Ploom, Inc. in 2007. It was later renamed Pax Labs, Inc. On June 30, 2017, Pax Labs renamed itself Juul Labs, Inc., and spun out Pax Labs, Inc., as a separate stand-alone corporation. JLI retained the e-vapor assets. FF ¶¶ 205-09.

²³ FF ¶ 212 (Robbins (JLI) Tr. 3243).

²⁴ FF ¶¶ 203, 215; *see also* FF ¶ 848.

²⁵ FF ¶¶ 208, 214-36.

²⁶ FF ¶ 214 (Valani (JLI) Tr. 907).

²⁷ FF ¶ 1392 (PX7036 Garnick (Altria) Dep. at 135).

the sidelines.”²⁸ Far from a matter of aesthetics, as Complaint Counsel sought to suggest, JUUL’s unique form factor “really solve[d] a problem” for adult smokers.²⁹



JUUL’s revolutionary design was paired with two features that allowed it to deliver superior satisfaction. The first was a superior battery to JUUL’s cig-a-like predecessors, which provides more power and more vapor, thereby allowing JUUL to overcome the weak inhale/exhale experience that was a central drawback of the cig-a-like form.³¹

Pairing that innovation with the second feature, the use of nicotine salts, allowed JUUL to crack the code on providing smokers the satisfaction necessary to replicate the nicotine experience provided by cigarettes.³² As Complaint Counsel acknowledged in its opening statement, the “key” to JUUL’s success was “its inclusion of nicotine salts” (the product of nicotine mixed with an

²⁸ FF ¶ 223 (Begley (Altria) Tr. 1095); *see also* FF ¶ 16 (Gardner (Altria) Tr. 2604); FF ¶ 222 (Crozier (Sheetz) Tr. 1555-56).

²⁹ FF ¶ 31 (Begley (Altria) Tr. 1079).

³⁰ FF ¶ 221 (RX0279 (Altria) at 011, 052).

³¹ FF ¶ 225.

³² FF ¶ 224.

organic acid).³³ And that “key” was corroborated by a trove of evidence at trial.³⁴ As was reiterated at trial over and over, nicotine salts are essential to the delivery of nicotine satisfaction.³⁵

Because JUUL could deliver the nicotine experience provided by cigarettes, it was succeeding in the critical area where Nu Mark was not: converting adult smokers from smoking to vaping.³⁶ JUUL also catalyzed a dramatic decline in cigarette sales, nearly doubling the annual rate of decline from an average of 3 to 4 percent per year to 4 to 6 percent in some retail chains, with others reporting that “at least 30% of smokers who tried JUUL did not return to smoking traditional cigarettes.”³⁷

Within two years of JUUL’s arrival on the market, there were a growing number of e-vapor products that had broken with the cig-a-like mold to offer superior, more powerful, less stigmatizing products.³⁸ And as consumer interest in pods grew, market participants uniformly recognized pods as a distinct market segment with a different consumer base.³⁹

³³ Tr. 34; *see also* FF ¶ 614.

³⁴ *See, e.g.*, FF ¶ 227 (Gardner (Altria) Tr. 3086-87 (key to providing “the experience the smoker was looking for” was “nicotine salts” and a “lower pH”)); FF ¶ 226 (Crozier (Sheetz) Tr. 1556 (“[N]icotine salts [lead] to greater nicotine satisfaction than products that [do not have salts].”)); FF ¶ 231 (PX7030 Wexler (Turning Point Brands) Dep. at 43-44 (use of nicotine salts 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)).

³⁵ FF ¶¶ 226-33 (Crozier (Sheetz) Tr. 1556; Gardner (Altria) Tr. 3086-86; Jupe (Altria) Tr. 2284; Quigley (Altria) Tr. 2007); *see also* FF ¶¶ 398, 478, 571, 614-27, 683-86, 712, 743, 1330-37, 1504.

³⁶ FF ¶ 236 (Robbins (JLI) Tr. 3243; PX7039 Robbins (JLI) Dep. at 189-91; Willard (Altria) Tr. 1359; Gifford (Altria) Tr. 2828; PX7036 Garnick (Altria) Dep. at 163-64).

³⁷ FF ¶¶ 234-35.

³⁸ FF ¶¶ 297-300.

³⁹ FF ¶ 1408 (Quigley (Altria) Tr. 2034 (Nu Mark separated pods and cig-a-likes in its internal market analysis because “different product forms . . . were behaving differently in the market” and reflecting different “consumer trends.”)); FF ¶ 1412 (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.”)); FF ¶ 1403 (PX7030 Wexler (Turning Point Brands) Dep. at 51 (“[p]od system[] [users] are significantly younger” than cig-a-like users, by a matter of decades)).

C. In 2016, FDA began to comprehensively regulate e-vapor products.

Another key player here is FDA and the regulations it established to govern these products. The Court heard numerous witnesses testify as to how the regulatory scheme FDA administers has played a critical role in shaping the competitive dynamics of the e-vapor industry—in particular, by limiting the ability to bring new products to market in a timely way.

1. *The Deeming Rule.* Through the Family Smoking Prevention and Tobacco Control Act of 2009 (“Tobacco Control Act”), Congress provided FDA with broad power to regulate the manufacture, marketing, and distribution of tobacco products.⁴⁰ Congress expressly found in passing the Act 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.”⁴¹

FDA started regulating e-vapor products in May 2016 through a regulation known as the “Deeming Rule,” which became effective in August 2016.⁴² The Deeming Rule “changed the game” in two critical respects.⁴³ First, by subjecting e-vapor products to the Tobacco Control Act, the Deeming Rule prohibited the introduction of any “new” e-vapor product—as well as the significant “modification” of any *existing* e-vapor product—without obtaining FDA approval of a premarket tobacco product application (“PMTA”).⁴⁴ Second, FDA allowed e-vapor products on the market as of August 8, 2016 to remain on the market as a matter of enforcement discretion, provided that manufacturers submitted a PMTA by a certain deadline (which shifted over the years,

⁴⁰ 21 U.S.C. § 387a; FF ¶¶ 45-46.

⁴¹ Pub. L. No. 111-31, § 2(45), 123 Stat. 1776, 1781 (2009).

⁴² FF ¶ 58 (Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28,973 (May 10, 2016) (hereinafter, “Deeming Rule”).

⁴³ FF ¶ 63 (PX7018 Schwartz (Altria) Dep. at 31).

⁴⁴ 21 U.S.C. § 387j(a)(1) (defining “new” product to include any product that undergoes “*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” (emphases added)); FF ¶¶ 55, 67.

as discussed further below).⁴⁵ In other words, the Deeming Rule effectively “froze[]” the market as it existed on August 8, 2016.⁴⁶

Preparing a PMTA is an arduous, multiyear process.⁴⁷ To obtain FDA authorization, a manufacturer must demonstrate that a product “is appropriate for the protection of the public health.”⁴⁸ In determining whether a manufacturer has met this statutory standard, FDA weighs: (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.”⁴⁹

As Murillo, who went on to a senior position in Altria’s regulatory affairs group before becoming JLI’s Chief Regulatory Officer, 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 smoking and is not riskier than other comparable e-vapor products (“Risk Reduction Individual”); and (iii) will actually “convert” smokers without having undue unintended effects on the non-tobacco-using population (“Harm Reduction Population”):⁵⁰

⁴⁵ FF ¶ 61.

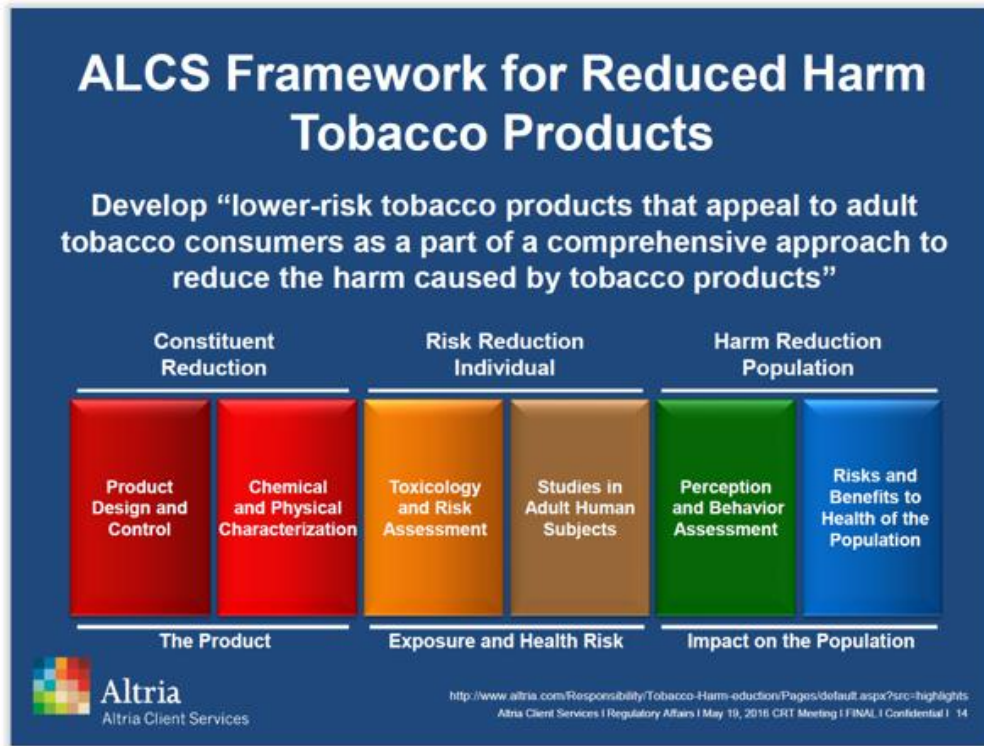
⁴⁶ FF ¶ 65 (Garnick (Altria) Tr. 1699).

⁴⁷ FF ¶ 72.

⁴⁸ 21 U.S.C. § 387j(c)(2)(A); FF ¶ 73.

⁴⁹ 21 U.S.C. § 387g(a)(3)(B)(i) (emphases added); *see also* FF ¶ 75 (Murillo (Altria/JLI) Tr. 2919).

⁵⁰ FF ¶ 76 (Murillo (Altria/JLI) Tr. 2917-20); *see also* FF ¶ 80 (Garnick (Altria) Tr. 1604).



51

Gathering this evidence for a company like JLI or Altria is “a ton of work,” requiring tens of millions of dollars in expenses, “[d]ozens and dozens of scientists at [every] stage[,]” and a great number of scientific studies covering stability, toxicology, and consumer topography, among many other subjects.⁵² The scientific work cannot begin until a manufacturer “really lock[s] down the design of the product,” which itself can take years.⁵³ And once a PMTA is submitted, the timeline for FDA’s decision-making is highly uncertain and may take years.⁵⁴ Indeed, though hundreds of thousands of e-vapor PMTAs have been filed—with some already pending for over two years—FDA has not granted approval for any e-vapor product to date.⁵⁵

For Altria, which was still in search of a competitive product, the Deeming Rule severely narrowed its options for competing in e-vapor—limiting the company to products already on the

⁵¹ FF ¶ 76 (RX2019 (Altria) at 014 (produced as native file)).

⁵² FF ¶¶ 72, 102 (Murillo (Altria/JLI) Tr. 2918-19, 2921); *see also* FF ¶ 97 (Murillo (Altria/JLI) Tr. 3074 (estimating “the total cost of the [JUUL] PMTA to JLI” as “over \$100 million”)).

⁵³ FF ¶ 87 (PX7000 Garnick (Altria) IHT at 25-26); *see also* FF ¶¶ 1586-93, 1609.

⁵⁴ FF ¶¶ 122-26.

⁵⁵ FF ¶ 126.

market by August 2016.⁵⁶ For JLI, the Deeming Rule imposed an unfamiliar layer of regulation and conditioned its long-term survival on future FDA authorization.⁵⁷

2. *The Continuum of Risk.* After issuing the Deeming Rule, FDA took action to encourage smokers to migrate from cigarettes to alternative products that did not depend on burning tobacco to produce nicotine, such as e-vapor products. In July 2017, FDA announced “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.”⁵⁸ The centerpiece of the new approach was a recognition that nicotine, while addictive, “is delivered through products that represent a *continuum of risk* and is most harmful when delivered through smoke particles in combustible cigarettes.”⁵⁹ As Murillo testified, then-Commissioner 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.”⁶⁰ This 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.”⁶¹ In effect, the Commissioner “indicat[ed] that it was the new policy of the FDA to foster a market of noncombustible tobacco products, such as e-vapor.”⁶²

II. Late 2017 – April 2018: Altria’s Nu Mark Subsidiary Attempted to Catch Up, but Problems Quickly Emerged

A. In 2017, Altria was caught flat-footed by rising consumer demand for pods.

Altria, which long had been advocating for the “continuum of risk” approach, welcomed FDA’s shift and saw it as an opportunity for both harm reduction and its bottom line.⁶³ But Altria

⁵⁶ FF ¶ 302.

⁵⁷ FF ¶ 1070 (Pritzker (JLI) Tr. 820 (“[G]etting PMTA approval is literally existential for [JLI]”)); *see also* FF ¶ 1223.

⁵⁸ FF ¶ 105.

⁵⁹ FF ¶ 106 (emphasis added).

⁶⁰ FF ¶ 109 (Murillo (Altria/JLI) Tr. 2906).

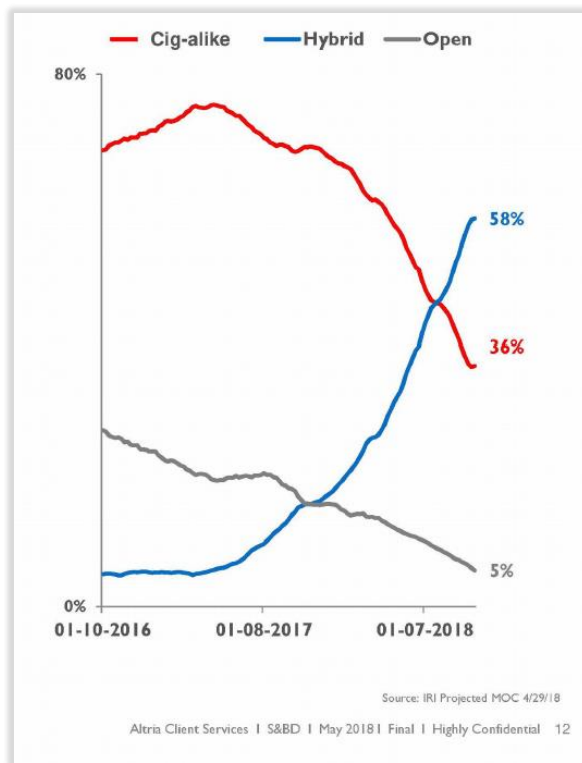
⁶¹ FF ¶ 316 (Murillo (Altria/JLI) Tr. 2905-06).

⁶² FF ¶ 110 (Garnick (Altria) Tr. 1694-95).

⁶³ FF ¶ 334.

was struggling to deliver on that opportunity and, now subject to the strictures of the Deeming Rule as well, was unprepared for the consumer-based shift to pod products.

The Court heard from Jody Begley, head of Nu Mark at the time, about the emergence of pods and how Nu Mark struggled to compete in this new category. 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.⁶⁴ But they did. Between 2016 and the end of 2017, pod sales increased by over 600 percent, driven largely by JUUL.⁶⁵ Meanwhile, the cig-a-like segment (in which Altria’s products competed) was contracting, with volume dropping by some 5,800,000 units in 2017 compared to the prior year.⁶⁶ As Gifford and Begley would advise the Altria Board in May 2018, pods, called “hybrids” in the below chart, were on a rocket trajectory and represented the clear future of the category:



67

⁶⁴ FF ¶ 567 (Begley (Altria) Tr. 1110).

⁶⁵ FF ¶¶ 324, 390.

⁶⁶ FF ¶¶ 298, 390.

⁶⁷ FF ¶ 565 (RX0272 (Altria) at 013 (excerpted)).

Meanwhile, Nu Mark’s cig-a-like products had not demonstrated the potential to convert smokers in significant numbers,⁶⁸ and the lack of a pod-based product now represented a “significant gap in [Nu Mark’s] portfolio”⁶⁹—a gap, Begley explained, that Nu Mark would need to fill in order to [REDACTED]⁷⁰ Craig Schwartz, then Nu Mark’s Senior Vice President of Operations, similarly noted that, by mid-2017, Nu Mark was “in a very difficult situation,” with cig-a-likes “declining very quickly” and pods “growing exponentially.”⁷¹ Put simply, Nu Mark was “getting [its] butt[] kicked week in and week out.”⁷² But, given the Deeming Rule, Altria had no [REDACTED] [REDACTED] so it was forced to scour the market to see if it could identify any pod products that it could acquire to try to compete.⁷³

In 2017, Altria’s Strategy & Business Development Group, working alongside Begley, undertook just that effort, searching for pod-based products that had been on the U.S. market as of August 8, 2016.⁷⁴ After conducting a series of consumer studies, they identified JUUL and another start-up brand, Von Erl, as “Potentially Attractive Options”:

⁶⁸ FF ¶¶ 601-08.

⁶⁹ FF ¶¶ 277, 324.

⁷⁰ [REDACTED]




⁷¹ FF ¶ 324 (Schwartz (Altria) Tr. 1866).

⁷² FF ¶ 324 (Schwartz (Altria) Tr. 1866).


⁷³ [REDACTED]

⁷⁴ FF ¶¶ 303-14.

S&BD and Nu Mark have identified potentially attractive options

<u>Examples of Products Considered</u>	→	<u>Potentially Attractive Options</u>
		<div style="display: flex; flex-direction: column; align-items: center;"> <div style="display: flex; align-items: center; margin-bottom: 20px;"> <div style="border: 1px solid black; border-radius: 50%; width: 20px; height: 20px; display: flex; align-items: center; justify-content: center; margin-right: 5px;">1</div> <div style="text-align: center;">  PAX LABS JUUL </div> </div> <div style="display: flex; align-items: center;"> <div style="border: 1px solid black; border-radius: 50%; width: 20px; height: 20px; display: flex; align-items: center; justify-content: center; margin-right: 5px;">2</div> <div style="text-align: center;">  VON ERL. My. </div> </div> </div>

Preliminary Investment Thesis
Secure access to a closed-tank product: (1) that appeals to AS&V, (2) was available for sale in the US prior to the FDA deeming date, and (3) has a high probability of success in a PMTA filing



Source: S&BD estimates

Altria Client Services | S&BD | May 2017 | DRAFT | Highly Confidential 5

75

But Von Erl was in talks with and soon acquired by another major cigarette company.⁷⁶ And, although Altria reached out to JLI in 2017 about pursuing an acquisition, those discussions did not progress past the exploratory phase.⁷⁷ Facing “a lot of urgency” to compete in the “[pod-based] space,”⁷⁸ Altria was forced to go further down on the list, ultimately settling on its fallback choices, two other products that it had considered and initially passed over: Cync and Elite.⁷⁹ Its subsidiaries licensed Elite—“the best of what was available at the time”—from a Chinese manufacturer, Smoore, on October 31, 2017.⁸⁰ The cost: \$500,000.⁸¹ According to Schwartz, who negotiated the license for Elite, no other companies were interested in Elite at the time.⁸²

⁷⁵ FF ¶ 305 (RX1103 (Altria) at 007).
⁷⁶ FF ¶¶ 311-12.
⁷⁷ FF ¶ 308.
⁷⁸ FF ¶ 368 (Schwartz (Altria) Tr. 1871).
⁷⁹ FF ¶ 326; *see also* FF ¶¶ 313-14.
⁸⁰ FF ¶ 327 (Begley (Altria) Tr. 1075); *see also* FF ¶ 328.
⁸¹ FF ¶ 328 (Schwartz (Altria) Tr. 1868-69).
⁸² FF ¶ 329 (Schwartz (Altria) Tr. 1867, 1869-70).

B. In February 2018, Nu Mark rushed Elite, its pod product, out to market and immediately faced headwinds.

“[F]ar behind” the competition,⁸³ Nu Mark decided to prioritize commercialization of Elite over Cync, which was viewed as inferior to Elite and “had some product issues that [Altria] needed to address.”⁸⁴ The company rushed the newly styled MarkTen Elite to market with “[e]xceptional speed,” making its first sale in February 2018.⁸⁵ No resources were spared.⁸⁶ As Begley set out in Nu Mark’s three-year plan presented to the Altria Board at the beginning of 2018, Nu Mark’s future profitability and growth depended on having a successful pod product.⁸⁷

Nu Mark executives were “hopeful” that Elite would prove popular,⁸⁸ but they quickly learned that these expectations would not be borne out. Leaks plagued the product at the start⁸⁹—at times over 40 percent of its pods leaked.⁹⁰ As a result, many customers trying the product for the first time endured the unpleasant experience of nicotine liquid leaking onto their hands or even into their mouths,⁹¹ leaving Altria to field complaints from angry retailers who “were really concerned that Altria would launch a product that was defective.”⁹² Though it improved over time, the leaking problem persisted for months, prompting Joseph O’Hara, JLI’s then-Senior Director for Strategic

⁸³ FF ¶ 324 (PX7018 Schwartz (Altria) Dep. at 153).

⁸⁴ FF ¶ 369 (Begley (Altria) Tr. 1097). Cync’s market launch would eventually be put “on [h]old” indefinitely in light of an “[a]cute battery hazard” issue, “[a]cute toxicological risk due to nickel components,” and “[f]ailed child resistance testing,” among other problems. FF ¶ 369 (PX4149 (Altria) at 093).

⁸⁵ FF ¶¶ 370-72.

⁸⁶ FF ¶¶ 407-08 (Willard (Altria) Tr. 1356-57 (explaining Elite’s launch was “well-funded” and “the number one priority for [Altria’s] sales force” because the company “wanted to get [the product] out there as quickly as possible”)); FF ¶ 423 (Gifford (Altria) Tr. 2753 (Altria provided “pretty much whatever [it was] asked for” with respect to promotional efforts for Elite)); FF ¶ 407 (Begley (Altria) Tr. 990 (Elite’s “rapid launch” was a “significant achievement” requiring “a lot of hard work” by “a lot of people”)).

⁸⁷ FF ¶ 1082 (Begley (Altria) Tr. 1087-88).

⁸⁸ FF ¶ 403 (Begley (Altria) Tr. 1124).

⁸⁹ FF ¶¶ 460-77.

⁹⁰ FF ¶ 461.

⁹¹ FF ¶¶ 464-70.

⁹² FF ¶ 477 (Myers (Altria) Tr. 3324); FF ¶ 477 (PX4083 (Altria) at 001 (Myers promising to “keep McLane and 7-11 calm” over the leaking)).

Finance, to observe in a July 2018 email that “[e]xcessive leakage has significantly (perhaps irreparably) damaged the [Elite] brand.”⁹³ Altria executives, cognizant that “it’s hard to undo [the consumer’s] first perception of the brand,” harbored the same concern.⁹⁴

Sales data also demonstrated that the product was not catching on.⁹⁵ In May 2018, Begley would show the Board that Nu Mark was selling just one Elite pack every other day in Sheetz.⁹⁶

[REDACTED]

[REDACTED]

[REDACTED] The reason for JUUL’s success, Begley advised the Board: nicotine satisfaction that Elite did not deliver.⁹⁹

For its part, while JLI tracked Elite’s performance as it did with many products, it quickly concluded that Elite was not a competitive threat.¹⁰⁰ Although Complaint Counsel promised the Court in its opening statement that it would show that JLI responded to Elite both on price and on innovation, this did not happen, and Complaint Counsel failed to offer any competent evidence that it did.¹⁰¹ To the contrary, JLI maintained its preexisting promotional plans and introduced nothing new.¹⁰² JLI had recognized the key problem with Elite immediately after the product was launched: Unlike JUUL, Elite did not have nicotine salts.¹⁰³ Based on that omission, JLI quickly concluded

⁹³ FF ¶ 475 (RX1165 (JLI) at 004); *see also* FF ¶ 475 (Begley (Altria) Tr. 1104 (agreeing that Elite’s brand was “significantly (perhaps irreparably) damaged”)); FF ¶ 475 (Myers (Altria) Tr. 3328-29 (same)).

⁹⁴ FF ¶ 473 (Begley (Altria) Tr. 1104).

⁹⁵ FF ¶¶ 431-59.

⁹⁶ FF ¶ 444 (PX1229 (Altria) at 019).

⁹⁷ [REDACTED]

⁹⁸ [REDACTED]

⁹⁹ FF ¶ 571 (PX1229 (Altria) at 006).

¹⁰⁰ FF ¶¶ 478-80, 761.

¹⁰¹ Tr. 64-67; FF ¶¶ 1637-50.

¹⁰² FF ¶¶ 1639-50.

¹⁰³ FF ¶ 480 (PX2269 (JLI) at 001).

that Elite could not “provide cig-like nicotine satisfaction” and was thus “not a threat.”¹⁰⁴ In JLI’s view, Elite was “an absolute nonstarter.”¹⁰⁵ Observing the situation in real time, O’Hara put the point bluntly: Elite’s “US sales have been absolutely terrible, no traction whatsoever.”¹⁰⁶

Other competitors agreed. Reynolds’s e-vapor subsidiary viewed “the quality of the MarkTen Elite product [as] inferior to that of competing products at that time.”¹⁰⁷ [REDACTED]

[REDACTED]¹⁰⁸ Elite was “not achieving success in the marketplace,” PMI recognized, nor was it “successful at converting adult smokers.”¹⁰⁹

C. Despite increasingly heavy promotional efforts, Elite was not catching on with consumers.

After Elite failed to see success in its initial rollout, Altria’s sales arm, Altria Group Distribution Company (“AGDC”), redoubled its efforts to “give [Elite] every chance to be successful.”¹¹⁰ 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?”¹¹¹ The Court heard from Scott Myers, the current head of AGDC who, at the time of Elite’s rollout, was the senior executive responsible for the Western Region of the United States and some of Altria’s largest trade partners.¹¹² Myers explained the various efforts Altria employed to promote Elite’s success, including guaranteeing returns,¹¹³ creating a clerk incentive

¹⁰⁴ FF ¶¶ 478, 480, 744 (RX1420 (JLI) at 001).

¹⁰⁵ FF ¶ 480 (PX2269 (JLI) at 001).

¹⁰⁶ FF ¶ 443.

¹⁰⁷ FF ¶ 483 (PX8008 Huckabee (Reynolds) Decl. at 025 ¶ 48).

¹⁰⁸ [REDACTED]

¹⁰⁹ FF ¶ 481 (PX7020 King (PMI) Dep. at 169, 226).

¹¹⁰ FF ¶ 422 (Myers (Altria) Tr. 3331).

¹¹¹ FF ¶ 423 (Gifford (Altria) Tr. 2753).

¹¹² FF ¶ 456.

¹¹³ FF ¶ 454 (Myers (Altria) Tr. 3316).

program by which store clerks received a substantial bonus for selling Elite,¹¹⁴ and instituting a store intercept program where Altria employees physically went to stores and handed out coupons to consumers.¹¹⁵ 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.”¹¹⁶

[REDACTED]

[REDACTED]

[REDACTED]¹¹⁷ If consumers became loyal Elite users, so the theory went, Nu Mark would eventually be able to ease promotions.¹¹⁸

But Nu Mark would learn that no matter how steep the promotions it offered, Elite would not stick. Nu Mark’s promotional campaign started off with a “Buy a Device, Get a Pod for Free” promotion for \$19.99.¹¹⁹ Under that first promotion, because a device’s MSRP was \$19.99 and a pod pack’s MSRP was \$8.99, the consumer got roughly “\$30 of value” for just \$19.99.¹²⁰ When that aggressive promotion generated only modest trial, Nu Mark went “as aggressive as you can get,” lowering the price of the \$19.99 bundle to just \$8.99.¹²¹ That meant Nu Mark was “basically giving the device away for free.”¹²² And in cases where customers also had a \$10 direct mail coupon for MarkTen Elite in hand, Nu Mark was giving not only the device away for free, but the pod pack as well.¹²³ Although these exceptional offers generated a temporary bump in device sales, sales dropped as soon as promotions were turned off.¹²⁴ And even when Altria kept the promotions

¹¹⁴ FF ¶ 428 (Myers (Altria) Tr. 3335-36).

¹¹⁵ FF ¶ 427 (Myers (Altria) Tr. 3336).

¹¹⁶ FF ¶ 408 (Myers (Altria) Tr. 3323).

¹¹⁷ [REDACTED]

¹¹⁸ FF ¶¶ 434-38 (Myers (Altria) Tr. 3352; PX7038 Myers (Altria) Dep. at 184).

¹¹⁹ FF ¶ 424.

¹²⁰ FF ¶ 424 (Myers (Altria) Tr. 3319-20).

¹²¹ FF ¶ 426 (Myers (Altria) Tr. 3333); *see also* FF ¶ 425.

¹²² FF ¶ 425 (Myers (Altria) Tr. 3333).

¹²³ FF ¶ 427 (Myers (Altria) Tr. 3334).

¹²⁴ FF ¶ 434.

on, device sales were not followed by an uptick in cartridge sales, indicating that consumers were not adopting the product.¹²⁵

None of it moved the needle: Elite would never achieve more than a one percent share of e-vapor cartridge unit sales.¹²⁶ Elite’s sales were so abysmal that it would consistently fall out of “carried status” with retailers, meaning that a chain’s inventory management system would automatically stop reordering Elite for failure to reach the preset selling threshold.¹²⁷ Myers, who had spent more than two decades in sales at Altria before taking over AGDC, testified that Elite performed the “worst” of any product Altria had rolled out in his experience.¹²⁸

D. MarkTen and Elite’s inability to convert smokers and other technical problems doomed their PMTA prospects.

MarkTen and Elite’s commercial struggles reflected a fundamental problem with the products: They could not convert adult smokers.¹²⁹ And without a proven track record of converting adult smokers, neither MarkTen, a cig-a-like, nor Elite, a pod, was likely to secure FDA approval.¹³⁰ To succeed on a PMTA, Altria would need to establish that each product was “appropriate for the protection of the public health.”¹³¹ As Dr. Bill Gardner, Altria’s then-Senior Principal Scientist, explained to the Court, “if adult smokers don’t convert to the product, . . . the product ha[s] no reason for being in the market.”¹³² The product would simply be adding additional nicotine products to the market without decreasing the use of combustible cigarettes.¹³³

That focus on the need for products to demonstrate conversion of adult smokers only intensified when FDA began sounding the alarm about the rise in youth vaping. In April 2018,

¹²⁵ FF ¶¶ 431-459.

¹²⁶ FF ¶ 442.

¹²⁷ FF ¶ 449 (Myers (Altria) Tr. 3321-22, 3336, 3345-46).

¹²⁸ FF ¶ 455 (Myers (Altria) Tr. 3366).

¹²⁹ FF ¶¶ 16-17, 289, 382-85, 478, 481, 572, 601-13, 634, 681, 743-47, 752.

¹³⁰ FF ¶¶ 76, 81, 387, 597-600, 601-13.

¹³¹ 21 U.S.C. § 387j(c)(2)(A).

¹³² FF ¶ 597 (Gardner (Altria) Tr. 2586).

¹³³ FF ¶¶ 387, 597, 600, 947.

FDA launched a “nationwide blitz” to crack down on retailers selling to minors.¹³⁴ In May 2018, FDA sent letters to e-vapor manufacturers, requiring them to submit “documents to better understand the reportedly high rates of youth use” of their products.¹³⁵ A contemporaneous press release emphasized that the “agency plan[ned] to explore additional restrictions on the sale and promotion” of the products, including “measures on flavors/designs that appeal to youth.”¹³⁶

Against the backdrop of these mounting regulatory concerns, MarkTen cig-a-like and Elite were also suffering from severe technical problems that further impaired their ability to obtain FDA approval. As part of MarkTen cig-a-like’s PMTA-related testing, Dr. Gardner learned that under certain test conditions, the battery tended to overheat, causing a phenomenon known as “dry puffing.”¹³⁷ This phenomenon resulted in levels of formaldehyde, a carcinogen, that were higher than those of other e-vapor products, including JUUL.¹³⁸ That disparity posed a problem, given that the PMTA standard requires showing that a product “presents less risk than other tobacco products,” including those in the same tobacco category (*i.e.*, e-vapor).¹³⁹ Altria’s scientists began trying to develop a battery that would automatically turn off when it became too hot, reducing the risk of dry puffing.¹⁴⁰ But the process was complex, as virtually every fix for an existing problem led to additional problems.¹⁴¹ Moreover, Altria had determined that “[c]hanging the electronics” would constitute a significant change “requir[ing] premarket approval from the agency,” preventing the product from being commercially available for years.¹⁴² Recognizing the need to reassess its

¹³⁴ FF ¶ 529.

¹³⁵ FF ¶ 530.

¹³⁶ FF ¶ 536.

¹³⁷ FF ¶¶ 351, 355-59.

¹³⁸ FF ¶¶ 351-63 (Gardner (Altria) Tr. 2569-70).

¹³⁹ 21 U.S.C. § 387j(b)(1)(A); *see also* FF ¶¶ 359-63.

¹⁴⁰ FF ¶ 493 (Gardner (Altria) Tr. 2570-71, 2576-77).

¹⁴¹ FF ¶¶ 498, 500-03.

¹⁴² FF ¶ 498 (Gardner (Altria) Tr. 2570).

regulatory strategy, by March 2018, Murillo’s regulatory group sent word to senior management that the PMTA filing for the MarkTen cig-a-like product was “delayed—date TBD.”¹⁴³

In Elite’s case, even before commercialization, Altria’s scientists had determined that the on-market product could not get FDA approval.¹⁴⁴ Elite, too, “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.”¹⁴⁵ And a half-dozen components would need to be replaced.¹⁴⁶ But the notion of an improved Elite (what came to be known as Elite 2.0 at the company) was purely conceptual.¹⁴⁷ As Murray Garnick, Altria’s General Counsel and head of Regulatory Affairs and Regulatory Sciences, testified, the product had not even been designed.¹⁴⁸

E. Altria and JLI engaged in preliminary discussions about an investment but made little progress.

In the first months of 2018, Altria and JLI—which had engaged in sporadic conversation since Altria’s initial overture in 2017—continued communicating in “fits and starts.”¹⁴⁹ These early discussions were “general” and “unstructured,” with a focus on the potential synergies of a partnership between the two companies.¹⁵⁰ In April 2018, the parties began discussing potential deal structures.¹⁵¹ Altria, as it had throughout discussions with JLI, emphasized the capabilities that it could offer to enhance JLI’s success, particularly its unrivaled regulatory capabilities.¹⁵²

¹⁴³ FF ¶ 489.

¹⁴⁴ FF ¶¶ 510-18.

¹⁴⁵ FF ¶ 366.

¹⁴⁶ FF ¶¶ 513-18.

¹⁴⁷ FF ¶¶ 519-27.

¹⁴⁸ FF ¶ 520 (Garnick (Altria) Tr. 1614).

¹⁴⁹ FF ¶ 537 (PX7000 Garnick (Altria) IHT at 83).

¹⁵⁰ FF ¶ 538.

¹⁵¹ FF ¶ 539 (Pritzker (JLI) Tr. 777-79).

¹⁵² FF ¶ 558; *see also* FF ¶¶ 320-21, 347.

As abstraction gave way to detail, however, the parties quickly realized that they were far apart on valuation and control.¹⁵³ JLI’s exponential growth meant that “Altria always seemed to be a little bit behind the curve” on valuation.¹⁵⁴ By the time Altria “came to a number” sought by JLI, “the value of [JLI]”—which was growing by 30 percent per month—“had jumped ahead of that.”¹⁵⁵ As for control, Altria was interested in a majority share that would allow it to steward its investment.¹⁵⁶ While JLI initially entertained that possibility, in the ensuing weeks the start-up “became more and more concerned about the nature of control” and decided that it was “unwilling to do a transaction where Altria either had control or had a path to control.”¹⁵⁷ With the parties substantially divided on key terms, and discussions “not really leading anywhere,” negotiations would not pick up in earnest until August 2018.¹⁵⁸

III. May 2018 – August 2018: Under New Leadership, Altria Undertook a Candid Assessment of the State of Its E-Vapor Business, and the Results Were Bleak

A. In May 2018, Altria restructured its leadership, appointing Brian Quigley the head of Nu Mark, Murray Garnick the head of Regulatory Sciences, and K.C. Crosthwaite as Chief Growth Officer.

In May of 2018, Howard Willard took over as Altria’s CEO.¹⁵⁹ Less than one week after taking the helm, Willard announced that, in recognition of the opportunity presented by FDA’s adoption of the continuum of risk, he was restructuring the company and its leadership into “two divisions—core tobacco and innovative products.”¹⁶⁰ In his day-long testimony before the Court, Willard testified, among other things, about his intentions with this reorganization.¹⁶¹

¹⁵³ FF ¶¶ 542, 543, 552-60.

¹⁵⁴ FF ¶ 559 (Pritzker (JLI) Tr. 783).

¹⁵⁵ FF ¶ 559 (Pritzker (JLI) Tr. 782-83).

¹⁵⁶ FF ¶¶ 540, 543, 556.

¹⁵⁷ FF ¶ 560 (Pritzker (JLI) Tr. 793).

¹⁵⁸ FF ¶¶ 552, 792.

¹⁵⁹ FF ¶ 579.

¹⁶⁰ FF ¶ 581 (RX0836 (Altria) at 001); *see also* FF ¶ 582.

¹⁶¹ FF ¶¶ 580-92 (Willard (Altria) Tr. 1371-75).

On the innovation side, Willard hoped to “to change [Altria’s] approach . . . to have a better chance to fulfill [its] aspiration of being the U.S. authorized leader in noncombustible reduced-risk products.”¹⁶² Willard needed “a fresh set of eyes [to] go in and see whether we had missed anything that could make one of [Nu Mark’s] products successful.”¹⁶³ To that end, he tapped Brian Quigley, who had previously run Altria’s smokeless tobacco business (U.S. Smokeless Tobacco), as the new CEO of Nu Mark, asking him 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.”¹⁶⁴ Quigley had racked up “some pretty big wins” in his prior role as the head of Altria’s smokeless unit—including overseeing the impressive launch of Copenhagen Wintergreen—and viewed himself as a “fixer.”¹⁶⁵ If anyone could turn around Nu Mark, the thought was, it was Quigley.¹⁶⁶

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.”¹⁶⁷

On the regulatory side, because commercializing new products was contingent on FDA approval, Willard moved Altria’s 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.¹⁶⁸ Garnick’s appointment was motivated by a concern that senior management was not being presented with a balanced view about Nu Mark’s regulatory prospects: 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

¹⁶² FF ¶ 580 (Willard (Altria) Tr. 1373).

¹⁶³ FF ¶ 585 (Willard (Altria) Tr. 1371-72).

¹⁶⁴ FF ¶ 586 (Willard (Altria) Tr. 1373-74); *see also* FF ¶ 583.

¹⁶⁵ FF ¶¶ 584, 589 (Gifford (Altria) Tr. 2758-59; Quigley (Altria) Tr. 2002).

¹⁶⁶ FF ¶¶ 584-589.

¹⁶⁷ FF ¶ 590 (RX0836 (Altria) at 002).

¹⁶⁸ FF ¶ 591 (RX0836 (Altria) at 003).

“positive news” was “bubbl[ing] up faster than negative news.”¹⁶⁹ Willard wanted Garnick to determine views of “the scientific experts about the potential for Nu Mark’s products to ultimately get approved by the FDA.”¹⁷⁰

Restructuring Altria in this fashion was a “big event,” as Altria did not “create new positions at that senior level very often.”¹⁷¹ But it was a necessary one: “[G]iven the business challenges [Altria was] facing, and the cultural [changes it was] trying to make happen,” leadership “wanted to send a strong signal that [the company was] embracing a different path forward.”¹⁷²

B. Soon after taking the job, Quigley experienced a “Eureka” moment precipitated by the findings of Altria’s scientists: Nu Mark’s products lacked the nicotine salts they needed to deliver nicotine satisfaction.

Spurred by Willard’s mandate, Quigley immediately began working to understand Nu Mark’s challenges—what he conceived of as a 100-day process in conjunction with Altria’s operational “game plan[ning]” schedule.¹⁷³ The “very first thing” Quigley did was meet with the existing Nu Mark leadership team to get their perspective on the business’s challenges.¹⁷⁴ Based on those meetings, Quigley determined that Nu Mark “did not yet fully understand what was wrong with the business.”¹⁷⁵

Quigley also met with Altria’s scientists, whose insights made clear that Nu Mark’s products were lacking what they needed to be competitive.¹⁷⁶ In particular, just as Altria was undergoing its restructuring, Dr. Gerd Kobal, head of Altria’s “sensomics” group, was conducting an analysis of nicotine salts and their effect on nicotine absorption and satisfaction.¹⁷⁷ Dr. Kobal’s analysis

¹⁶⁹ FF ¶ 592 (Willard (Altria) Tr. 1375).

¹⁷⁰ FF ¶ 593 (Willard (Altria) Tr. 1375).

¹⁷¹ FF ¶ 595 (Willard (Altria) Tr. 1372).

¹⁷² FF ¶ 595 (Quigley (Altria) Tr. 2000).

¹⁷³ FF ¶ 676 (Quigley (Altria) Tr. 2018).

¹⁷⁴ FF ¶ 702 (Quigley (Altria) Tr. 2003).

¹⁷⁵ FF ¶ 702 (Quigley (Altria) Tr. 2003-04).

¹⁷⁶ FF ¶¶ 677-86.

¹⁷⁷ FF ¶ 680.

demonstrated that nicotine salts, by lowering a product's pH, prevent nicotine from escaping into the mouth and throat before it can reach the deep lung where nicotine is absorbed most effectively.¹⁷⁸ As Jupe, Kobal's boss, explained at trial, armed with that newfound knowledge, Altria's scientists reached a consensus that nicotine salts are—as they contemporaneously put it—“required for a satisfying and relaxing E-vapor experience,” akin to the experience of smoking a cigarette, and that “[a]ll newly developed e-vapor products, regardless of nicotine content, should utilize nicotine salt technology.”¹⁷⁹

Dr. Kobal's analysis also demonstrated that JUUL possessed the ideal formulation of nicotine salts, allowing it to mimic the nicotine delivery of a cigarette.¹⁸⁰ Nu Mark's products did not—most of its products, including Elite, had no salts at all—and their high pH caused a “significant amount of nicotine loss.”¹⁸¹ MarkTen Bold, Nu Mark's only product with any salts, had only 1 percent acid to JUUL's 4 percent.¹⁸² As a result, Altria found that only 40 to 60 percent of MarkTen Bold's nicotine reached the lung.¹⁸³ Jupe summed it up for the Court: Dr. Kobal's research demonstrated 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 th[e] goal of converting smokers.”¹⁸⁴

In early June 2018, Dr. Kobal presented Quigley with his key findings. This was, as both Quigley and Jupe told the Court, a “Eureka moment.”¹⁸⁵ Quigley understood that Dr. Kobal and his

¹⁷⁸ FF ¶¶ 617-26. Although some at Altria had previously theorized that nicotine salts could promote nicotine satisfaction, they “didn't have the data” to support the hypothesis. FF ¶ 616.

¹⁷⁹ FF ¶¶ 622, 626 (Jupe (Altria) Tr. 2275; RX0796 (Altria) at 053).

¹⁸⁰ FF ¶ 681.

¹⁸¹ FF ¶ 629 (RX0419 (Altria) at 001); *see also* FF ¶¶ 628-30, 638.

¹⁸² FF ¶ 1505.

¹⁸³ FF ¶ 642 (RX0796 (Altria) at 050). As Jupe explained, and as confirmed by pharmacokinetic studies, the salts ratio in Bold was “the best [Altria] knew” in 2016 “but it wasn't enough salt. It just was not satisfying.” FF ¶ 644 (Jupe (Altria) Tr. 2228-29).

¹⁸⁴ FF ¶ 681 (Jupe (Altria) Tr. 2279).

¹⁸⁵ FF ¶¶ 617, 684 (Quigley (Altria) Tr. 2029; Jupe (Altria) Tr. 2142).

team had alerted him to something “foundational” and had identified the root of the “problem with all of [Nu Mark’s e-vapor] products.”¹⁸⁶

At the same time, Quigley understood that despite the significance of these insights, there was no easy fix.¹⁸⁷ As an initial matter, under the Deeming Rule’s August 8, 2016 cut-off date, Altria could not add nicotine salts without first obtaining FDA approval,¹⁸⁸ an “expensive, time-consuming process” that would take years.¹⁸⁹

Moreover, identifying the significance of nicotine salts was only the first step toward addressing the issue from a technical perspective. As Jupe testified, Altria still needed to determine what type of acid or acids was optimal and the “right ratio of those . . . acids in combination with the right ratio of the nicotine.”¹⁹⁰ And the scientists also needed to account for the acids’ effect on the “flavor system” and to ensure that any contemplated salts formula would not “degrade” product components.¹⁹¹

In light of Altria’s critical gaps in this area, combined with the regulatory overlay preventing Altria from modifying its existing products, Quigley wrote to Dr. Kobal and Jupe that it was “important [to] right size expectations for the current products.”¹⁹²

C. In June 2018, Altria’s leadership concluded that Nu Mark’s products were fundamentally flawed based on the findings of Altria’s scientists and that the business was in dire need of change.

Following Willard’s reorganization, the new leadership took stock of where Altria was in terms of its innovative products in a series of meetings in June. The Court heard from numerous participants in those meetings, which took place at a time when Altria was not actively negotiating

¹⁸⁶ FF ¶ 686 (Quigley (Altria) Tr. 2008).

¹⁸⁷ FF ¶ 687 (Quigley (Altria) Tr. 2008-09).

¹⁸⁸ FF ¶¶ 636, 1541.

¹⁸⁹ FF ¶ 72 (Quigley (Altria) Tr. 2009).

¹⁹⁰ FF ¶ 687 (Jupe (Altria) Tr. 2140).

¹⁹¹ FF ¶¶ 688-89 (PX7016 Jupe (Altria) Dep. at 333-34).

¹⁹² FF ¶ 713.

with JLI. The bottom-line conclusion: Nu Mark and Altria’s innovative product lineup was in dire shape.

On June 18, Quigley and Crosthwaite held a joint day-long strategy session with their teams.¹⁹³ Quigley outlined a new strategy for Nu Mark, based on what he learned from his discussions with the scientists: building a portfolio centered on providing immediate nicotine satisfaction, adult smokers’ “#1 requirement.”¹⁹⁴ Making that happen required an adjustment in Nu Mark’s vision and mission to focus on switching adult tobacco consumers from combustible cigarettes to e-vapor products.¹⁹⁵

Three days later, on June 21 and 22, the most senior leaders from across Altria convened to conduct a broader organizational review known as a Level Setting meeting.¹⁹⁶ As the session unfolded, presentation after presentation highlighted the weakness of both Altria’s innovative process and product pipeline. 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.”¹⁹⁷ To bring the point to life, Quigley, a veteran of the diaper business, compared an e-vapor product that fails to deliver nicotine satisfaction to a diaper that leaks. “[Y]ou could add Velcro tabs and you can make them pull up and make them more comfortable,” Quigley explained to his colleagues, “but if your diaper is leaking, no one is going to come back and buy your diaper.”¹⁹⁸

Quigley also highlighted the various related challenges facing Nu Mark and what Altria needed to change to begin to address them:

¹⁹³ FF ¶ 701.

¹⁹⁴ FF ¶ 704; *see also* FF ¶¶ 702-03, 705.

¹⁹⁵ FF ¶ 705.

¹⁹⁶ FF ¶ 706.

¹⁹⁷ FF ¶ 712 (Quigley (Altria) Tr. 2022, 2028-29).

¹⁹⁸ FF ¶ 685 (Quigley (Altria) Tr. 2016).

- Nu Mark’s product portfolio had “[o]verarching [g]aps,”¹⁹⁹—a “polite way of saying . . . weakness[es],” as Willard explained at trial²⁰⁰—driven by 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;²⁰¹
- Nu Mark needed to “[g]round all efforts in nicotine satisfaction first”,²⁰²
- Altria was not “structured appropriately” to innovate and needed to “think more like a technology company” and develop “different capabilities and different processes”;²⁰³ and
- Altria needed to establish growth or “speed” teams, comprising personnel across various different functions at Altria, to try to address these concerns with the development of new products.²⁰⁴

Jupe, the head of Innovative Product Development, also presented, highlighting the litany of challenges facing Nu Mark’s existing products:

- Elite would not be able to compete without “higher level nicotine offerings”;²⁰⁵
- MarkTen Bold would not be able to convert adult smokers without a reformulated e-liquid capable of delivering nicotine satisfaction;²⁰⁶ and
- MarkTen cig-a-like’s PMTA was a nonstarter without a new battery to prevent dry puffing.²⁰⁷

¹⁹⁹ FF ¶ 714 (RX0450 (Altria) at 024).

²⁰⁰ FF ¶ 711 (Willard (Altria) Tr. 1378).

²⁰¹ FF ¶ 714 (RX0450 (Altria) at 024).

²⁰² FF ¶ 712 (Quigley (Altria) Tr. 2022).

²⁰³ FF ¶ 715 (Quigley (Altria) Tr. 2025).

²⁰⁴ FF ¶ 724 (Quigley (Altria) Tr. 2025-26).

²⁰⁵ FF ¶ 717 (RX0450 (Altria) at 068).

²⁰⁶ FF ¶ 717 (RX0450 (Altria) at 065).

²⁰⁷ FF ¶ 717 (RX0450 (Altria) at 062-63).

Next up was Murillo, Altria's Senior Vice President of Regulatory Affairs, who covered Nu Mark's challenges from a regulatory perspective.²⁰⁸ Murillo set out his points in a single slide, as his message was simple:

- Altria needed to “[e]mbrace what it means to be regulated and be realistic about the FDA’s approach;”²⁰⁹ and
- Altria needed to “[c]ompletely re-set [Nu Mark’s] product and filing plans,”²¹⁰ in which he had “no confidence.”²¹¹

As Murillo explained at trial, Altria employees needed to stop “running around like chickens with [their] heads cut off trying to find products in the vapor space that could be successful” and instead return to “first principles” and recognize that the company could not “just . . . throw products against the wall and see which ones stick and fix them later.”²¹²

The discussion was “sobering,” and “some people were dismayed.”²¹³ Quigley testified that, following the presentations, Willard “stood up and just said, this is a lot of information to process.”²¹⁴ Willard, for his part, recalled being “glad the information was provided” and that he had “got[ten] more transparency,” although he recognized the picture was “fairly dire.”²¹⁵

D. In July 2018, the Regulatory Affairs team began preparing an update for the Board that would convey the products’ dim hopes for FDA approval.

While Quigley was working to understand Nu Mark's challenges and to convey his findings to senior leadership, Garnick was separately meeting regularly with Altria's regulatory scientists, as Willard had requested, to gain a better understanding of the Nu Mark portfolio's prospects for

²⁰⁸ FF ¶¶ 718-19.

²⁰⁹ FF ¶ 719 (RX0450 (Altria) at 051).

²¹⁰ FF ¶ 718 (RX0450 (Altria) at 051).

²¹¹ FF ¶ 718 (Murillo (Altria/JLI) Tr. 2950).

²¹² FF ¶ 719 (Murillo (Altria/JLI) Tr. 2948-49).

²¹³ FF ¶ 721 (Murillo (Altria/JLI) Tr. 2952).

²¹⁴ FF ¶ 721 (Quigley (Altria) Tr. 2023).

²¹⁵ FF ¶ 721 (Willard (Altria) Tr. 1383).

regulatory approval.²¹⁶ As it turned out, there was no one “on the science team” who believed that any of Altria’s products “could get PMTAs.”²¹⁷ As Garnick recalled at trial, 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 [I]t was exhausting[.]”²¹⁸ Growing accustomed to receiving negative reports from Dr. Gardner, executives took to calling him “Dr. Doom” and “Bad News Bill.”²¹⁹

In early July, shortly after the June Level Setting meeting, Garnick began working with his regulatory team to put together a presentation for the August Board meeting that would bring these problems to the directors’ attention.²²⁰ Complaint Counsel made the baseless assertion in its pretrial brief and opening statement that this presentation, which was prepared by the Regulatory Affairs team based on the findings of Altria’s scientists,²²¹ was ginned up in response to the receipt of the first term sheet from JLI on July 30, 2018.²²² The testimony and contemporaneous documentation belie this assertion.

Contrary to Complaint Counsel’s allegation, the Regulatory Affairs team completed the first draft of the deck on July 15, 2018—over two weeks before the first term sheet was sent.²²³ The deck reflected the consensus reviews of scientists and regulatory experts, none of whom had any involvement in the JLI negotiations.²²⁴ And by that point, the draft identified “key concerns” with

²¹⁶ FF ¶ 693 (Garnick (Altria) Tr. 1712; Gardner (Altria) Tr. 2578-2579, 2581).

²¹⁷ FF ¶ 698 (PX7036 Garnick (Altria) Dep. at 15; PX1890 (Altria) at 001 (Altria scientist advising Garnick that “no one thinks we can get a PMTA on current Mark Ten product”).

²¹⁸ FF ¶ 695 (Garnick (Altria) Tr. 1713).

²¹⁹ FF ¶ 696.

²²⁰ FF ¶¶ 725-27.

²²¹ FF ¶¶ 725-27, 731 (Garnick (Altria) Tr. 1732).

²²² See CC Pretrial Br. 21; Tr. 43-44.

²²³ FF ¶ 729.

²²⁴ FF ¶¶ 729-31, 867-74.

each of Nu Mark’s products and determined that each product failed to meet requirements necessary to obtain regulatory approval, as the below slide involving Elite exemplifies:²²⁵

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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226

E. In August 2018, Quigley informed management that Elite was not competitive, and management updated the Board on Nu Mark’s challenges.

On August 2, 2018, Quigley, who was about halfway through his 100-day process, presented his latest findings on Nu Mark’s current situation to Altria’s senior leadership: Willard, Gifford, Garnick, and Crosthwaite.²²⁷ He explained that Nu Mark’s portfolio “[I]ack[ed] quality pod products” and “[p]roducts that provide immediate nicotine satisfaction.”²²⁸ Elite “did not have the . . . levels of nicotine that adult smokers would be looking for,” and given 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.”²²⁹ As a result, Quigley advised the group, Nu Mark

²²⁵ FF ¶ 732 (RX0689 (Altria) at 008, 011, 015, 016, 017).

²²⁶ FF ¶ 732 (RX0689 (Altria) at 011).

²²⁷ FF ¶ 839 (Quigley (Altria) Tr. 2029-30).

²²⁸ FF ¶ 841 (PX1644 (Altria) at 006, 018).

²²⁹ FF ¶ 846 (Quigley (Altria) Tr. 2031-33).

was “limited to competing . . . in the cig-a-like segment,” which was “very small” and “not meaningful in terms of what was driving change in the tobacco landscape.”²³⁰

Faced with these challenges, and given his mandate from Willard to “com[e] up with the best plan [he] could to turn around Nu Mark,” Quigley proposed what he termed his “bridge” plan.²³¹ Under Quigley’s bridge plan, as Quigley testified at trial, Nu Mark would continue to lose money for the foreseeable future with its in-market products, with the hope of “achiev[ing] leadership” with newly developed, FDA-approved products some seven years later—or, as the presentation put it, “By 2025.”²³² Quigley knew that he was proposing a “risky approach” and that his plan was a “long shot.”²³³ He told leadership that the plan would be “long,” “expensive,” and involve “a lot of risk on the science.”²³⁴ As Willard explained, Quigley was advising him that “in the short run, [Quigley couldn’t] do much better than [Nu Mark was] doing today”—meaning the continued loss of hundreds of millions of dollars—and that a plan that looked to 2025 was the “best [he could] do.”²³⁵

By the end of Quigley’s presentation, Gifford was alarmed, and raised whether Altria should consider pulling Elite from the market.²³⁶ As Gifford observed at the time, Altria was “losing money, we don’t have the nicotine we need, so . . . why are we continuing to lose money on this piece of business.”²³⁷ Given the dire state of the Nu Mark business and its portfolio, Gifford testified that he believed Altria “really needed to assess whether [it] needed to free up those people and financial resources and invest them elsewhere.”²³⁸ Though Quigley was not anticipating that the question of Elite’s fate would come to a head yet, Gifford’s questions made sense to Quigley in

²³⁰ FF ¶ 843 (PX1644 (Altria) at 006; Quigley (Altria) Tr. 2032).

²³¹ FF ¶¶ 588, 850 (Quigley (Altria) Tr. 1956).

²³² FF ¶ 850 (PX1644 (Altria) at 004).

²³³ FF ¶ 851 (Quigley (Altria) Tr. 2066; PX7003 Quigley (Altria) IHT at 118-19).

²³⁴ FF ¶ 851 (Quigley (Altria) Tr. 2042).

²³⁵ FF ¶ 850 (Willard (Altria) Tr. 1392-93).

²³⁶ FF ¶ 852.

²³⁷ FF ¶ 852 (PX7041 Quigley (Altria) Dep. at 33-34).

²³⁸ FF ¶ 856 (Gifford (Altria) Tr. 2782).

light of “the[] fundamental business gaps” Quigley had highlighted.²³⁹ As Quigley recalled, what to do with Elite was a “question being asked throughout the organization,” including by “regulatory affairs, product development, the [Executive Leadership Team], [and Quigley’s own] team.”²⁴⁰ Nevertheless, Willard told Quigley to keep working on Elite for the time being, as the company continued to debate the product’s future.²⁴¹

Complaint Counsel has made much of Willard’s determination around this time to approve a new gasket for Elite to address its leaking problem. [REDACTED], though the new gasket made it to market given the supply-chain process put in place after his initial approval.²⁴² In any case, as both [REDACTED] and Quigley testified, the gasket could not change what was fundamentally wrong with the product: its failure to convert smokers.²⁴³

A few weeks later, on August 23, 2018, 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 in conjunction with Altria’s scientists.²⁴⁴ With respect to the “significant, substantive information” that it conveyed, the deck was unchanged from the mid-July draft.²⁴⁵ Garnick spoke with Willard in advance of the meeting about how “the [B]oard needed to know the facts about what [Garnick] had found in his regulatory review.”²⁴⁶ The two leaders anticipated “that some of the [B]oard [might] be unhappy that we hadn’t had a better outcome,” but agreed that the Board needed to be apprised of the scientists’ assessment of Nu Mark’s bleak regulatory prospects.²⁴⁷ While Complaint Counsel has attacked the bona fides of the presentation, *every* witness from whom

²³⁹ FF ¶ 854 (Quigley (Altria) Tr. 1958-59).

²⁴⁰ FF ¶ 853 (Quigley (Altria) Tr. 2073; PX7041 Quigley (Altria) Dep. at 173).

²⁴¹ FF ¶ 857 (Quigley (Altria) Tr. 2049-50).

²⁴² [REDACTED]; *see also* FF ¶¶ 671-72.

²⁴³ FF ¶ 674; *see also* [REDACTED]. [REDACTED]

²⁴⁴ FF ¶¶ 858, 862, 866-68.

²⁴⁵ FF ¶ 736.

²⁴⁶ FF ¶ 860 (Willard (Altria) Tr. 1422).

²⁴⁷ FF ¶ 860 (Willard (Altria) Tr. 1422).

the Court heard on the topic—including Quigley, who Complaint Counsel claimed disagreed with the presentation—affirmed that the presentation was both accurate and complete.²⁴⁸

IV. August 2018: Altria and JLI Discussed a Possible Investment, but Negotiations Broke Down at the End of the Month

A. On July 30, 2018, JLI sent Altria an initial proposed term sheet, which Altria promptly rejected.

During this same time period, negotiations with JLI picked up, only to break down by the end of August. On July 30, 2018, JLI (code-named “Jack” in the negotiations) sent an initial nonbinding term sheet (the “July 30 Term Sheet”) to Altria (code-named “Richard”) proposing a potential transaction structure.²⁴⁹ With JLI no longer willing to entertain giving up control, its term sheet contemplated that Altria would purchase a 45 percent stake in JLI’s U.S. business.²⁵⁰ In exchange, Altria would receive just five percent voting power.²⁵¹ 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’s ability to increase its ownership stake.²⁵²

JLI’s proposal also included two provisions that addressed the contemplated investment’s implications for Altria’s e-vapor portfolio *after* the transaction took place. *First*, mindful that the transaction would require HSR clearance, JLI proposed in a section entitled “Antitrust Clearance Matters” that, in connection with filing for antitrust clearance, Altria would “divest” its existing e-vapor products.²⁵³ As an alternative, only if “divestiture [were] not reasonably practicable,”

²⁴⁸ FF ¶¶ 868-74. Complaint Counsel has seized on an August 14, 2018 email from Quigley to Crosthwaite in which Quigley objected to aspects of a draft of the deck—in particular, its portrayal of the cig-a-like platform as “declining.” But at his deposition and at trial, Quigley explained that his frustration was with Crosthwaite himself—and that “ultimately . . . the facts in the deck were accurate.” FF ¶¶ 875-77.

²⁴⁹ FF ¶¶ 767-68.

²⁵⁰ FF ¶ 770.

²⁵¹ FF ¶ 770.

²⁵² FF ¶ 770.

²⁵³ FF ¶¶ 772-74.

Altria was to contribute its products to JLI.²⁵⁴ And, only if that too were impracticable, as a last resort, Altria was to “cease to operate” them within nine months following the transaction.²⁵⁵ In the same “Antitrust Clearance Matters” section, JLI specified that both parties would be obligated to “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.”²⁵⁶ As Nick Pritzker and Riaz Valani, two members of JLI’s Board, testified at trial, they assumed that the FTC would require divestiture as part of the HSR clearance process and thus intended these provisions to ensure that Altria cooperated with the FTC with respect to the disposition of its e-vapor business.²⁵⁷ 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.”²⁵⁸ Indeed, the provision would kick in only *after* the transaction was consummated.²⁵⁹

Second, a separate section entitled “Richard Support Obligations” detailed various support services that the parties had discussed as one of the key strategic benefits of the deal, including regulatory assistance with JLI’s PMTA.²⁶⁰ Because the provision of those services would

²⁵⁴ FF ¶ 778.

²⁵⁵ FF ¶ 781.

²⁵⁶ FF ¶ 784.

²⁵⁷ FF ¶¶ 775-76, 784-85.

²⁵⁸ FF ¶ 785 (Pritzker (JLI) Tr. 815). A few days before the circulation of this proposed term sheet, JLI’s investment banker, Peter Gross from Goldman Sachs, had emailed Pritzker, writing, “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.” FF ¶ 1212. Pritzker responded, “I think they may need to sell it,” FF ¶ 1212—consistent with his view 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, FF ¶ 1212 (Pritzker (JLI) Tr. 681). 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 him that they had heard Altria would shut down any products. FF ¶ 1213 (Pritzker (JLI) Tr. 796). And while Complaint Counsel declined to call Gross at trial, Gross confirmed in his deposition that he had never heard from anyone that Altria was planning to shut down MarkTen. Rather, he understood that Altria’s e-vapor products “were inferior products that had no traction in the market” and “assumed [Altria] attributed no value to MarkTen.” FF ¶¶ 1213-14 (PX7043 Gross (Goldman Sachs) Dep. at 34-36).

²⁵⁹ FF ¶¶ 772-86, 1203-1207.

²⁶⁰ FF ¶ 787.

necessarily give Altria access to JLI’s “technology, trade secrets, data,” and other confidential information—material that would “work to the detriment of JUUL if Altria . . . appl[ied] that information to [its] own product portfolio”²⁶¹—JLI’s proposed term sheet called for Altria to “refrain from competing . . . in the e-vapor business.”²⁶² As Pritzker explained, JLI was not concerned about competition from Altria’s existing products, but feared that Altria would “use information that it would obtain *from JUUL* after the transaction in order to use JUUL’s data and trade secrets against JUUL” by developing new competitive products.²⁶³ To that end, JLI also included a carve-out that provided that Nu Mark could continue to sell “MarkTen and MarkTen Elite prior to their divestiture or contribution” in connection with HSR clearance.²⁶⁴

The parties met two days later on August 1 in Washington, D.C.²⁶⁵ The meeting was not “designed to go through” the term sheet “in detail.”²⁶⁶ Instead, the parties discussed “some of the most important terms between the two sides,” at a high level, “to assess whether or not there was enough common ground to proceed.”²⁶⁷ At trial, Complaint Counsel conspicuously avoided asking the participants what was discussed at this meeting. But by all accounts, the meeting did not go well. Altria was focused on the ownership and control terms in the term sheet, which it found “insult[ing],” “outrageous,” and “appalling.”²⁶⁸ The discussion was “tense.”²⁶⁹ The parties “barely got past” the five percent voting power for a 45 percent economic interest, which was “a huge

²⁶¹ FF ¶ 788 (Pritzker (JLI) Tr. 821).

²⁶² FF ¶ 788.

²⁶³ FF ¶ 815 (Pritzker (JLI) Tr. 895) (emphasis added); *see also* FF ¶ 791.

²⁶⁴ FF ¶ 789.

²⁶⁵ FF ¶ 792.

²⁶⁶ FF ¶ 793 (PX7031 Willard (Altria) Dep. at 177).

²⁶⁷ FF ¶ 793 (PX7031 Willard (Altria) Dep. at 177-78).

²⁶⁸ FF ¶ 771 (Garnick (Altria) Tr. 1745; Gifford (Altria) Tr. 2764).

²⁶⁹ FF ¶ 794.

sticking point.”²⁷⁰ And there was no discussion of the divestiture/contribution/“cease to operate” provision.²⁷¹

B. The parties engaged in active negotiations throughout August 2018 and coalesced around a structure by which Altria would divest or contribute its e-vapor assets pursuant to HSR review.

Despite the inauspicious start to this more active period of negotiations, the parties continued in August to explore the potential for a deal. Throughout this process, each proposed term sheet exchanged by the parties, including the July 30 Term Sheet, was drafted by outside counsel.²⁷² Some of the parties’ disagreements were narrow and likewise focused more on by outside counsel rather than the businesspeople, including the discussions around the provisions addressing Altria’s e-vapor products.²⁷³ Altria recognized that, to secure antitrust clearance, it would “potentially” need to “exit [its] own vapor business” by divesting or contributing its e-vapor assets—a subject for outside counsel to work through.²⁷⁴

On August 9, Altria sent JLI a revised term sheet, striking the divestiture/contribution/“cease to operate” term *entirely*, and instead proposing that Altria would exclusively license its e-vapor assets to JLI upon HSR approval.²⁷⁵ At the same time, Altria maintained the provision concerning

²⁷⁰ FF ¶ 795 (PX7040 Gifford (Altria) Dep. at 143).

²⁷¹ FF ¶ 797. On August 4, 2018, JLI sent Altria a revised term sheet that proposed increased voting power for Altria (from five percent to 15 percent), the addition of an Altria-appointed nonvoting observer to JLI’s Board prior to receiving HSR clearance, and other terms related to control. FF ¶¶ 800-01. The idea was to try to address concerns Altria raised at the August 1 meeting. FF ¶ 800. In addition, JLI made a conforming change to the carve-out provision in the noncompete, stating that it applied “prior to the[] [products’] divestiture, shutdown or contribution as described above.” FF ¶ 802. Pritzker testified that this provision was not a subject of discussion with Altria, and he did not know why it was added. FF ¶ 803 (Pritzker (JLI) Tr. 829-30). Based on the process of the revisions, however, Pritzker “believe[d] the lawyer that drafted it wanted to” conform this provision to the divestiture/contribution/“cease-to-operate” provision. FF ¶ 803 (Pritzker (JLI) Tr. 829-30). The language did not appear in any subsequent term sheet.

²⁷² FF ¶ 1163.

²⁷³ FF ¶ 1210 (PX7031 Willard (Altria) Dep. at 185-86); *see also* FF ¶ 816 (Willard (Altria) Tr. 1223).

²⁷⁴ FF ¶¶ 1162-65, 1205.

²⁷⁵ FF ¶¶ 805, 807.

“cooperat[ion] with the FTC” in connection with its e-vapor business.²⁷⁶ Pritzker inferred from Altria’s revisions that Altria “had a problem with the exact language” proposed by JLI, but that “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.”²⁷⁷ With respect to the noncompete linked to support services, Altria sought to expand the carve-out to encompass not only Altria’s existing products but also “under development products” prior to the contemplated licensing.²⁷⁸ This implicated JLI’s concern that Altria could, in the future, misuse JLI’s trade secrets to produce new e-vapor products.²⁷⁹

On August 15, 2018, Valani responded to Altria’s August 9 term sheet with an issues list.²⁸⁰ The working issues list covered many topics, including the scope of the standstill, transfer rights, and valuation.²⁸¹ It also covered Altria’s revisions to the divestiture term and the noncompete. Valani explained his understanding that Altria would not ultimately compete against JLI while providing services and that, accordingly, Altria’s strike-through of the “commitment to divest Mark Ten”—along with Altria’s effort to expand the carve-out for existing products to include “under development and future products”—was “not acceptable.”²⁸² Under no circumstances would JLI allow Altria to have “access to all of [its] proprietary information” via the contemplated services relationship or Board seats while Altria retained the ability to use that proprietary information to develop its own e-vapor products.²⁸³ But neither Valani nor JLI was concerned about Altria’s existing products remaining on the market post-signing and did not object to the striking of the “cease to operate” language.²⁸⁴ Instead, as Valani testified at trial, JLI’s request that Altria not

²⁷⁶ FF ¶ 807.

²⁷⁷ FF ¶ 808 (Pritzker (JLI) Tr. 841-42).

²⁷⁸ FF ¶ 809 (PX2313 (JLI) at 017).

²⁷⁹ FF ¶¶ 812-15.

²⁸⁰ FF ¶ 810 (PX1012 (Altria) at 001).

²⁸¹ FF ¶ 811 (PX1012 (Altria) at 002).

²⁸² FF ¶ 812.

²⁸³ FF ¶ 1182 (Valani (JLI) Tr. 933-34).

²⁸⁴ FF ¶ 812.

compete against JLI post-transaction was contingent upon “complete and total regulatory sanction” by the FTC.²⁸⁵ It was “extremely . . . important” to JLI that Altria achieve that outcome through “appropriate means” and “per regulatory sanction.”²⁸⁶

The parties and their outside counsel met on August 18, 2018, at the law offices of Pillsbury Winthrop Shaw Pittman (JLI’s outside counsel).²⁸⁷ While “progress was starting to be made” on some of the more contentious terms, the parties remained “very significantly apart” on valuation.²⁸⁸ Complaint Counsel again did not even ask the participants at trial what was discussed at the meeting, but there is no evidence that the noncompete was even raised.²⁸⁹ As Willard explained, the treatment of Altria’s e-vapor products was not a topic he recalled reaching the discussions between the senior group of negotiators; rather, it was an issue “that the respective counsels at the companies were . . . focused on.”²⁹⁰

JLI sent Altria a revised term sheet the next day (the “August 19 Term Sheet”)—one which Complaint Counsel chose to ignore at trial.²⁹¹ In this latest term sheet, JLI proposed that Altria would (1) be required to contribute its e-vapor assets to JLI upon HSR clearance; and (2), in the event regulatory approval was not obtained within nine months following the transaction, divest its e-vapor assets within six months thereafter.²⁹² JLI did not reincorporate the proposed “cease to operate” provision.²⁹³ JLI also again proposed requiring both parties to “cooperate with the FTC” in connection with the disposal of Altria’s e-vapor assets.²⁹⁴ As for the noncompete, JLI followed

²⁸⁵ FF ¶ 1204 (Valani (JLI) Tr. 934).

²⁸⁶ FF ¶ 1204 (Valani (JLI) Tr. 911-12).

²⁸⁷ FF ¶ 818.

²⁸⁸ FF ¶ 820 (Pritzker (JLI) Tr. 845-46).

²⁸⁹ FF ¶ 821.

²⁹⁰ FF ¶ 821 (Willard (Altria) Tr. 1219).

²⁹¹ FF ¶ 824. The August 19 Term Sheet was occasionally referred to at trial as the “August 18 term sheet” (reflecting the draft stamp on the document). FF ¶ 824.

²⁹² FF ¶ 826.

²⁹³ FF ¶ 826.

²⁹⁴ FF ¶ 825.

through on its objection in the August 15 issues list, rejecting Altria's effort to expand the carve-out to include "under development products." Instead, the term sheet proposed, 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)."²⁹⁵

As reflected in an August 22, 2018 issues list exchanged between the parties, Altria perceived no "material substantive difference" between the parties on the new contribution/divestiture term; the parties' outside counsel were merely fleshing out the details.²⁹⁶ Recognizing the reasonableness of JLI's concern regarding Altria's ability to exploit JLI's proprietary information, Altria also accepted JLI's revision to the scope of the noncompete.²⁹⁷ Accordingly, the issues list confirmed what the draft term sheets had made clear all along—"MarkTen and MarkTen Elite" could remain on the market following "signing."²⁹⁸

C. Negotiations collapsed at the end of August for reasons unrelated to the noncompete.

While the parties had settled on a framework for the divestiture and noncompete provisions, other deal terms—of great consequence to both parties—remained in serious dispute.²⁹⁹ On August 27, the parties met in New York at outside counsel's offices in an attempt to reconcile their positions on valuation, deal structure, and control.³⁰⁰ They "reached an impasse," and discussions "broke down."³⁰¹ Among other issues, the companies remained "very far apart on what a reasonable price would be."³⁰² As for control, JLI was concerned that the 45 percent interest Altria

²⁹⁵ FF ¶ 827.

²⁹⁶ FF ¶¶ 834-36.

²⁹⁷ FF ¶¶ 1185-86.

²⁹⁸ FF ¶ 837 (RX1784 (PWP) at 004).

²⁹⁹ One aspect of the noncompete provision—not directly at issue in this case—remained unresolved. The parties had not agreed on the extent to which any noncompete would apply to an upstream affiliate of Altria's. FF ¶ 828.

³⁰⁰ FF ¶¶ 879, 883.

³⁰¹ FF ¶ 878 (Garnick (Altria) Tr. 1753; Willard (Altria) Tr. 1419).

³⁰² FF ¶ 890 (PX7021 Pritzker (JLI) Dep. at 123-24).

was seeking was “too close to 51 percent.”³⁰³ Finally, Altria refused to agree to JLI’s demand for a “sign-and-close” transaction—in other words, that Altria make the full investment at closing before obtaining FTC approval.³⁰⁴

The next day, JLI’s Board concluded that “in light of the wholly unsatisfactory nature of recent discussions,” a deal was “highly unlikely.”³⁰⁵ Altria, too, believed the deal “was off.”³⁰⁶ And at its next meeting on September 8, JLI’s Board formally decided that, in light of “its prospects for future growth and further increases in valuation . . . , which were not adequately reflected in [Altria’s] offer,” JLI would “cease discussions of an investment or strategic relationship.”³⁰⁷ Around the same time, JLI decided that it would pursue alternative financing (such as via a tender offer), and Pritzker “wanted to just get that done and move on.”³⁰⁸ Valani communicated the message to Altria on September 11.³⁰⁹

As a result of the impasse, negotiations remained broken down through September and into October: following the August 27 meeting, the parties would not resume negotiations until October 5, when Willard sent JLI a letter making concessions on open issues involving valuation, payment process, and control.³¹⁰

V. Early-to-Mid September 2018: After Coming to Grips with Nu Mark’s Challenges, Altria Decided to Downsize Nu Mark, Suspend Development Work, and Chart a New Course in E-Vapor—the Growth Teams

In September 2018, without a product that could convert smokers, and at a time when JLI deal discussions had broken off, senior leadership determined that Altria needed to fundamentally

³⁰³ FF ¶ 890 (PX7021 Pritzker (JLI) Dep. at 123-24).

³⁰⁴ FF ¶¶ 886-89.

³⁰⁵ FF ¶ 890 (PX2117 (JLI) at 032).

³⁰⁶ FF ¶ 891 (Gifford (Altria) Tr. 2798).

³⁰⁷ FF ¶¶ 893-94 (PX2117 (JLI) at 041); *see also* FF ¶ 894 (PX7021 Pritzker (JLI) Dep. at 131 (“[W]e determined at the [B]oard that this was just not going to happen.”)).

³⁰⁸ FF ¶¶ 895-96 (PX7021 Pritzker (JLI) Dep. at 132).

³⁰⁹ FF ¶ 895.

³¹⁰ FF ¶¶ 897, 979.

restructure in order “to course correct” Nu Mark’s failings.³¹¹ As Quigley explained, the determination reflected the culmination of his 100-day review of Nu Mark’s e-vapor business that had begun in June 2018.³¹² The embodiment of that restructuring was an Altria initiative known as the “Growth Teams”—small teams that “would be empowered to make all the decisions” around e-vapor development.³¹³ The Growth Teams would be directed to “start from scratch” in an effort to develop “leapfrog” e-vapor products.³¹⁴ Everyone at Altria understood that, even if the Growth Teams were successful, it would be a minimum of five years (and likely much longer) before they could bring a new product to market.³¹⁵ To Quigley, the shift to the Growth Teams reflected that Altria had “no confidence” in Nu Mark’s current portfolio and “very little confidence” in its “current business approach . . . to innovative products.”³¹⁶

As Willard explained:

[R]eally, *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.*³¹⁷

The Growth Teams plan entailed significant corporate restructuring, including “downsiz[ing] the Nu Mark business.”³¹⁸ And because of resource constraints and the mandate to

³¹¹ FF ¶ 900.

³¹² FF ¶ 904 (Quigley (Altria) Tr. 2079-80).

³¹³ FF ¶¶ 902-03.

³¹⁴ FF ¶¶ 903-04.

³¹⁵ FF ¶ 905.

³¹⁶ FF ¶ 900 (Quigley (Altria) Tr. 2071).

³¹⁷ FF ¶ 900 (PX7031 Willard (Altria) Dep. at 268-69 (emphases added); Willard (Altria) Tr. 1434 (explaining that, “all of the existing Nu Mark products . . . had failed to be successful in the marketplace” and that a “different approach” was needed)).

³¹⁸ FF ¶¶ 906-08 (Quigley (Altria) Tr. 2067-78).

start “from scratch,” the regulatory team and Quigley began identifying ongoing development projects and PMTA-related work to phase out. On September 10, the regulatory team took an inventory of ongoing projects for this purpose, while Quigley undertook a similar effort.³¹⁹ All were 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.³²⁰ A few days later, Quigley advised Garnick that “[w]e should stop ALL work around the [Elite] pmta.”³²¹ And within a week, Willard had signed off on suspending development work.³²² These decisions were all made with the expectation that there would *not* be a deal with JLI. As Garnick testified, [REDACTED]

[REDACTED]³²³ Indeed, the move to the Growth Teams would be a bitter pill for many in the organization, spurring numerous lay-offs and other restructurings in connection with the recognition that Nu Mark was failing and that Altria needed to all but start over in e-vapor.³²⁴

VI. Mid-to-Late September 2018: FDA Called on Altria to Combat Youth Use and Altria Decided to Pull Elite and Non-Traditional Cig-a-Like Flavors in Response

A. FDA called for manufacturers to take prompt and forceful action to address youth vaping on September 12, 2018.

After making several public warnings in spring 2018 about youth vaping, on September 12, 2018, FDA sent a letter to Altria, along with four other e-vapor manufacturers including JLI, and made a simultaneous public statement demanding that the manufacturers take “prompt action” to address the crisis.³²⁵ In its letter to Altria, FDA noted that its “blitz” of retailers revealed “the

³¹⁹ FF ¶ 910.

³²⁰ FF ¶ 911.

³²¹ FF ¶ 912 (RX0319 (Altria) at 001).

³²² FF ¶ 913 (PX1182 (Altria) at 001).

³²³ [REDACTED]

³²⁴ FF ¶¶ 914-16, 949 (Quigley (Altria) Tr. 2048-49, 2081).

³²⁵ FF ¶ 917 (RX1120 (FDA) at 002).

illegal sale of MarkTen products to minors.”³²⁶ FDA advised Altria that it was reconsidering its exercise of enforcement 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.³²⁷ And FDA asked Altria to meet with the Commissioner and respond in writing within 60 days with “a detailed plan . . . to address and mitigate widespread use by minors.”³²⁸ Among other things, FDA listed “[r]emoving flavored products from the market until those products can be reviewed by FDA” as a step that Altria could consider as part of its plan.³²⁹ In an accompanying press release, FDA promised that it would hold e-vapor manufacturers “accountable,” including by utilizing its “civil and criminal enforcement tools.”³³⁰ It was up to e-vapor manufacturers “to respond with forceful plans . . . or face regulatory consequences.”³³¹

Altria immediately recognized the severity of FDA’s concern.³³² As Howard Willard testified, the September 12 letter was “from [Altria’s] most important regulator,” and the message was simple: “you’re part of the problem, and I expect you to contribute to fixing it. I expect you to do it quickly and completely.”³³³ Willard had previously served as Altria’s Senior Vice President of Youth Smoking Prevention and was accordingly “very sensitive” to the “FDA’s concerns about youth usage of tobacco products.”³³⁴ To Willard, FDA’s statements were “pretty threatening,” and it was “hard to miss [the Commissioner’s] point.”³³⁵ Murillo was similarly concerned, “fear[ing]” that FDA was “threatening” to reverse course on the continuum of risk, a result which would be “of

³²⁶ FF ¶ 919.

³²⁷ FF ¶ 920.

³²⁸ FF ¶ 921.

³²⁹ FF ¶ 922.

³³⁰ FF ¶¶ 917, 928-29 (RX1921 (FDA) at 007).

³³¹ FF ¶ 928 (RX1921 (FDA) at 008).

³³² As did JLI. FF ¶¶ 1032-41.

³³³ FF ¶¶ 930, 934 (Willard (Altria) Tr. 1437).

³³⁴ FF ¶ 935 (Willard (Altria) Tr. 1322).

³³⁵ FF ¶ 929 (Willard (Altria) Tr. 1439).

potential catastrophic consequence to” Altria.³³⁶ [REDACTED]

[REDACTED]

[REDACTED]³³⁷

B. At a leadership team meeting held on September 26, 2018, senior management conveyed that it would discontinue Elite and transition to the Growth Teams.

In late September, Altria’s senior management gathered for an annual planning meeting at Altria’s off-site facility, known as the Ranch.³³⁸ As summarized in a presentation by Quigley on September 26, Altria’s senior leadership decided that “in response to FDA,” Altria would “[r]emove Elite . . . from the Marketplace,” along with non-traditional cig-a-like flavors.³³⁹



340

For Willard, FDA’s grave concerns, in combination with Nu Mark’s commercial and regulatory challenges, drove the decision.³⁴¹ And in light of the FDA letter, Quigley “was fully

³³⁶ FF ¶ 937 (PX7027 Murillo (Altria/JLI) Dep. at 202-03).

³³⁷ [REDACTED]

³³⁸ FF ¶ 939 (Murillo (Altria/JLI) Tr. 2976-78).

³³⁹ FF ¶¶ 943-44 (RX1176 (Altria) at 024).

³⁴⁰ FF ¶ 943 (RX1176 (Altria) at 024).

³⁴¹ FF ¶¶ 930-36, 940, 947.

supportive”—Altria’s “legacy as a company was to lead and be the most responsible tobacco company, and . . . it was the most responsible thing to do.”³⁴²

At the same meeting, Quigley communicated to the broader leadership team Altria’s decision to transition to 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.”³⁴³ 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.³⁴⁴

[REDACTED]

[REDACTED]

[REDACTED]³⁴⁵ [REDACTED]

[REDACTED]

[REDACTED]³⁴⁶ This all occurred at a time when JLI’s Board had declared an end to negotiations between JLI and Altria and when Altria was preparing to implement its Growth Teams strategy. As witness after witness testified, it had nothing to do with any conjectured demand by JLI.³⁴⁷

VII. October 2018: Altria Pursued Parallel Paths in E-Vapor—The Growth Teams and an Investment in JLI

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. On October 5, Altria took

³⁴² FF ¶ 946 (Quigley (Altria) Tr. 1993, 2078-79). While Complaint Counsel has attempted to cast doubt on the timing of Altria’s decision by observing that the decision was not announced to the entire Altria organization until October 25 (when it was announced publicly), Quigley explained that leadership did not think it was prudent to do so before informing FDA of the decision, which did not occur until October 18. FF ¶ 949 (Quigley (Altria) Tr. 2082).

³⁴³ FF ¶ 950 (RX1176 (Altria) at 012).

³⁴⁴ FF ¶ 950 (RX1176 (Altria) at 017).

³⁴⁵ [REDACTED]

³⁴⁶ [REDACTED]

³⁴⁷ FF ¶¶ 1152-61.

steps forward on each approach. *First*, Altria officially announced the launch of the Growth Teams. *Second*, Altria decided to make “one last effort” at a deal with JLI.³⁴⁸

A. Altria announced the Growth Teams.

On October 5, Willard circulated a company-wide memo announcing the Growth Teams’ formation. The memo explained that Altria had “spent the past 100 days doing a deep situation analysis” and that a “change in direction [was] necessary.”³⁴⁹ Roughly 60 Nu Mark employees would be terminated or transferred.³⁵⁰ 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 development work.³⁵¹ Per Gifford, the message was “we’re going back to square zero.”³⁵²

Despite the radical shift in approach, the Growth Teams were primarily staffed with existing Altria personnel, which leadership perceived as a significant barrier to success. To develop a leapfrog product, Altria needed “external talent that had more experience innovating and that had experience with electronic products.”³⁵³ But recruiting that talent was “very, very challenging.”³⁵⁴ Altria had been trying and failing to hire people with innovation and product expertise “for a number of years,”³⁵⁵ as 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.”³⁵⁶

³⁴⁸ FF ¶ 978 (PX7031 Willard (Altria) Dep. at 226).

³⁴⁹ FF ¶ 964 (RX0842 (Altria) at 003).

³⁵⁰ FF ¶ 965 (RX0842 (Altria) at 003).

³⁵¹ FF ¶ 966 (RX0842 (Altria) at 003).

³⁵² FF ¶ 966 (Gifford (Altria) Tr. 2802).

³⁵³ FF ¶ 848 (Willard (Altria) Tr. 1396).

³⁵⁴ FF ¶ 972 (PX7024 Crosthwaite (Altria/JLI) Dep. at 269).

³⁵⁵ FF ¶ 848 (PX7031 Willard (Altria) Dep. at 264).

³⁵⁶ FF ¶ 848 (Willard (Altria) Tr. 1397). According to JLI’s current CEO, K.C. Crosthwaite, none of the hundreds of employees that JLI recently “let go of as a result of the competitive environment [it is] in . . . [has] joined a tobacco company.” FF ¶ 848.

Despite these challenges, Altria believed it had made a breakthrough hiring in connection with the Growth Teams. To lead the new initiative, Altria hired Bassiouni (“B.K.”) Khalid as Senior Vice President of Innovative Product Development. As Willard informed the organization, Altria believed that Khalid was an “innovation leader with a proven track record,” a successful Amazon executive who had “led platform development for [Amazon] Alexa.”³⁵⁷ But within days of Khalid joining Altria, the company realized that it had been duped: Khalid was a “fraud.”³⁵⁸ He had plagiarized his resume, invented references, and entirely fabricated his claimed employment history.³⁵⁹ Altria terminated Khalid’s employment.³⁶⁰

Altria began looking for external talent to replace Khalid, but “there was no other candidate”—it was too “difficult to find someone who had the expertise that [Altria was] looking for who was willing to move to Richmond.”³⁶¹ Altria was thus left to attempt to develop “leapfrog” technologies with its existing, tobacco-company-based talent. And though the teams were autonomous, enjoyed free rein to determine the direction of product development, and were unconstrained by a budget, they were beginning their work without a product concept.³⁶² “It was a bunch of people in a room saying, okay, think of something.”³⁶³

B. Altria sent JLI a letter, and negotiations resumed.

On the same day that Altria announced the formation of the Growth Teams, Willard sent JLI a letter that reflected major concessions on the ownership and structure issues that had been a sticking point between the parties.³⁶⁴ Altria proposed purchasing 35 percent of JLI’s U.S. *and* international business, softening its position both on ownership stake (from 45 percent to

³⁵⁷ FF ¶ 973 (RX0842 (Altria) at 002).

³⁵⁸ FF ¶ 974 (Jupe (Altria) Tr. 2319).

³⁵⁹ FF ¶ 974 (Jupe (Altria) Tr. 2319-20).

³⁶⁰ FF ¶ 976.

³⁶¹ FF ¶ 977 (PX7000 Garnick (Altria) IHT at 82; PX7024 Crosthwaite (Altria/JLI) Dep. at 269).

³⁶² FF ¶ 970.

³⁶³ FF ¶ 970 (PX7000 Garnick (Altria) IHT at 132).

³⁶⁴ FF ¶¶ 978-79.

35 percent) and its previous insistence that JLI be split into an international and domestic business.³⁶⁵ Altria also relented on the payment structure, proposing that the “full investment . . . be made at closing,” at which time Altria would “receive non-voting shares.”³⁶⁶

Altria saw the letter as “one last effort” to engage with JLI to “see whether some of these different terms [would be] of any interest to them.”³⁶⁷ [REDACTED]

[REDACTED]³⁶⁸

Altria’s revised positions on ownership and structure did persuade JLI to reengage.³⁶⁹ Those issues had been “particularly important to JLI,” and Willard was proposing terms that were “significantly different” from Altria’s prior offers.³⁷⁰ “[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.”³⁷¹

With respect to the noncompete though, nothing had changed. Willard’s letter simply reiterated that Altria would agree “not [to] compete, in a manner consistent with [the parties’] previous discussions.”³⁷² As JLI correctly understood, Willard was referencing the framework the parties had settled on in the August 19 Term Sheet and the August 22 issues list: that Altria would “keep MarkTen and MarkTen Elite on the market until they could be divested or contributed pursuant to FTC review.”³⁷³

On October 12, Pritzker informed Willard that JLI was amenable to the terms set forth in the letter, and, on October 15, Altria sent JLI a proposed term sheet.³⁷⁴ That term sheet addressed

³⁶⁵ FF ¶ 979.

³⁶⁶ FF ¶ 979.

³⁶⁷ FF ¶ 978 (PX7031 Willard (Altria) Dep. at 226).

³⁶⁸ [REDACTED]

³⁶⁹ FF ¶¶ 979-84.

³⁷⁰ FF ¶ 980 (PX7031 Willard (Altria) Dep. at 225-26).

³⁷¹ FF ¶ 984 (PX7021 Pritzker (JLI) Dep. at 137).

³⁷² FF ¶ 985 (PX2152 (JLI) at 003).

³⁷³ FF ¶ 986 (PX7021 Pritzker (JLI) Dep. at 204-05).

³⁷⁴ FF ¶¶ 991, 994. The October 15 proposed term sheet contemplated that Altria would provide certain “enhanced” services upon the “earlier of (i) contribution . . . or (ii) [Altria] otherwise exiting

Altria’s e-vapor products in the same manner as the August 19 Term Sheet: (1) Altria would contribute its products to JLI upon HSR clearance or, as necessary to obtain clearance, divest them, and (2) Altria would not compete by developing new e-vapor products although it could continue with its existing e-vapor business until HSR clearance.³⁷⁵ As Altria reported to members of the deal team, “it appear[ed] that Tree,” the code name for Altria’s potential investment in JLI, “[was] still alive (if on life support).”³⁷⁶

VIII. October 25, 2018: Altria Pulled Its Pod Product and Non-Traditional Flavors in Response to FDA’s Concerns

A. Altria discontinued Elite in response to FDA’s concerns.

On October 18, Altria met with Commissioner Gottlieb to discuss his letter and the company’s planned response.³⁷⁷ Altria informed FDA of its intention to withdraw its own pod products and non-traditional flavors of its cig-a-like products in light of FDA’s concerns about the “epidemic” rate of youth e-vapor use.³⁷⁸ FDA had a “positive reaction” to this news,³⁷⁹ although Altria did not get the “impression” at the meeting that FDA was “seriously considering” pulling all pod products from the market.³⁸⁰

On October 25, 2018, Altria sent its formal response to FDA, in a letter that the company made public that same day.³⁸¹ Altria announced that it would pull its pod products from the market.³⁸² Although Altria did not believe it had a “current issue with youth access or use,” it did

the marketing and sale of products in the Field.” FF ¶ 1065. The specific services at issue could be provided under the antitrust laws only if Altria were no longer competing with JLI, and Altria’s deal counsel added this language to “ensure that [Altria was] protected and in compliance with the antitrust laws” in this respect. FF ¶¶ 1064, 1066 (PX7036 Garnick (Altria) Dep. at 193-94).

³⁷⁵ FF ¶¶ 994-95.

³⁷⁶ FF ¶ 992.

³⁷⁷ FF ¶ 997.

³⁷⁸ FF ¶ 998.

³⁷⁹ FF ¶ 999.

³⁸⁰ FF ¶ 1000.

³⁸¹ FF ¶ 1001.

³⁸² FF ¶ 1002.

“not want to risk contributing to the issue” with a product that was not converting adult smokers.³⁸³ Altria likewise committed to discontinuing all non-traditional cig-a-like flavors.³⁸⁴ There was no change in the competitiveness of the market as Elite had minimal market share and little consumer following.³⁸⁵

B. To Altria’s surprise, JLI remained willing to continue negotiations.

That same day, following the public release of its letter, Altria shared the letter with JLI, recognizing that JLI would be unhappy with the announcement.³⁸⁶ JLI was indeed “shocked” by the announcement and viewed the letter as a “hostile action towards JUUL.”³⁸⁷ Pritzker was “amazed” that Altria “had taken the[] [products] off”;³⁸⁸ JLI did not “welcome[]” the action, having been “perfectly happy to have [Elite] stay on the market.”³⁸⁹

Notwithstanding its frustration, JLI was willing to continue negotiating with Altria.³⁹⁰ As Garnick summarized in an email sent only hours after Altria shared the letter with JLI, “[t]he Tree folks are still talking to us even in light of the announcement we made today.”³⁹¹ Complaint Counsel’s assertion that the parties had a prior agreement about Altria’s action on October 25 cannot be squared with this contemporaneous document.

³⁸³ FF ¶ 1002.

³⁸⁴ FF ¶ 1003.

³⁸⁵ FF ¶¶ 1020-21 (Myers (Altria) Tr. 3368-69 (explaining that retailers “weren’t upset about [Elite’s] discontinuation” because Elite “hadn’t performed well in stores”)); FF ¶ 1021 (PX7019 Crozier (Sheetz) Dep. at 76-77 (Elite had not “resonated” with consumers and had not made “any dent in JUUL’s share”)).

³⁸⁶ FF ¶¶ 1008, 1012.

³⁸⁷ FF ¶ 1013 (PX7011 Valani (JLI) IHT at 124-26 (describing the decision as “shock[ing]”)); *see also* FF ¶ 1014 (PX2473 (JLI) at 001 (Robbins commenting that “[t]he Altria letter is a thinly veiled attempt to get rid of competition that threatens their cig franchise”)).

³⁸⁸ FF ¶ 1016 (PX7021 Pritzker (JLI) Dep. at 150).

³⁸⁹ FF ¶ 1016 (Pritzker (JLI) Tr. 874).

³⁹⁰ FF ¶ 1018.

³⁹¹ FF ¶ 1019.

Soon thereafter, the parties exchanged their final nonbinding term sheet.³⁹² That term sheet maintained materially the same structure for treatment of Altria’s existing e-vapor products, contemplating that Altria would either contribute or divest its e-vapor assets as part of the HSR clearance process.³⁹³ And the carve-out to the noncompete continued to provide for Nu Mark’s existing products to remain on the market in the interim.³⁹⁴ [REDACTED] the term sheet also provided that Altria could delay filing for HSR approval until July 15, 2020.³⁹⁵ That was fine with JLI “because it meant pushing back the date when [Altria would be able to appoint directors to JLI’s] [B]oard.”³⁹⁶ It would also not affect Altria’s ability to provide key regulatory services, as those could be provided even before MarkTen was divested.³⁹⁷ The parties proceeded to due diligence in November and began drafting the actual deal documents.³⁹⁸

C. Shortly thereafter, JLI removed its own non-traditional flavored products from retail.

Two weeks after Altria’s letter to FDA, JLI announced its own response to FDA’s letter.³⁹⁹ JLI decided to pull all non-traditional flavors from retail, leaving those flavors to be sold only online.⁴⁰⁰ In announcing the decision, JLI explained that it was “sensitive to the concern articulated by Commissioner Gottlieb” about flavors, and that its decision reflected its “common goal” with FDA to “prevent[] youth from initiating on nicotine.”⁴⁰¹ At the time, flavored pods made up 50 percent of JLI’s revenue, and the company anticipated a “big” financial impact as a result of its

³⁹² FF ¶ 1049.

³⁹³ FF ¶ 1049.

³⁹⁴ FF ¶ 1049.

³⁹⁵ [REDACTED]; *see also* FF ¶¶ 1053-61.

³⁹⁶ FF ¶ 1061 (Garnick (Altria) Tr. 1678).

³⁹⁷ FF ¶ 1063.

³⁹⁸ FF ¶¶ 1103, 1106.

³⁹⁹ FF ¶ 1032.

⁴⁰⁰ FF ¶ 1033.

⁴⁰¹ FF ¶ 1034.

decision, with many of its customers “go[ing] to a competitor’s products.”⁴⁰² Altria, for its part, was “very encouraged” by JLI’s decision and believed it “reflected a commitment” to prevent youth usage of e-vapor products.⁴⁰³

IX. December 7, 2018: Seeking Cost Savings for New Opportunities and Lacking Viable E-Vapor Products, Altria Discontinued Nu Mark’s Remaining Cig-A-Like Products

Altria was reckoning with its own financial challenges. In the course of its annual budget process, Altria came to terms with the fact that its alternative potential “pathways” to an e-vapor product—whether through the Growth Teams or the potential investment in JLI—would require a substantial financial commitment.⁴⁰⁴ Altria already anticipated that each Growth Team would cost approximately \$30 million per year and was prepared to allocate more.⁴⁰⁵ And if Altria instead completed a multibillion-dollar deal with JLI, that too would require significant financial resources.⁴⁰⁶ Thus, regardless of which pathway Altria pursued, it needed to “free[] up [its] people . . . and financial resources.”⁴⁰⁷

Meanwhile, Nu Mark had been losing money year after year, was now down 60 employees, and had only traditional-flavored cig-a-like products left in its on-market portfolio. In the first nine months of 2018 alone, Nu Mark had lost \$101 million, missing projections yet again.⁴⁰⁸

While Altria was willing to accept losses to make a long-term investment in e-vapor, it would do so only if there were [REDACTED].⁴⁰⁹ By December of 2018, senior leadership understood no such path existed. Though Altria had initially been hopeful it could eventually become profitable in e-vapor, as the Court heard

⁴⁰² FF ¶¶ 1036-37 (PX7009 Burns (JLI) IHT at 164-65).

⁴⁰³ FF ¶ 1040 (Garnick (Altria) Tr. 1769).

⁴⁰⁴ FF ¶ 1074 (Gifford (Altria) Tr. 2842); [REDACTED].

⁴⁰⁵ FF ¶ 1075.

⁴⁰⁶ FF ¶ 1076.

⁴⁰⁷ FF ¶ 1074 (Gifford (Altria) Tr. 2810).

⁴⁰⁸ FF ¶¶ 392, 1081.

⁴⁰⁹ [REDACTED]

from both Gifford, who was then CFO, and Begley, who ran Nu Mark for years, every year Nu Mark would shift the goalposts, pushing off the projected year in which it would finally become profitable.⁴¹⁰ And Altria was projecting that Nu Mark’s losses would continue for the foreseeable future, with Nu Mark expected to lose another \$235 million over the next three years.⁴¹¹

Meanwhile, Altria’s regulatory team continued to harbor concerns that they would even be able to complete a PMTA for MarkTen by the then-operative August 2022 deadline—let alone for a product that could actually pass regulatory muster.⁴¹² The MarkTen PMTA had been “continuously delayed” throughout 2018, Altria had not completed its product stability studies, and the contemplated battery solution for the next-generation product was not performing in testing as expected.⁴¹³

Cognizant of these financial and regulatory challenges, Altria decided it “would be better served putting resources towards future platforms and not supporting the [cig-a-like] platform.”⁴¹⁴ On December 7, the company publicly announced that it would discontinue Nu Mark’s remaining products, citing their “current and expected financial performance . . . , coupled with regulatory restrictions that burden[ed] [Altria’s] ability to quickly improve these products.”⁴¹⁵ The shutdown encompassed not only Altria’s remaining cig-a-like products, but also Altria’s Verve product—an oral tobacco product, which, like MarkTen, was “not profitable,” lacked “a pathway to profitability,” and was “not converting smokers.”⁴¹⁶ Quigley thought it was the “right business decision.”⁴¹⁷ Though 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.”⁴¹⁸ Nu Mark’s

⁴¹⁰ FF ¶¶ 1078, 1080 (Begley (Altria) Tr. 1087-88; Gifford (Altria) Tr. 2725-26).

⁴¹¹ FF ¶ 1083.

⁴¹² FF ¶¶ 1085-89.

⁴¹³ FF ¶ 503 (Gardner (Altria) Tr. 2577, 2585); FF ¶¶ 1087-88.

⁴¹⁴ FF ¶ 1090.

⁴¹⁵ FF ¶¶ 1091-92.

⁴¹⁶ FF ¶¶ 1093-95 (Garnick (Altria) Tr. 1777-78).

⁴¹⁷ FF ¶ 1098 (PX7041 Quigley (Altria) Dep. at 131).

⁴¹⁸ FF ¶ 1098 (PX7041 Quigley (Altria) Dep. at 131).

Craig Schwartz was of the same view given that Nu Mark “only had a cig-a-like franchise” left and had eliminated its non-traditional flavors.⁴¹⁹

JLI, for its part, had no notice of the decision, and its principal negotiators could not even recall learning of it.⁴²⁰ As Pritzker explained, the decision “was of no consequence” to JLI.⁴²¹ And in Valani’s view, the announcement was “irrelevant” because the MarkTen cig-a-like was a “terrible” product.⁴²² He testified that he learned of the announcement for the first time in a deposition in this action.⁴²³

X. December 20, 2018: After Further Impasses that Nearly Scuttled the Deal in December, the Parties Executed the Transaction

Following Altria’s announcement that it was shutting down Nu Mark, Altria’s leadership advised the Board that the deal remained [REDACTED] as the parties continued “working out issues.”⁴²⁵ 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.”⁴²⁶ On December 15, 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.”⁴²⁷ One day later, the parties hit yet another “impasse on valuation,”⁴²⁸ when JLI tried to dilute Altria’s shares by half a billion dollars.⁴²⁹ Willard indicated that, if JLI “d[id] not give . . . the deal w[ould] not proceed.”⁴³⁰ Though the

⁴¹⁹ FF ¶ 1098 (PX7002 Schwartz (Altria) IHT at 160).

⁴²⁰ FF ¶¶ 1101-02.

⁴²¹ FF ¶ 1102 (PX7021 Pritzker (JLI) Dep. at 163).

⁴²² FF ¶ 1102 (PX7011 Valani (JLI) IHT at 134).

⁴²³ FF ¶ 1154 (Valani (JLI) Tr. 957).

⁴²⁴ [REDACTED]

⁴²⁵ FF ¶ 1116 (PX7028 Wappler (PWP) Dep. at 130).

⁴²⁶ FF ¶ 1115.

⁴²⁷ FF ¶ 1119 (RX0910 (Altria) at 001).

⁴²⁸ FF ¶ 1122 (RX1417 (JLI) at 001).

⁴²⁹ FF ¶ 1120.

⁴³⁰ FF ¶ 1120.

parties had settled on a 35 percent investment by mid October 2018, they had not agreed on valuation, which remained “an eleventh-hour issue” that the parties continued to negotiate through December 17.⁴³¹ No one was confident the deal would happen until the documents were signed.⁴³²

On December 20, 2018, the parties finally reached an agreement. Altria invested \$12.8 billion in JLI in exchange for a 35 percent economic interest in JLI.⁴³³ The parties’ agreement settled long-fought issues of governance and control: Altria obtained the right to appoint one-third of JLI’s directors upon HSR clearance and some restrictions on JLI’s sale rights, while JLI imposed several guardrails preventing Altria from acquiring control.⁴³⁴ 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 PMTAs for JUUL, among other services.⁴³⁵

Consistent with JLI’s concern about Altria’s access to JLI’s proprietary information in connection with services, the final 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 services agreement remained in effect.⁴³⁶ Because it limited the noncompete to the e-vapor business, the transaction had no effect on Altria’s ability to market other alternative tobacco products such as PMI’s “heat-not-burn” product (IQOS) and oral alternatives such as the On! product, both of which were demonstrated to the Court at the hearing.⁴³⁷ Consistent with the term sheets, the provision also included a carve-out permitting Altria to “engage in the business relating to [its existing products] as such business is presently conducted,” pending HSR

⁴³¹ FF ¶ 1112 (Pritzker (JLI) Tr. 839).

⁴³² FF ¶¶ 1123-25.

⁴³³ FF ¶ 1126.

⁴³⁴ FF ¶ 1127.

⁴³⁵ FF ¶ 1127. On January 28, 2020, the parties amended their agreements. 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. FF ¶¶ 1133-34.

⁴³⁶ FF ¶ 1128.

⁴³⁷ FF ¶ 1129.

approval.⁴³⁸ At the time this language appeared in the draft deal documents, Altria had announced the removal of Elite, though it was still marketing MarkTen cig-a-likes.⁴³⁹ Regardless, JLI understood that these existing products were not covered by the noncompete: Pritzker’s understanding was that Altria could have brought its withdrawn products “back on the market if [it] wished.”⁴⁴⁰ And consistent with the parties’ recognition back in August 2018 that Altria may need to divest its e-vapor assets to garner regulatory approval, the final agreement requires Altria to offer to do just that if required by the FTC.⁴⁴¹

XI. Post-Investment: Altria Provided Critical Regulatory Services to Assist JLI with Its PMTA Filing

Shortly after the deal, and as contemplated throughout the negotiations, Altria began providing JLI regulatory services in support of JLI’s PMTA.⁴⁴² As Pritzker testified, these regulatory services were “a key part of the deal,” and “one of the most critical” components from JLI’s perspective.⁴⁴³ That is because, for JLI, “getting PMTA approval is literally existential.”⁴⁴⁴ “Altria’s [regulatory] team was the best in the country,”⁴⁴⁵ having assembled “dozens of experts in the area” and having submitted “hundreds, if not thousands of applications.”⁴⁴⁶ In addition to covering all of the “very specific expertises” required for the PMTA, Altria was home to scientists and other experts who had been engaged with the PMTA process from the beginning and “developed the methods” for many of the necessary studies.⁴⁴⁷ As Murillo testified, this expertise

⁴³⁸ FF ¶ 1128.

⁴³⁹ FF ¶¶ 1107-10.

⁴⁴⁰ FF ¶¶ 1109, 1130 (Pritzker (JLI) Tr. 879).

⁴⁴¹ FF ¶ 1131.

⁴⁴² FF ¶ 1233.

⁴⁴³ FF ¶ 1220 (Pritzker (JLI) Tr. 759-60).

⁴⁴⁴ FF ¶ 1221 (Pritzker (JLI) Tr. 820).

⁴⁴⁵ FF ¶ 1221 (Pritzker (JLI) Tr. 820); *see also* FF ¶ 1223 (PX7021 Pritzker (JLI) Dep. at 161 (describing JLI as a “neophyte[]” with respect to the regulatory process)).

⁴⁴⁶ FF ¶¶ 1223, 1225 (Murillo (Altria/JLI) Tr. 2973).

⁴⁴⁷ FF ¶ 1225 (Murillo (Altria/JLI) Tr. 2975).

was unique to Altria: “[I]t’s one thing to hire a lab, but some of the folks [i]n the chemistry group [at Altria] had invented any number of methods to actually assess products.”⁴⁴⁸

At the beginning of January 2019, JLI invited Murillo, who was still at Altria, to a meeting where he “present[ed] on some of [Altria’s] regulatory capabilities.”⁴⁴⁹ Murillo presented the same overview that he had used with Altria executives when reviewing the PMTA requirements as applied to Altria’s products.⁴⁵⁰ The presentation was followed by a reception, at which Murillo “was just surrounded by people asking [him] . . . when [Altria] could start.”⁴⁵¹

Next came a meeting for JLI to share the details of its PMTA plan. For this meeting, Altria sent its “deepest experts in the different areas” who, by necessity, “would have to see confidential information of JLI.”⁴⁵² Altria obtained access to that information and then performed an analysis of the state of JLI’s PMTA.⁴⁵³ In Altria’s view at the time, JLI “needed help in every aspect of the application.”⁴⁵⁴ [REDACTED]⁴⁵⁵ Among other things, JLI still had “little to no science” supporting a number of its applications.⁴⁵⁶ And JLI had not devised a narrative to “explain the data” or present the “overall story.”⁴⁵⁷ JLI had not even 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.”⁴⁵⁸

⁴⁴⁸ FF ¶ 1225 (Murillo (Altria/JLI) Tr. 2975).

⁴⁴⁹ FF ¶ 1231 (Murillo (Altria/JLI) Tr. 2971).

⁴⁵⁰ FF ¶ 1231 (Murillo (Altria/JLI) Tr. 2971-72).

⁴⁵¹ FF ¶ 1232 (Murillo (Altria/JLI) Tr. 2975-76).

⁴⁵² FF ¶ 1234 (Murillo (Altria/JLI) Tr. 2981-82).

⁴⁵³ FF ¶¶ 1254-55.

⁴⁵⁴ FF ¶ 1255.

⁴⁵⁵ [REDACTED]

⁴⁵⁶ FF ¶ 1255 (Gardner (Altria) Tr. 2631-32).

⁴⁵⁷ FF ¶ 1255 (Gardner (Altria) Tr. 2633). JLI’s plan omitted an assessment of the scientific literature, which is required and “specifically called out in the PMTA rules and draft guidances.” FF ¶ 1255 (Gardner (Altria) Tr. 2636).

⁴⁵⁸ FF ¶ 1255 (Gardner (Altria) Tr. 2634-35).

Regulatory developments drove the situation from bad to worse in the spring and summer of 2019. In March 2019, FDA, expressing continued concern about youth usage, announced that it was moving the PMTA deadline for non-traditional flavors up one year, to August 2021.⁴⁵⁹ A few months later, a federal judge presiding over a legal challenge to FDA’s e-vapor guidance moved the deadline yet again for all products, imposing a new deadline of May 2020 (which was ultimately postponed to September 2020 because of Covid-19).⁴⁶⁰ *See Am. Acad. of Pediatrics v. FDA*, 399 F. Supp. 3d 479, 481 (D. Md. 2019). In the meantime, FDA issued its final guidance on e-vapor PMTAs.⁴⁶¹ The document detailed a labyrinthine series of requirements regarding shelf-life information, a “pharmacological profile,” a comprehensive literature review, and more.⁴⁶²

Against this challenging regulatory backdrop, Altria’s regulatory team scrambled to assist JLI with meeting the accelerated PMTA deadlines.⁴⁶³ The company provided JLI with one of its top program directors as the full-time program lead and offered the full-time services of Dr. Gardner.⁴⁶⁴ Altria also contributed a dozen scientists on a full-time basis and several dozen more on a part-time basis.⁴⁶⁵ As Dr. Gardner explained at trial, Altria drafted the chemistry stability and bridging sections of JLI’s PMTA and oversaw countless studies.⁴⁶⁶ And when Covid-19 struck, Altria’s experts “hole[d] up at [JLI’s] offices” in a “PMTA pod,” so that they could continue their critical work in support of JLI’s PMTA and meet FDA’s deadline.⁴⁶⁷ Altria’s personnel could not have provided this assistance without accessing JLI’s confidential information.⁴⁶⁸

⁴⁵⁹ FF ¶ 117.

⁴⁶⁰ FF ¶¶ 118-19.

⁴⁶¹ FF ¶ 82.

⁴⁶² FF ¶ 83.

⁴⁶³ FF ¶ 1260.

⁴⁶⁴ FF ¶ 1260.

⁴⁶⁵ FF ¶ 1260.

⁴⁶⁶ FF ¶ 1261 (Gardner (Altria) Tr. 2621-28, 2635).

⁴⁶⁷ FF ¶ 1261 (Murillo (Altria/JLI) Tr. 3008).

⁴⁶⁸ FF ¶ 1261 (Murillo (Altria/JLI) Tr. 2981-82).

The resources and project-specific assistance Altria provided allowed JLI to significantly accelerate multiple components of its application. When the PMTA deadline was moved up in June 2019 to May 2020, JLI’s internal PMTA workstream tracker showed that the company was at “[r]isk of missing [the] deadline” for half of its PMTA workstreams.⁴⁶⁹ JLI predicted though that it could save [REDACTED].⁴⁷⁰ All told, JLI estimates that Altria’s services “sav[ed] 17 to 28 months on [the PMTA] process.”⁴⁷¹ With this boost, in the midst of a pandemic, JLI filed timely PMTAs for its products in July 2020, which remain pending with FDA.⁴⁷² And Altria is continuing to assist JLI as it navigates the PMTA process, as well as in connection with [REDACTED] [REDACTED] and a modified risk tobacco product application—which, if granted, would allow JLI to make reduced exposure claims about its products.⁴⁷³

XII. Post-Investment: Competition in the E-Vapor Category Flourished

Since Altria’s investment in JLI, the e-vapor category has become much more competitive. Prices of JUUL and other e-vapor products declined dramatically, output increased, and market concentration decreased.⁴⁷⁴ In the second half of 2018, competitors commercialized numerous product lines [REDACTED].⁴⁷⁵ The most significant entrants were two pod-based devices: [REDACTED], and [REDACTED].

⁴⁶⁹ FF ¶ 1258.

⁴⁷⁰ [REDACTED]

⁴⁷¹ FF ¶ 1263.

⁴⁷² FF ¶¶ 1247, 1265.

⁴⁷³ [REDACTED]; *see also* FF ¶ 1266.

⁴⁷⁴ FF ¶¶ 1345-76.

⁴⁷⁵ FF ¶¶ 243, 1285, 1300; [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴⁸⁰ [REDACTED]

[REDACTED]

[REDACTED]⁴⁸¹ [REDACTED]

[REDACTED]⁴⁸² At

one large retail chain, NJOY Ace captured 66 percent of device share, almost three-quarters of which came “at JUUL’s expense.”⁴⁸³ By September of 2019, roughly one year after its entry, NJOY had captured 23 percent of total volume share.⁴⁸⁴ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴⁸⁵

By August 2019, JLI had observed that the company was “facing an aggressive competitive threat for the first time.”⁴⁸⁶ As a JLI internal analysis explained, JUUL users do not perceive JUUL as offering “meaningful advantages to justify its cost,” so “it is common and easy for users to try

⁴⁷⁶ [REDACTED]; *see also* FF ¶ 1299. [REDACTED]

[REDACTED]

⁴⁷⁷ [REDACTED]

⁴⁷⁸ [REDACTED]

⁴⁷⁹ [REDACTED]

⁴⁸⁰ [REDACTED]

⁴⁸¹ [REDACTED]

⁴⁸² [REDACTED]

⁴⁸³ FF ¶ 1291.

⁴⁸⁴ FF ¶ 1292.

⁴⁸⁵ [REDACTED]

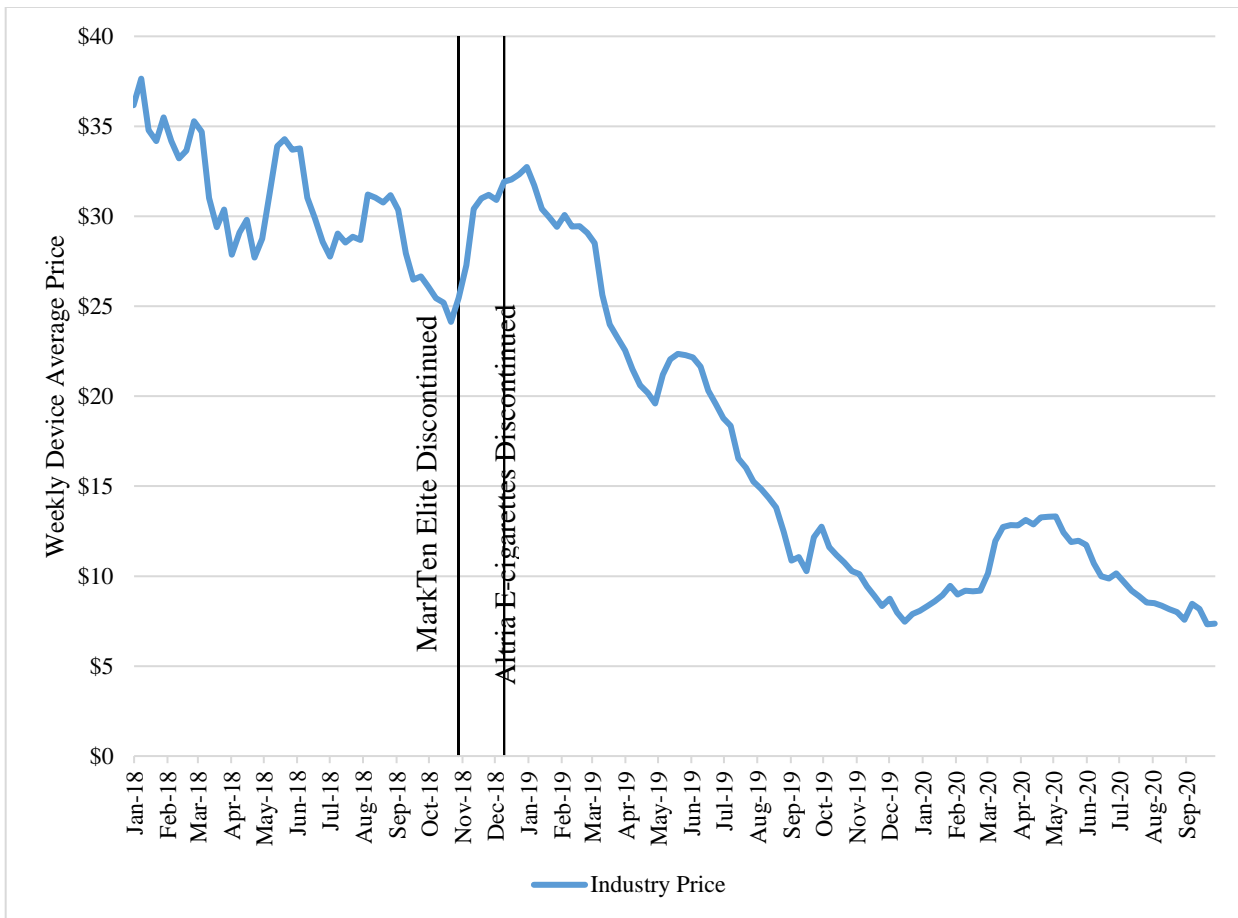
⁴⁸⁶ FF ¶ 1297 (RX1547 (JLI) at 002).

something else.”⁴⁸⁷ Recognizing that it was no longer [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴⁸⁸ This is a step JLI never took in response to Elite or any other Nu Mark product.⁴⁸⁹ JLI would later go on to permanently lower the price of its device in response to the new competitive landscape.⁴⁹⁰ Indeed, as the following graph reflects, average device prices have plummeted since Altria discontinued its unsuccessful e-vapor business, falling over 70 percent from September 2018 (about \$27) to September 2020 (about \$8):



491

⁴⁸⁷ FF ¶ 1310.

⁴⁸⁸ [REDACTED]

⁴⁸⁹ FF ¶ 1644 (Robbins (JLI) Tr. 3245, 3248, 3252-54).

⁴⁹⁰ FF ¶ 1312 (Robbins (JLI) Tr. 3257).

⁴⁹¹ FF ¶ 1347 (RX1217 Murphy Report ¶ 62, Fig. V.1).

[REDACTED]

[REDACTED]⁴⁹² By December 2019, Reynolds had overtaken JLI as the leading seller of devices.⁴⁹³ And one year after that, Reynolds was selling “more than twice the number of devices per week” as JLI.⁴⁹⁴ And like NJOY, Reynolds saw a similar uptick in cartridge sales following its device promotion.⁴⁹⁵ [REDACTED]

[REDACTED]⁴⁹⁶

In addition to Reynolds and NJOY, many other pod-based competitors, including Glas and Leap,⁴⁹⁷ have entered the marketplace and expanded distribution.⁴⁹⁸ And JLI has correspondingly seen a sharp drop in market share on the cartridge side of its pod business.⁴⁹⁹

Meanwhile, the cig-a-like segment once occupied by MarkTen has continued its descent into obsolescence,⁵⁰⁰ with pod sales far outstripping cig-a-like sales. Cig-a-like cartridge volume share ended 2018 at about 20 percent relative to pod-based devices.⁵⁰¹ As of September 2020, the last month for which data is available, cig-a-likes garnered just 5 percent of total e-vapor cartridge volume, with pods capturing the other 95 percent.⁵⁰²

⁴⁹² [REDACTED]

⁴⁹³ FF ¶ 1315.

⁴⁹⁴ FF ¶ 1316 (PX7033 O’Hara (JLI) Dep. at 199).

⁴⁹⁵ FF ¶ 1317.

⁴⁹⁶ [REDACTED]

⁴⁹⁷ FF ¶ 1365 (Crozier (Sheetz) Tr. 1490).

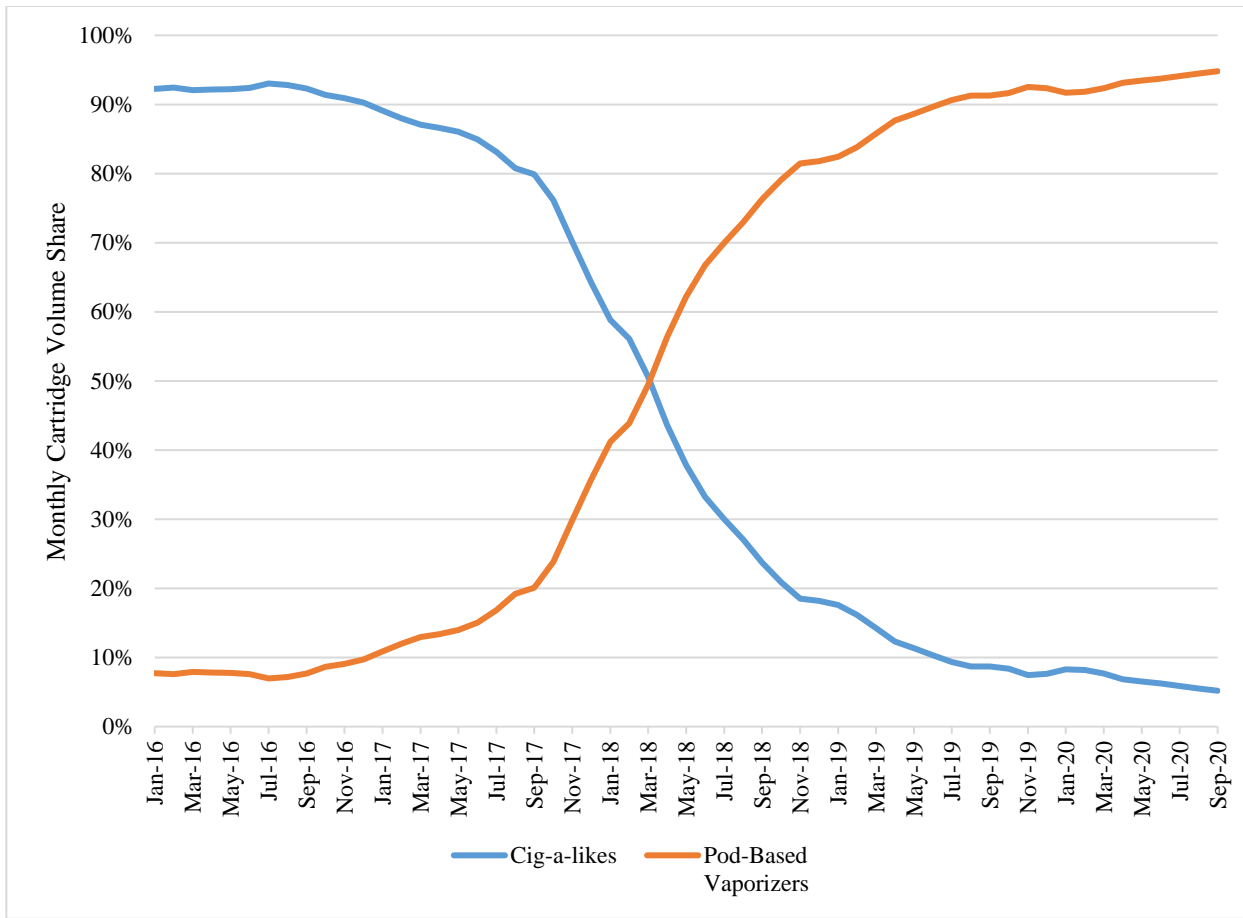
⁴⁹⁸ FF ¶¶ 272-275, 1364-65.

⁴⁹⁹ FF ¶ 1319.

⁵⁰⁰ [REDACTED]; *see also* FF ¶ 1329 (Crozier (Sheetz) Tr. 1560).

⁵⁰¹ FF ¶¶ 1325-26.

⁵⁰² FF ¶¶ 1325-26.



503

Pods—the product category in which Altria never had a competitive product and had no prospect of bringing one to market for years—are now, for all intents and purposes, the only game in town.

⁵⁰³ FF ¶ 1326 (RX1217 Murphy Report ¶ 41, Fig. IV.3).

DISCUSSION

Under Section 1, it is Complaint Counsel’s burden to prove an illegal agreement. And under both Section 1 and Section 7, it is Complaint Counsel’s burden to prove substantial anticompetitive effects resulting from the transaction. Complaint Counsel has failed to meet their burden on both counts. As the record at trial makes crystal clear, the parties did not enter into the secret agreement Complaint Counsel alleges, Altria’s removal of its e-vapor products was for independent business reasons that were not pretextual, and there are no anticompetitive effects flowing from the transaction, let alone substantial ones.

I. Complaint Counsel Failed to Prove an Agreement or that Altria Removed Its E-Vapor Products for Pretextual Reasons, Dooming Its Section 1 Claim and Gutting Its Section 7 Claim

At trial, Complaint Counsel promised that it would prove “that the agreement [between Altria and JLI] went beyond the four corners of the transaction agreements that the companies executed in December of 2018,” Tr. 36, that “Altria agreed to JLI’s demands [to exit the market] by taking steps to shut down its e-cigarette business [in] the weeks before the formal transaction was executed,” Tr. 13, and that “Altria’s stated justifications for exiting the market [were] pretextual,” Tr. 74. But Complaint Counsel did not prove any of this—for the most part, they didn’t even try. After over two years of investigation and litigation, the production of more than a million documents, the examination of 20 witnesses at trial, and 47 depositions and investigational hearings, Counsel adduced zero evidence at trial supporting its baseless allegations. To the contrary, the contemporaneous documents are inconsistent with such an agreement, and *every* witness with relevant knowledge testified under oath that there was none. Likewise, every witness involved in the withdrawal of MarkTen cig-a-like and MarkTen Elite testified those decisions were made for independent business reasons, which were well-documented over time.

A. Complaint Counsel failed to prove that Altria removed its e-vapor products pursuant to an agreement with JLI.

The essence of a Section 1 violation is an illegal “agreement.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007). Thus, to satisfy its burden under Section 1, 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). “In other words, there must be a

‘conscious commitment to a common scheme designed to achieve an unlawful objective.’” *In the Matter of McWane, Inc.*, 2013 WL 8364918, at *223 (F.T.C. May 1, 2013) (initial decision) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). The standard of proof in an antitrust case is “demanding.” *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). And “[w]here, as here, the plaintiff’s case is based entirely on such 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) (citation omitted). Indeed, the Supreme Court has limited “the range of permissible inferences from ambiguous evidence,” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), because “mistaken inferences in [antitrust] cases . . . are especially costly, . . . chill[ing] the very conduct the antitrust laws are designed to protect,” *id.* at 594.

Here, Complaint Counsel’s alleged “agreement” is premised on the notion that JLI presented Altria in its July 30, 2018 Term Sheet with “three options to meet JLI’s demand that Altria not compete with JLI” (Tr. 39-40)—divestiture, contribution, or ceasing to operate its e-vapor business—and that “Altria chose the third option that JLI put on the table” to avoid a delay in its provision of services to JLI (Tr. 49). But that is a lawyer’s theory in search of evidence. And it is a theory that was flatly contradicted by the record of the parties’ negotiations adduced at trial, the sworn testimony of each witness with knowledge of the negotiations, and the evidence of JLI’s assessment of Altria’s e-vapor products and its real-time reaction to the product withdrawals.

1. The negotiation history disproves Complaint Counsel’s theory.

“[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.” *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000). Yet that is exactly what Complaint Counsel seeks to do here, plucking provisions in proposed, nonbinding term sheets and letters out of context and shutting its eyes to surrounding evidence that negates its speculation.

As a threshold matter, Complaint Counsel misreads the July 30 Term Sheet. That term sheet did not present “three options,” as Complaint Counsel claims (Tr. 45), but rather proposed that, as

part of the antitrust clearance process, Altria would divest its products or, failing that, contribute its products to JLI. As a last resort, if neither divestiture nor contribution were possible, JLI proposed that Altria “cease to operate” its e-vapor products within nine months of signing.⁵⁰⁴ Moreover, the very same section of the term sheet required Altria to “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.”⁵⁰⁵ Indeed, the July 30 Term Sheet included a carve-out to the noncompete provision specifically *permitting Altria to compete* with “MarkTen and MarkTen Elite prior to their divestiture or contribution.”⁵⁰⁶ As Pritzker confirmed at trial, it was “clear to [JLI] that a transaction of this kind would be subject to antitrust clearance,”⁵⁰⁷ and the intent of these terms was to reflect that Altria was expected to “leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the product[s].”⁵⁰⁸ That is precisely why JLI (like Altria) engaged outside counsel to draft the term sheets, think through the legal implications of different structures, and to structure the deal, in Pritzker’s words, “to be above-board and to optimize the chance for a successful regulatory outcome.”⁵⁰⁹ Critically, these proposed terms (which were never agreed to) would all kick in *after* any transaction between the parties—which alone refutes Complaint Counsel’s accusation that there was some secret agreement under which Altria would remove its e-vapor products from the market *pre-transaction*.⁵¹⁰

But even if Complaint Counsel’s reading of the “cease to operate” provision in the initial framework were plausible, Complaint Counsel ignores the subsequent negotiations between the parties, which continued for months. *See In the Matter of Benco Dental Supply Co.*, 2019 WL 5419393, at *9 (F.T.C. Oct. 15, 2019) (initial decision) (“To determine whether an antitrust

⁵⁰⁴ FF ¶¶ 772-81.

⁵⁰⁵ FF ¶ 784.

⁵⁰⁶ FF ¶ 789.

⁵⁰⁷ FF ¶ 1190 (Pritzker (JLI) Tr. 817).

⁵⁰⁸ FF ¶ 1190 (Pritzker (JLI) Tr. 853).

⁵⁰⁹ FF ¶ 1190 (Pritzker (JLI) Tr. 784).

⁵¹⁰ FF ¶¶ 772-86, 1203-1207.

conspiracy exists, courts must consider the ‘totality of the evidence.’”); *In re Baby Food Antitrust Litig.*, 166 F.3d at 124 (“[E]vidence should be analyzed as a whole and not be tightly compartmentalized to see if *together* it supports an inference of concerted action.” (emphasis added)). Complaint Counsel did not adduce an ounce of evidence that Altria assented to the “cease to operate” term in JLI’s initial proposed term sheet. To the contrary, it was undisputed at trial that Altria was “very unhappy” with JLI’s July 30 Term Sheet.⁵¹¹ It was undisputed at trial that Altria found its provisions concerning voting power and control “insult[ing],” “outrageous,” and “appalling.”⁵¹² And it was undisputed at trial that Altria struck the “cease to operate” term (along with the rest of the divestiture provision) when it circulated its own proposed term sheet to JLI on August 9.⁵¹³

The August 19 Term Sheet is a critical piece of documentary evidence that Complaint Counsel simply ignored throughout the proceeding.⁵¹⁴ In that term sheet, JLI confirmed its indifference to the “cease to operate” language by excluding it. Instead, JLI proposed that Altria contribute its e-vapor products upon HSR clearance or, if such clearance were not obtained within nine months, divest those products within six months thereafter.⁵¹⁵ And while JLI rejected Altria’s attempt to expand the noncompete carve-out to allow Altria to work on “under development products” prior to HSR approval, the proposed term continued to allow Altria to compete with its existing products “prior to their contribution or divestiture.”⁵¹⁶ This proposed structure made sense from JLI’s perspective. JLI viewed Nu Mark’s existing products as “nonstarter[s],” but was deeply concerned that Altria might use JLI’s proprietary knowledge—regarding what JLI viewed as “the most cutting-edge technolog[y] of any group in the world”—to develop competitive products while

⁵¹¹ FF ¶ 771 (Pritzker (JLI) Tr. 825).

⁵¹² FF ¶ 771 (Garnick (Altria) Tr. 1745; Gifford (Altria) Tr. 2764).

⁵¹³ FF ¶ 807.

⁵¹⁴ FF ¶ 824 (Pritzker (JLI) Tr. 715-23 (Complaint Counsel declining to show Pritzker August 19 Term Sheet)).

⁵¹⁵ FF ¶ 826 (PX1432 (Altria) at 021-22).

⁵¹⁶ FF ¶ 827.

the parties worked toward HSR approval.⁵¹⁷ For that reason, allowing Altria to use JLI’s trade secrets to develop better products was “not acceptable” to JLI.⁵¹⁸ As Pritzker explained, however, JLI was “perfectly happy” for Nu Mark’s products to stay on the market pending an FTC decision.”⁵¹⁹

If there were any doubt that Complaint Counsel’s “cease to operate” theory is fantasy, the August 22 issues list summarizing the parties’ positions, which was also ignored by Complaint Counsel at trial, dissolves it. Within days of receiving JLI’s August 19 Term Sheet, Altria observed in the August 22 issues list that there was no “substantive difference” between the parties on the approach to antitrust clearance. Contribution and divestiture were the only options on the table.⁵²⁰ And in the same document, JLI asked Altria to confirm that the noncompete “commences on signing” “*except as to MarkTen and MarkTen Elite.*”⁵²¹ Negotiations broke down shortly thereafter over unrelated and difficult questions of control, valuation, and payment structure and would not resume until Willard sent JLI a letter on October 5.⁵²² When Willard wrote in the October 5 letter that Altria would agree to a noncompete “*consistent with our previous discussions,*” he was, as he testified and as JLI understood, referencing the August 19 Term Sheet that expressly contemplated that Nu Mark’s existing products would stay on the market pending HSR clearance and which contained no “cease to operate” provision.⁵²³ He was *not*, as Complaint Counsel claimed in its

⁵¹⁷ See FF ¶¶ 480, 1178-88. This structure was consistent with the positions Valani previewed in JLI’s August 15, 2018 issues list—another document that Complaint Counsel misreads. In that issues list, Valani made clear that JLI was not willing to abandon the divestiture obligation—as Altria had proposed—or to narrow the noncompete in a manner that would allow Altria to use JLI’s proprietary information to develop new products. FF ¶ 812. But JLI did not object to the striking of the “cease to operate” language—in the issues list or otherwise. FF ¶ 812. As Valani testified at trial, JLI’s request that Altria not compete against it post-transaction was contingent upon “complete and total regulatory sanction” by the FTC. FF ¶ 1204 (Valani (JLI) Tr. 934).

⁵¹⁸ FF ¶¶ 812-13 (Pritzker (JLI) Tr. 844).

⁵¹⁹ FF ¶ 1190 (Pritzker (JLI) Tr. 874).

⁵²⁰ FF ¶ 836.

⁵²¹ FF ¶ 837 (emphasis added).

⁵²² FF ¶¶ 878-97.

⁵²³ FF ¶¶ 985-86 (emphasis added).

opening it would prove (Tr. 45), referring to the “three options” presented in the obviated July 30 Term Sheet. And the subsequent term sheets, the proposed deal documents, and the final transaction documents each included a carve-out for Altria’s existing e-vapor products and made no mention of any obligation to cease operations.⁵²⁴

Complaint Counsel has never explained how this negotiation history is reconcilable with its theory. The only possible explanation, tacitly implied by Complaint Counsel, is that the parties—despite being advised at all times by sophisticated antitrust counsel—were lying to their counsel, papering the record, and had a secret agreement that the “cease to operate” provision remained live. There is *zero* evidence of that offensive accounting—and Complaint Counsel’s failure to ask witnesses about the critical documents discussed above or to develop any such theory at trial requires its rejection. As this Court has held, “where proof is lacking, . . . it is [not] fair or appropriate to fill in the blanks . . . to assist the government in winning its case.” *McWane*, 2013 WL 8364918, at *289.

On the eve of the hearing, Complaint Counsel came up with a new theory—that Altria was concerned it could not divest until July 2020 [REDACTED], that it was “[u]nwilling to wait” until then to provide certain services, such as direct marketing, to JLI, and that it therefore “chose the third option that JLI put on the table [*i.e.*, cease to operate].” Tr. 49; CC Pretrial Br. 41.⁵²⁵ But this theory is equally without basis. As shown above, there was no “third option that JLI put on the table.” Altria had rejected the “cease to operate term,” which in any event contemplated the products remaining on the market post-closing.

Moreover, Complaint Counsel adduced no evidence at trial in support of its claim that Altria (or JLI) was unwilling to delay services until July 2020 and therefore decided to discontinue the

⁵²⁴ FF ¶¶ 804, 1192.

⁵²⁵ There was no hint of this theory in the Commission’s Complaint. It was concocted by Complaint Counsel after discovery disproved Complaint Counsel’s initial theory that Altria was acting pursuant to JLI’s knowledge and wishes. *See* Compl. ¶ 4 (“After negotiations had stalled temporarily, Altria reaffirmed its willingness to accede to JLI’s demand in early October 2018. With that commitment secured, negotiations resumed.”).

products to obviate the issue.⁵²⁶ [REDACTED]
[REDACTED] term sheets and draft deal documents *delayed* the trigger for contribution or divestiture by extending the time for filing for HSR clearance, first to “two years from closing”⁵²⁷ and later until July 15, 2020—[REDACTED]⁵²⁸ Delaying the provision of services—only a handful of which were implicated (and *not* the critical regulatory services)—posed no concern to either party.⁵²⁹ As Willard testified, “both sides were fairly flexible” regarding the timing of the provision of those services that might need to be delayed.⁵³⁰ And as Pritzker confirmed, JLI was willing to wait as well: delaying these services was not a “problem” and “would not have been consequential to [him].”⁵³¹

Finally, Complaint Counsel’s theory fails for at least two additional reasons:

First, even on Complaint Counsel’s imagined version of events, Altria was acting independently. The “cease to operate” provision, by its express terms, contemplated Altria’s products being on the market *after* signing.⁵³² The testimonial record at trial is unequivocal that JLI expected and *wanted* Altria’s existing products to remain on the market following signing and to be disposed of in accordance with FTC review.⁵³³ Thus, even if Altria had exited the market in order to provide the services, Complaint Counsel offers no evidence that this was the result of an agreement between Altria and JLI. Indeed, in Complaint Counsel’s own telling it was *Altria* that was “unwilling to wait” until July 2020 to provide services. Tr. 49. It is hornbook law that

⁵²⁶ FF ¶¶ 1068-73.

⁵²⁷ [REDACTED]; *see also* FF ¶¶ 1053-55.

⁵²⁸ [REDACTED]; *see also* FF ¶¶ 1057-59. It bears emphasis that these contractual changes are entirely inconsistent with the notion that the parties had agreed and were anticipating that Altria would withdraw its products prior to the transaction. If that were the case, these changes to account for the PMI complication would have been pointless; there would be no PMI complication to account for because the complication only presented itself in the event of a divestiture or contribution following the transaction.

⁵²⁹ FF ¶¶ 1068-73.

⁵³⁰ FF ¶ 1073 (Willard (Altria) Tr. 1213).

⁵³¹ FF ¶ 1072 (Pritzker (JLI) Tr. 871-72).

⁵³² FF ¶ 781.

⁵³³ *See, e.g.*, FF ¶¶ 775-77, 1153-56, 1189-90, 1203-04, 1206-07.

Section 1 “does not reach independent decisions.” *McWane*, 2013 WL 8364918, at *223. And what Complaint Counsel has alleged is an “independent decision[]”—not an “actual agreement.” *Id.*

Second, nonbinding term sheets cannot form the basis of a Section 1 agreement. JLI saw the July 30 Term Sheet as a “nonbinding letter of intent,”⁵³⁴ the terms for which were “fluid and subject to significant expansion and revision by business and legal teams.”⁵³⁵ As the July 30 Term Sheet itself noted, “[t]he transactional structure presented in this term sheet as the means for effecting [Altria’s] investment is illustrative but not definitive.”⁵³⁶ It could hardly be otherwise given that the parties were “sufficiently far apart [on valuation] that it wasn’t worth putting” a price figure in the initial term sheet.⁵³⁷ *See Azco Biotech, Inc. v. Qiagen, N.V.*, 2015 WL 12516024, at *5 (S.D. Cal. July 2, 2015) (where term sheet left price open, term sheet was not an offer that could be accepted as a matter of law). Indeed, even the final term sheet that the parties settled on was expressly “not binding on any party.”⁵³⁸ As both parties recognized, there was no deal until the parties had conducted diligence, agreed on all terms, and executed the definitive deal documents.⁵³⁹ Complaint Counsel has cited no precedent where a court found a Section 1 agreement based on terms proposed by one party in early, nonbinding term sheets that were not incorporated into a final agreement. This Court should not be the first. *See In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 217 (E.D.N.Y. 2003) (rejecting Section 1 claim premised on nonbinding term sheet because “the Term Sheet [was] not an agreement”: “any claim of anticompetitive conduct flowing from the Term Sheet [was] too speculative to support a cause of action under the Sherman Act”).

⁵³⁴ FF ¶ 786 (Pritzker (JLI) Tr. 692-93).

⁵³⁵ FF ¶ 786 (Pritzker (JLI) Tr. 814).

⁵³⁶ FF ¶ 786.

⁵³⁷ FF ¶ 1171 (Pritzker (JLI) Tr. 816).

⁵³⁸ FF ¶ 1049.

⁵³⁹ FF ¶¶ 1104-05.

2. Complaint Counsel has not met its burden to overcome the uniform sworn denials of conspiracy.

Where an antitrust plaintiff is confronted with uniform sworn denials in response to its theory, it faces a substantial burden to overcome the weight of that evidence and must “produce significant probative evidence” of conspiracy. *Lamb’s Patio Theatre, Inc. v. Universal Film Exchs., Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978); *see also City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (same). Here, each and every witness with knowledge of the negotiations—Burns, Crosthwaite, Garnick, Gifford, Masoudi, Pritzker, Valani, and Willard—swore under oath that there was no agreement between the parties that Altria would discontinue its e-vapor products as a precondition to the deal.⁵⁴⁰ Each and every witness with firsthand knowledge of the negotiations swore under oath that JLI had no prior notice of Altria’s announcements that it would discontinue its e-vapor products.⁵⁴¹ And each and every Altria witness involved in the product discontinuations swore under oath that the products were withdrawn for independent business reasons and regardless of negotiations with JLI.⁵⁴² *Impro Prods., 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).

These witnesses were consistent and credible. Complaint Counsel asks the Court to disbelieve all of these witnesses, but “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 (alteration omitted) (quoting *Venzie Corp. v. United States Min. Prods. Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975)). Complaint Counsel’s effort to make its case based on what amounts to nothing more than the disbelief of every witness should be rejected. *See Lamb’s Patio Theatre*, 582 F.2d at 1070 (affirming summary

⁵⁴⁰ FF ¶¶ 1152-60.

⁵⁴¹ FF ¶¶ 1101, 1109-10, 1152-60.

⁵⁴² FF ¶¶ 917-51, 1001-03, 1074-98, 1157-61.

judgment where plaintiff had made only a “bald allegation of conspiracy to refute the sworn affidavit denying a conspiracy”); *Am. Key Corp. v. Cumberland Assocs.*, 579 F. Supp. 1245, 1259 (N.D. Ga. 1983) (in the absence of “significant probative evidence supporting [plaintiff’s] allegations of a conspiracy,” sworn “affidavits denying the existence of any contract, combination or conspiracy” entitled defendants to summary judgment).

Complaint Counsel is left with nothing more than its own innuendo regarding what may have occurred during phone calls and in-person meetings between the parties. But that, too, is not cognizable evidence under the antitrust laws. As this Court has explained, “prov[ing] an opportunity to conspire” is insufficient. *McWane*, 2013 WL 8364918, at *265; *see also Petruzzi’s IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d 1224, 1235, 1242 n.15 (3d Cir. 1993) (evidence of calls was “[p]roof of opportunity to conspire[,] [which,] without more, will not sustain an inference that a conspiracy has taken place”). “It is not enough to point out the temptation and ask that the defendants bear the onerous, if not impossible, burden of proving the negative—that no conspiracy occurred.” *McWane*, 2013 WL 8364918, at *265 (quoting Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1417b). That would flip the burden of proof on its head. Rather, “[i]t remains the plaintiff’s burden to prove that the defendant[s] succumbed to temptation and conspired.” *Id.* (quoting Areeda & Hovenkamp, *Antitrust Law* ¶ 1417b). And where Complaint Counsel did not even ask witnesses for their recollections of what occurred at given meetings and on given calls—as repeatedly occurred at trial—it “would be pure speculation . . . to simply assume” that an unlawful agreement was struck. *McWane*, 2013 WL 8364918, at *253 (“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.”).

3. Complaint Counsel’s theory is irreconcilable with JLI’s assessment of Altria’s products and JLI’s reaction to their withdrawal.

JLI’s assessment of Altria’s e-vapor products also refutes any notion that JLI insisted that Altria cease to operate its e-vapor business as a precondition to the deal. Complaint Counsel imagines that JLI was threatened by Altria’s products and used the negotiations to neutralize a

fearsome competitor. *See* CC Pretrial Br. 1. But contemporaneous JLI documents show that the company was utterly uninterested in, even contemptuous of, Nu Mark’s e-vapor products. Immediately after Elite was launched, one of JLI’s founders assessed that it was “not a threat.”⁵⁴³ Given Elite’s lack of salts, JLI viewed it as “an absolute nonstarter.”⁵⁴⁴ By mid-July 2018, Joseph O’Hara had observed that Elite’s “US sales [were] absolutely terrible, no traction whatsoever.”⁵⁴⁵ And with respect to MarkTen Bold, Altria’s only product that had any nicotine salts (albeit the wrong formulation), JLI saw it as a “terrible product,” noting that Altria “didn’t get it right.”⁵⁴⁶ The suggestion that JLI was so desperate to stop Altria from competing with these products post-signing that it conditioned a multibillion-dollar investment on their withdrawal, and papered the record to cover up its demand, defies credulity.

Nor was JLI’s reaction to learning of these two decisions by Altria in any way consistent with the notion that Altria was acting pursuant to an “agreement” with JLI. On the contrary, JLI perceived the announcement that Altria was discontinuing its pod and non-traditional-flavored cig-a-likes, of which it had no notice,⁵⁴⁷ as a “hostile action.”⁵⁴⁸ A contemporaneous JLI document described Altria’s announcement as a “thinly veiled attempt to get rid of competition that threaten[ed] [Altria’s] cig franchise.”⁵⁴⁹ And as Pritzker confirmed at trial, Altria’s announcement was neither “[e]xpected” nor “welcome[.]”⁵⁵⁰ *See Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965) (“[T]he term ‘agreement’ . . . necessarily impl[ies] mutual consent.” (internal quotation marks omitted)).

⁵⁴³ FF ¶ 480 (RX1420 (JLI) at 001).

⁵⁴⁴ FF ¶ 480 (PX2269 (JLI) at 001).

⁵⁴⁵ FF ¶ 443 (RX1165 (JLI) at 004).

⁵⁴⁶ FF ¶ 744 (PX2269 (JLI) at 001).

⁵⁴⁷ FF ¶¶ 1010, 1101.

⁵⁴⁸ FF ¶ 1013 (PX7011 Valani (JLI) IHT at 124-26).

⁵⁴⁹ FF ¶ 1014 (PX2473 (JLI) at 001).

⁵⁵⁰ FF ¶ 1016.

As for the later withdrawal of the remaining cig-a-like products, the decision barely registered with JLI. Pritzker has no memory of learning of it.⁵⁵¹ As he later observed, “[i]t was of no consequence because [he] didn’t think [the products] were particularly competitive to Juul.”⁵⁵² And Valani testified that he did not learn that Altria had discontinued its cig-a-like products until Complaint Counsel brought it to his attention at his deposition.⁵⁵³ These two reactions, displeasure and indifference, belie any notion that Altria pulled its products as part of a “common scheme” with JLI. *Monsanto Co.*, 465 U.S. at 768.

B. The record confirms that Altria removed its products for independent business reasons, further gutting the Section 1 Claim.

The “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). That is because Section 1 of the Sherman Act “does not reach independent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors.” *McWane*, 2013 WL 8364918, at *223. And while Complaint Counsel claimed in its opening statement that “Altria’s stated justifications for exiting the market [were] pretextual,” Tr. 74, it did not come close to satisfying its burden to adduce evidence that “tend[s] to rule out the possibility that the defendants were acting independently.” *Twombly*, 550 U.S. at 554 (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 588). To the contrary, the record shows that each of Altria’s withdrawal decisions was made for bona fide, independent business reasons, further gutting any contention of an illegal conspiracy.

1. Complaint Counsel did not meet its burden to prove that Altria’s decision to pull the Elite pod product and non-traditional cig-a-like flavors was pretextual.

“Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.” *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008). Here, Altria

⁵⁵¹ FF ¶ 1102.

⁵⁵² FF ¶ 1102 (PX7021 Pritzker (JLI) Dep. at 163-64).

⁵⁵³ FF ¶ 1154.

made two separate decisions at two separate points in time to remove its e-vapor products. The first of these decisions—to discontinue Nu Mark’s pod products and non-traditional cig-a-like flavors—was announced on October 25, 2018 and made in direct response to FDA’s September 12, 2018 letter demanding Altria take “bold action” in response to the youth-vaping crisis.⁵⁵⁴ Since April 2018, FDA had been expressing progressively greater alarm about what it perceived as an “epidemic” of youth vaping, particularly with pod products and non-traditional flavors.⁵⁵⁵ This alarm culminated in FDA’s September 12, 2018 letter—a letter Complaint Counsel prefers to leave out of its version of events—demanding that Altria respond within 60 days with specific actions that it would take to address FDA’s concerns, and specifically suggesting that the company respond by removing flavored products from the market.⁵⁵⁶

As is true for any participant in a heavily regulated industry, Altria’s relationship with its regulator is existential.⁵⁵⁷ And as Willard explained at trial, he was particularly “sensitive” to FDA’s concerns about youth use in light of his prior role at Altria as Senior Vice President for Youth Smoking Prevention.⁵⁵⁸ Per Willard, by way of FDA’s press release and letter—which he perceived as “pretty threatening”—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.”⁵⁵⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁶⁰

⁵⁵⁴ FF ¶¶ 932, 1001-04.

⁵⁵⁵ FF ¶¶ 528-36, 998.

⁵⁵⁶ FF ¶¶ 917-37.

⁵⁵⁷ FF ¶ 931 (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”)).

⁵⁵⁸ FF ¶ 935.

⁵⁵⁹ FF ¶ 934 (Willard (Altria) Tr. 1437, 1439).

⁵⁶⁰ [REDACTED] As Complaint Counsel has noted, CC Pretrial Br. at 47 n.274, Altria discussed whether its possible investment in JLI should affect its recommendation that FDA consider banning *all* pods pending PMTA approval. FF ¶¶ 948, 955. At its October 18 meeting with FDA, Altria did

That context for Willard’s decision, combined with the fact that JLI was not seeking a product withdrawal, eviscerates Complaint Counsel’s empty accusation that Willard was acting pretextually. *McWane*, 2013 WL 8364918, at *253 (“Where there is an independent business justification for a defendant’s behavior, an inference of conspiracy is not easily drawn.” (citing *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 (11th Cir. 1991))). And that JLI undertook a similarly significant response to FDA’s concerns, ceasing sales of non-traditional flavors to retail chains, further puts the lie to the claim that Altria was acting pretextually.⁵⁶¹ Complaint Counsel has never suggested, nor could it, that JLI’s decision was the subject of an agreement between the parties.

Moreover, contributing to Willard’s decisionmaking was his recognition, as a result of the deep dive analyses that Quigley and Garnick had recently completed, that (1) Elite was a commercial failure that had no prospects of competing given its lack of nicotine salts; and (2) Elite could not get FDA approval given its technical deficiencies and its inability to convert smokers.⁵⁶² As was undisputed at trial, Elite was not a successful product, never cracking a one percent market share in cartridges despite increasingly heavy promotional activity by Nu Mark, to the point that the company was all but giving the product away for free.⁵⁶³ Elite was an inferior product. Altria knew it, JLI knew it, and other e-vapor competitors knew it.⁵⁶⁴

Nor is the reason for Elite’s lack of competitiveness disputed: as Complaint Counsel recognized in its opening statement, nicotine salts are the “key” ingredient to an e-vapor product’s commercial viability. Tr. 34. Quigley, who was never involved in the JLI negotiations, reported this insight to senior management at the Level Setting meeting in June 2018—after his and the scientists’ “Eureka” moment recognizing that nicotine salts (with the right ratio) were required—

not get the “impression” that FDA was “seriously considering” pulling all pod products from the market. FF ¶ 1000.

⁵⁶¹ FF ¶¶ 1032-38.

⁵⁶² FF ¶¶ 513-27, 601-13, 628-37, 693-700, 717-19, 743, 844-47, 940, 947.

⁵⁶³ FF ¶¶ 408-59.

⁵⁶⁴ FF ¶¶ 478-85.

and bluntly advised senior management in early August that Elite was not a competitive product for this reason.⁵⁶⁵ He reiterated the point when he summed up his learnings at the end of his 100-day review at the Ranch meeting in late September 2018.⁵⁶⁶ Complaint Counsel has never questioned Quigley’s credibility on the matter, nor could they. Thus, contrary to Complaint Counsel’s insinuation, CC Pretrial Br. 21, Altria’s recognition of these problems occurred *before* Altria received the first term sheet from JLI on July 30. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 288 F.3d 1028, 1034 (7th Cir. 2002) (attributing one party’s actions to an agreement was “shaky” when those actions predated the alleged agreement).

Nor was it disputed at trial that Altria had concluded that Elite could not obtain FDA approval, another factor figuring in Willard’s decision-making.⁵⁶⁷ Given Elite’s many defects, the scientists had suspected as much from even before Elite’s commercialization.⁵⁶⁸ Indeed, a core premise of Quigley’s “bridge plan” was that because the on-market products could not obtain PMTAs, Altria needed to “bridge” to the future by filing placeholder applications for those products that it knew would be rejected.⁵⁶⁹ By June 2018, as discussed in Section III.C (Facts), *supra*, senior management had been briefed on the magnitude of these problems, and shortly thereafter began preparing to inform the Board of these problems at the next scheduled Board meeting in August.⁵⁷⁰ And while Complaint Counsel claimed in its opening that the “evidence [would] show that Altria . . . had made good progress on its PMTA[s],” Tr. 50, the evidence at trial showed the opposite: Altria had not started working in earnest on a PMTA for an improved Elite product.⁵⁷¹ Complaint Counsel’s suggestion that Altria would have left on the market a product that was hemorrhaging

⁵⁶⁵ FF ¶¶ 706-16, 839-57.

⁵⁶⁶ FF ¶¶ 939-51.

⁵⁶⁷ FF ¶¶ 510-27, 601-13, 628-37, 693-700, 711-22, 743, 849, 947.

⁵⁶⁸ FF ¶¶ 365-67, 510-18.

⁵⁶⁹ FF ¶¶ 512, 523, 850-51.

⁵⁷⁰ FF ¶¶ 706-36.

⁵⁷¹ FF ¶¶ 510-27.

money and could not obtain regulatory approval in the face of FDA’s call-to-action letter is not reasonable, nor is it a sensible way to envision the “but for” world Section 7 contemplates.

Finally, the timing of Altria’s decision to pull the product further undermines any claim of pretext. When Altria made the decision to pull Elite at the September 26 Ranch meeting, negotiations had been broken down for a month, a fact that Complaint Counsel has ignored throughout this action.⁵⁷² And contrary to the notion that Altria pulled those products to in some way acquiesce to JLI, the contemporaneous documentation shows that by late October—by which point the parties were back at the negotiating table—Altria was concerned that JLI would be so upset by Altria’s announcement that it might scuttle the chance of an investment.⁵⁷³ That concern was well-founded. Though JLI continued to negotiate with Altria, JLI was “shocked” by the announcement.⁵⁷⁴ *See Rickards v. Canine Eye Registration Found., Inc.*, 704 F.2d 1449, 1453 (9th Cir. 1983) (no Section 1 violation where members of one of the alleged co-conspirators “voiced their disapproval” of other alleged co-conspirator’s conduct).

Complaint Counsel did not attempt at trial to reconcile any of this evidence with its “pretext” theory or to otherwise prove its claim that Altria acted in bad faith to mislead its regulator. Complaint Counsel’s only response to any of this at trial was to suggest that Altria must have been acting pretextually when it pulled its pod products in response to the FDA letter because it went on to invest in JUUL, a pod product that FDA had associated with concerns about youth usage. Tr. 490; CC Pretrial Br. 47. The argument disregards the fundamental distinction between Nu Mark’s product and JLI’s products: JUUL had demonstrated that it could convert adult smokers, while Nu Mark’s products could not.

As FDA has consistently recognized, e-vapor products present both an upside (the potential to convert adult smokers) and a downside (the risk of attracting nontobacco users, including youth).⁵⁷⁵ Nu Mark’s products, which were not converting adult smokers, presented only the

⁵⁷² FF ¶¶ 878-97, 938-49.

⁵⁷³ FF ¶¶ 1008-12, 1019.

⁵⁷⁴ FF ¶¶ 1013-19.

⁵⁷⁵ FF ¶¶ 917, 923-29.

downside risk, and thus had “no reason for being in the market” from a public-health perspective.⁵⁷⁶

By contrast, because JUUL had demonstrated that it could convert adult smokers, it presented a substantial upside. As Willard explained, Altria had a product that was [REDACTED]

[REDACTED]⁵⁷⁷ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁷⁸ And, per Garnick, Altria also believed it could help JLI manage downside risks.⁵⁷⁹ Cognizant of this fundamental distinction between these [REDACTED]

[REDACTED], and confident that it could leverage its expertise and experience to help JLI navigate the concerns raised by FDA, Altria perceived no contradiction between its response to the FDA letter and its continued interest in an investment in JLI.⁵⁸⁰

2. Complaint Counsel did not meet its burden to prove that Altria’s decision to pull its remaining traditional cig-a-like flavors was pretextual.

Where the evidence reflects 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 at 127. Here, as demonstrated at trial, Altria’s decision to withdraw its remaining cig-a-like products (announced December 7, 2018) was made as part of Altria’s annual budgeting process for independent business reasons. *See* Section IX (Facts), *supra*. Specifically, as Altria explained publicly at the time, the decision was motivated by the “current and expected financial performance [of these products], coupled with regulatory restrictions that burden [Altria’s] ability to quickly improve these products.”⁵⁸¹

⁵⁷⁶ FF ¶¶ 387, 597 (Gardner (Altria) Tr. 2586).

⁵⁷⁷ [REDACTED]

⁵⁷⁸ [REDACTED] *see also* FF ¶¶ 1030-31 (Garnick (Altria) Tr. 1769, 1771; Gifford (Altria) Tr. 2828).

⁵⁷⁹ FF ¶ 1030 (Garnick (Altria) Tr. 1771).

⁵⁸⁰ [REDACTED]; *see also* FF ¶¶ 1030-31 (Garnick (Altria) Tr. 1769, 1771; Gifford (Altria) Tr. 2828).

⁵⁸¹ FF ¶ 1092.

As set forth above, *see* Section IX (Facts), *supra*, Nu Mark had been hemorrhaging money, and there was no end in sight. By December 2018, Altria was projecting at least another \$235 million in losses for Nu Mark over the next three years with no hope of growing volume.⁵⁸² And its only remaining products were traditional flavors in the cig-a-like segment, a segment that was in “free-fall,” as Willard saw it.⁵⁸³ Contrary to Complaint Counsel’s claim that Altria was “well positioned to succeed and did, in fact, have success” (Tr. 29)—a claim premised on Altria’s cig-a-like performance in 2017—the reality by the end of 2018 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.⁵⁸⁴

On the regulatory side, Nu Mark’s remaining products, like the products it had withdrawn some six weeks earlier, had little prospect of securing FDA approval. As described in Section II.D (Facts), *supra*, Altria could not show either that they were capable of converting adult smokers or that they “present[ed] less risk” than comparable products given, among other issues, their greater formaldehyde yield.⁵⁸⁵ And new problems were emerging even as late as November 2018 in connection with Altria’s effort to address the formaldehyde problem caused by “dry puffing.”⁵⁸⁶ With no “pathway to profitability” and no e-vapor product that could meet the statutory standard for obtaining FDA approval, and needing to free up funds to finance a more promising approach in e-vapor, Altria decided to cut its losses and shut down Nu Mark.⁵⁸⁷ As Gifford testified at trial, based on a contemporaneous analysis projecting losses and Altria’s budgeting process, Altria decided, “let’s shut it down, let’s not lose additional money, and let’s look at how we could continue the growth teams.”⁵⁸⁸ *See In re Citric Acid Litig.*, 191 F.3d 1090, 1100 (9th Cir. 1999)

⁵⁸² FF ¶¶ 1082-83.

⁵⁸³ FF ¶ 564.

⁵⁸⁴ FF ¶¶ 1082-83 (Begley (Altria) Tr. 1088).

⁵⁸⁵ FF ¶¶ 362-63, 743; *see also* 21 U.S.C. §§ 387j(c)(4)(A), (b)(1)(A).

⁵⁸⁶ FF ¶¶ 1085-89.

⁵⁸⁷ FF ¶¶ 1077-98.

⁵⁸⁸ FF ¶ 1090 (Gifford (Altria) Tr. 2841).

(rejecting claims of acts against self-interest where defendant “explicitly weigh[ed] the costs and benefits”); *see also In re Baby Food Antitrust Litig.*, 166 F.3d at 127 (rejecting plaintiff’s theory that defendant’s “decision not to invest in [particular geographic] markets” was evidence of Section 1 agreement because “such investment required substantial capital expenditures and resource commitments” and “only [defendant] was in a position to decide whether it was in its best interest to make such commitments”).

In response, all Complaint Counsel can point to in support of its claim of pretext is the relative proximity of Nu Mark’s shutdown to the ultimate investment in JLI. But Complaint Counsel ignores that [REDACTED].⁵⁸⁹ And when Altria decided to discontinue Nu Mark in early December, the deal was far from certain.⁵⁹⁰ On December 7, Altria management was informing the Board that the prospects of a deal remained [REDACTED].⁵⁹¹ As late as December 15, Garnick told his colleagues that the “deal may not survive the day.”⁵⁹² As Willard testified, he did not have “any faith that th[e] deal would go through until the documents were signed on December 20.”⁵⁹³ That the discontinuations of the products “predate[d]” any certainty about getting the deal done with JLI undercuts the FTC’s suggestion that the timing of Nu Mark’s discontinuation relieves the government of its burden to adduce actual evidence of conspiracy. *See In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, 158 F. Supp. 3d 544, 568 (E.D. La. 2016).

In addition, Altria’s September pivot to the Growth Teams to develop new e-vapor products from scratch reinforces Altria’s independent reasons for discontinuing Nu Mark. In its pretrial brief and in its opening statement at trial, Complaint Counsel repeatedly stressed that, in the long term, Altria had to compete in e-vapor. CC Pretrial Br. 14-18, 42-43; Tr. 29-32. But Complaint Counsel ignores that Altria had created the Growth Teams and simultaneously downsized Nu Mark to do

⁵⁸⁹ [REDACTED]

⁵⁹⁰ FF ¶¶ 1103-25.

⁵⁹¹ [REDACTED]

⁵⁹² FF ¶ 1119 (RX0910 (Altria) at 001).

⁵⁹³ FF ¶ 1123.

precisely that. That Altria deemed it necessary to commit the resources needed to try to develop new products from scratch reflects its assessment that Nu Mark’s existing products had no prospects of becoming competitive. And the substantial resources that would be required by such development efforts explain why it made sense to shut down Nu Mark in December as part of the annual budgeting process; Willard and Gifford recognized that the money was better spent trying to develop products that could actually compete, albeit in the distant future.⁵⁹⁴

Complaint Counsel’s pretext theory also cannot be reconciled with the fact that Altria did not withdraw all its e-vapor products at once. Instead, it made two separate decisions months apart in response to separate business exigencies: (1) FDA’s demand for “bold action” on youth usage rates in September;⁵⁹⁵ and (2) the budgetary issues that the company was facing in December.⁵⁹⁶ If JLI were in fact insisting that Altria completely exit the e-vapor category as a condition of the investment, as Complaint Counsel contends, it would make no sense to remove those products in stages. Rather, Altria would have simply shut down Nu Mark in a single stroke. Moreover, when Altria shut down Nu Mark, that did not just affect Altria’s existing e-vapor products. It also meant the discontinuation of Verve, an oral nicotine product that would never have been subject to the noncompete contemplated in the context of the JLI deal.⁵⁹⁷ Like Altria’s remaining cig-a-like products, “there was no sign [Verve] was ever going to be successful,” and so Altria discontinued it as well.⁵⁹⁸

Finally, as discussed above, it is undisputed that JLI had no notice of Altria’s decision to withdraw Nu Mark’s remaining cig-a-like products and did not register it as a notable event. Valani did not even learn of it until he was deposed.⁵⁹⁹

* * *

⁵⁹⁴ FF ¶ 1090.

⁵⁹⁵ FF ¶¶ 917-51, 997-1007.

⁵⁹⁶ FF ¶¶ 1074-98.

⁵⁹⁷ FF ¶¶ 1093-95.

⁵⁹⁸ FF ¶ 1094 (Willard (Altria) Tr. 1459-60).

⁵⁹⁹ FF ¶¶ 1102, 1154.

The entire record confirms the sincerity of Altria’s independent reasons—financial and regulatory—for discontinuing its products in favor of the Growth Teams. With no coherent framing and no corroborating evidence, Complaint Counsel falls well short of its burden to “exclude the possibility” of independent action. *Monsanto Co.*, 465 U.S. at 764, 768. Accordingly, the Court should dismiss the Section 1 claim.

C. Complaint Counsel’s failure to sustain its secret agreement and pretext theory also guts its Section 7 claim.

Complaint Counsel’s failure to prove a secret agreement or pretext dooms its Section 7 claim as well. Section 7 makes unlawful acquisitions that may have the “effect of . . . substantially . . . lessen[ing] competition.” 15 U.S.C. § 18. But, here, Complaint Counsel failed to show that the removal of Altria’s existing e-vapor products was an effect of its deal with JLI; to the contrary, Altria removed its products for independent business reasons and regardless of any prospective deal with JLI. And as Complaint Counsel acknowledged in its opening statement, a finding that Altria removed its products for independent business reasons leaves the government with only a potential competition claim premised on hypothetical products. Tr. 72-74.⁶⁰⁰ As set forth in Section II.D.3 (Discussion), *infra*, Complaint Counsel failed to show that Altria, but for the JLI deal, would have entered with a new product in “the near future,” meaning that a Section 7 claim premised on potential products fails as well. *In the Matter of B.A.T. Indus., Ltd.*, 1984 WL 565384, at *4 (F.T.C. Dec. 17, 1984).

II. Complaint Counsel Failed to Prove Substantial Anticompetitive Effects

Complaint Counsel bears the burden of showing substantial anticompetitive effects under both Section 1 of the Sherman Act and Section 7 of the Clayton Act. As Complaint Counsel acknowledges, the Court’s analysis under Section 1 should be conducted under the rule of reason; it is not bringing a *per se* challenge. Compl. ¶ 79; Tr. 64. Thus, under Section 1, Complaint Counsel

⁶⁰⁰ Respondents dispute the legitimacy of the actual potential competition doctrine, which “rests on speculation about . . . future conduct” and “does not promote existing competition,” *United States v. Siemens Corp.*, 621 F.2d 499, 504 (2d Cir. 1980), making it precisely the type of “ephemeral possibilit[y]” the Supreme Court rejected in *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). But Respondents recognize that this argument is foreclosed by FTC precedent and raise the argument only to preserve it for appellate review.

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). And 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 also United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120 (1975); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 351 (2d Cir. 1979) (Complaint Counsel must demonstrate a “reasonable probability of a substantial impairment of competition”; “[a] mere possibility will not suffice.” (internal quotation marks omitted)). This is “no slight burden.” *NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021). As the Supreme Court recently highlighted in the Section 1 context, “courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect.” *Id.* at 2161 (citing amicus brief with approval).

In its opening statement, Complaint Counsel promised that it would show that Altria was a significant competitor, that it was “well positioned to succeed,” and that its “exit . . . has harmed and will continue to harm consumers.” Tr. 29-31, 64. It did not keep that promise, failing to make a showing on any of these points. To the contrary, as Respondents demonstrated at trial, Altria was not a significant competitor while it was on the market, it was not well positioned to succeed with any future products, and its exit caused no harm. Complaint Counsel’s only “evidence” to the contrary is the outcome-oriented opinion of its expert, whose assumptions were exposed as cherry-picked and illogical during his trial deposition. As shown below, whether the effect on competition is considered as to Altria’s existing e-vapor products or any hypothetical future products, Complaint Counsel failed to satisfy its burden to demonstrate harm, much less substantial harm. Altria’s existing products had low and declining market share, lacked the nicotine formulation needed to be competitive, and were highly unlikely to obtain FDA approval; when Altria discontinued them, the market only became *more* competitive, not less so. With respect to hypothetical future products, the regulatory scheme prevented Altria from bringing *any* such product to market absent navigating an arduous FDA pathway, which all parties agree would take at least five years from product development on. Because Complaint Counsel has failed to show any substantial anticompetitive effect flowing from the transaction, the claims should be dismissed.

A. Competition in the real world has intensified since the investment.

Complaint Counsel cannot meet its burden because it is undisputed that the market, however defined, is intensely more competitive than prior to the transaction. This is because of competition by third parties who are indisputably beyond the control of either Altria or JLI.

1. Post-acquisition evidence is properly before the Court for purposes of analyzing both of Complaint Counsel's claims.

Post-transaction evidence, particularly in the context of a consummated transaction, is an “important indicator of the probability of anticompetitive effects” in a Section 7 analysis. *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981). Indeed, the Horizontal Merger Guidelines “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. U.S. DOJ and FTC, Horizontal Merger Guidelines § 2 (2010) (hereinafter, “HMG”). Similarly, post-acquisition evidence is critical for a Section 1 rule of reason analysis, which requires courts “to assess a challenged restraint’s *actual effect on competition*.” *Alston*, 141 S. Ct. at 2144 (internal quotation marks omitted; emphasis added).

Such 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 *74 (N.D. Cal. Jan. 8, 2014). And absent circumstances suggesting that such evidence is the product of a conscious “decision [on the part of the transacting parties] to deliberately but temporarily refrain from anticompetitive actions,” post-acquisition evidence is properly before the Court and highly probative. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 506 (1974); compare *Lektro-Vend Corp.*, 660 F.2d at 276 (post-acquisition evidence of “dramatically declin[ing]” market share was probative because it could not “arguably have been subject to the defendant’s deliberate manipulation”), with *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 435 (5th Cir. 2008) (post-acquisition evidence was not probative where acquiring company could have manipulated the evidence by temporarily allowing competitors to “win a few bids so as to bolster the market’s appearance of competitiveness”).

Complaint Counsel proffered nothing at trial to suggest that the thriving state of competition post-acquisition is the product of manipulation by Altria or JLI.⁶⁰¹ Nor could it, given that the increased competition has been driven by aggressive price activity and expansion by third parties such as Reynolds and NJOY who are beyond the parties’ control. *See In re AMR Corp.*, 625 B.R. 215, 250 (Bankr. S.D.N.Y. 2021) (where “evidence . . . center[ed] on market trends involving third parties,” there was “little basis, if any, to suggest that evidence . . . [was] subject to . . . manipulation”); *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”). [REDACTED]

[REDACTED]

[REDACTED]⁶⁰² [REDACTED]

[REDACTED]

[REDACTED]⁶⁰³ Complaint Counsel does not dispute these facts.

2. The post-acquisition evidence, all of which is undisputed, is devastating to Complaint Counsel’s effects theory.

Key indicia of anticompetitive effects include “increased prices,” “reduced output,” and increases in market concentration. *Am. Express.*, 138 S. Ct. at 2284; *MacDermid Printing Sols. LLC v. Cortron Corp.*, 833 F.3d 172, 184 (2d Cir. 2016) (“[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.”); HMG § 5.3. In the nearly three years since the transaction, all three metrics uniformly demonstrate that the market is highly competitive: average pod-based device prices have *decreased* by more than 70 percent.⁶⁰⁴ Output has *increased*

⁶⁰¹ It would be absurd to suggest that JLI has consciously caused its market share, revenues, and margins to nosedive since the transaction, for the sake of evading antitrust scrutiny. As Pritzker testified, as a result of the “competitive pressures” JLI is facing, the company has had to “retrench” and lay off roughly “70 or 75 percent of the company.” FF ¶ 1313 (Pritzker (JLI) Tr. 881-82).

⁶⁰² [REDACTED]

⁶⁰³ [REDACTED]

⁶⁰⁴ FF ¶ 1347.

by over 20 percent.⁶⁰⁵ And market concentration is *lower*, with JLI’s market share of pod-based devices having *fallen* by more than half.⁶⁰⁶

Indeed, Complaint Counsel’s own expert, Dr. Dov Rothman, *agrees* “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”—though, as he admitted during his trial deposition, he failed to account for any of this post-transaction data in his analysis.⁶⁰⁷ Each of the major third parties to have offered evidence in this action also confirmed that the market is competitive, [REDACTED]

[REDACTED]⁶⁰⁸

Prices: “To prove an actual adverse effect on price, a plaintiff must show just that—that prices actually increased.” *MacDermid*, 833 F.3d at 184 (Section 1 case). Far from there being “[e]vidence of observed post-[transaction] price increases,” to which the Horizontal Merger Guidelines would assign “substantial weight,” § 2.1.1, prices *fell* dramatically following the transaction. 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 reduction in price.⁶⁰⁹ And the average price of pod cartridges *fell* by over 15 percent during the same period.⁶¹⁰

Nor did Complaint Counsel meet its burden under Section 7 to show that prices would be likely to be any lower, now or in the future, but for the transaction. As Sheetz’s Paul Crozier confirmed at trial, the market became “increasingly competitive [after] Altria removed its vaping products.”⁶¹¹ [REDACTED]

[REDACTED]⁶¹²

[REDACTED]

⁶⁰⁵ FF ¶ 1356.

⁶⁰⁶ FF ¶¶ 1368, 1372, 1452.

⁶⁰⁷ FF ¶ 1377 (PX7048 Rothman Trial Dep. at 39, 93-96).

⁶⁰⁸ [REDACTED]

⁶⁰⁹ FF ¶ 1347 (RX1217 Murphy Report ¶ 62).

⁶¹⁰ FF ¶ 1349 (RX1217 Murphy Report ¶ 63).

⁶¹¹ FF ¶ 1341 (Crozier (Sheetz) Tr. 1548).

⁶¹² [REDACTED]

[REDACTED]

[REDACTED]⁶¹³ [REDACTED]⁶¹⁴ And unlike Nu Mark’s approach to discounting Elite, which was a failure, NJOY’s and Reynolds’ efforts with their pod products worked: within months, Vuse Alto had knocked JUUL off its number one position in device share.⁶¹⁵ Put simply, and as Willard confirmed in response to the Court’s questioning, [REDACTED]⁶¹⁶

JLI, confronting “an aggressive competitive threat for the first time,”⁶¹⁷ [REDACTED]
[REDACTED]—“the very essence of competition,” *Matsushita*, 475 U.S. at 594.⁶¹⁸ As Bob Robbins, JLI’s Chief Growth Officer, told the Court, “[s]ince December 2018, we have lowered the price on the device permanently, and then we’ve run deeper promotions as well.”⁶¹⁹ The effect of this price war on JLI has been profound. As the Court heard from Pritzker, the aggressive discounting by its competitors has “significantly reduced [JLI’s] revenues and margins,” as well as its market share.⁶²⁰ Such “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).

Output: 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) (internal quotation marks omitted). Although Complaint Counsel claimed in its opening statement

⁶¹³ [REDACTED]

⁶¹⁴ [REDACTED]

⁶¹⁵ FF ¶¶ 1315-16. As Reynolds observed on an earnings call, their consumer testing shows that “Alto rates significantly higher than any other nicotine salt [p]od . . . on a number of key consumer attributes and purchase intent.” FF ¶ 1300.

⁶¹⁶ [REDACTED]

⁶¹⁷ FF ¶ 1297 (RX1547 (JLI) at 002).

⁶¹⁸ [REDACTED]

⁶¹⁹ FF ¶ 1312 (Robbins (JLI) Tr. 3257).

⁶²⁰ FF ¶ 1321 (Pritzker (JLI) Tr. 881).

that “[e]xpansion by existing competitors doesn’t make up for the loss of Altria,” Tr. 72, the real-world evidence shows the opposite and then some. In particular, a year after Altria had discontinued Elite, sales of pod-based devices had *increased* by more than 20 percent.⁶²¹ Over the same time period, sales of pod cartridges had likewise increased by more than 30 percent.⁶²² *See In re AMR Corp.*, 625 B.R. at 255 (“[S]howings of increased output have been found to overcome claims of anticompetitive effects . . .”). Put in different terms, at the time of its exit, Elite was selling only 100,000 cartridges a week; less than two years later, competitors’ sales (*excluding* sales of JUUL) had increased by more than three million cartridges a week.⁶²³ As Dr. Murphy explained at trial, this reflects “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.”⁶²⁴

While Complaint Counsel will argue that these increases in output have “not necessarily replaced” Altria’s contribution, Complaint Counsel proffered nothing at trial to support its speculation that output would have been higher in the but-for world. CC Pretrial Br. 68. Indeed, Dr. Rothman conceded during his trial deposition that “whether output is higher after December 2018 [was] not an input into [his] analysis of the competitive effect of the transaction.”⁶²⁵ And the actual market evidence demonstrates that Complaint Counsel’s speculation is unfounded. After Altria’s discontinuation of its MarkTen products, the average number of e-vapor products in the top 20 retailers increased from 3.0 to 3.8.⁶²⁶ Sheetz, in particular, added three new e-vapor products to its shelves—NJOY’s Ace, ITG’s *myblu*, and EAS’s Leap—as well as a product called Glas.⁶²⁷ That enhanced product diversity was made possible at least in part by Altria’s departure. As Dr. Murphy

⁶²¹ FF ¶ 1356 (RX1217 Murphy Report ¶ 65).

⁶²² FF ¶ 1356 (RX1217 Murphy Report ¶ 65).

⁶²³ FF ¶ 1360.

⁶²⁴ FF ¶ 1360 (Murphy Tr. 3127-28).

⁶²⁵ FF ¶ 1377 (PX7048 Rothman Trial Dep. at 95).

⁶²⁶ FF ¶ 1364 (Murphy Tr. 3140).

⁶²⁷ FF ¶ 1365 (Crozier (Sheetz) Tr. 1482, 1490).

explained, and as the actual market evidence demonstrated was true with respect to the products at issue here, “when a product leaves the market,” other manufacturers have the “ability and incentive . . . to expand, to come in and fill the void,” and to “create[] an opportunity for more attractive products”—evidence of a robust and healthy competitive process.⁶²⁸ *See also* HMG § 6.1 (recognizing that “repositioning” of competitors offsets anticompetitive effects).

Market Shares and Concentration: Post-transaction evidence of market share is a critical input into effects analysis where it is available and properly before the Court, as here. *See, e.g., Lekro-Vend Corp.*, 660 F.2d at 276. Yet, as with price and output, Complaint Counsel completely ignores what happened to market concentration post-transaction, and its expert again conceded that he did not account for it in his analysis.⁶²⁹

The reason for the omission of this real-world evidence is obvious: market concentration has significantly *decreased* in the wake of the transaction. Less than a year after its introduction, NJOY, by offering a satisfying pod product with nicotine salts, achieved a 30 percent share of device sales for a time, approximately the same share as JUUL.⁶³⁰ Reynolds’ Vuse Alto later surged past both NJOY and JUUL, capturing about 60 percent of all pod-based device sales as of September 2020.⁶³¹ JLI’s share of device sales has correspondingly plummeted from approximately 69 percent in October 2018 to approximately 30 percent in September 2020.⁶³² In addition, JLI lost approximately 20 percentage points in *cartridge* unit share from December 2018 to September 2020.⁶³³ *See Bazaarvoice*, 2014 WL 203966, at *74.

⁶²⁸ FF ¶ 1366 (Murphy Tr. 3140); *see also* FF ¶¶ 1651-64 (discussing shelf space opening up following Altria’s exit).

⁶²⁹ FF ¶ 1377 (PX7048 Rothman Trial. Dep. at 93-96).

⁶³⁰ FF ¶ 1370 (RX1217 Murphy Report ¶ 72).

⁶³¹ FF ¶ 1371 (RX1217 Murphy Report ¶ 72).

⁶³² FF ¶ 1372 (RX1217 Murphy Report ¶ 72).

⁶³³ FF ¶ 1374 (RX1217 Murphy Report ¶ 73).

Taken together, the increased output, decreased prices, and the deconcentrated market provide powerful, real-world evidence that competition *has not been*, and *will not be*, diminished as a result of the transaction, let alone “substantially” so, as Complaint Counsel was required to prove.

B. Complaint Counsel failed to carry its burden on market definition.

Complaint Counsel bears the burden to define a relevant market. *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 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). “Without a well-defined relevant market, a court cannot determine the effect that an allegedly illegal act has on competition.” *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 613 (8th Cir. 2011). Thus, if Complaint Counsel fails to meet its burden on market definition, both its Section 1 and Section 7 claims fail.

1. Complaint Counsel failed to prove a product market of closed-system e-vapor products.

In its opening statement, Complaint Counsel committed to proving a product market of all “closed-system e-cigarettes” (*i.e.*, comprising pods *and* cig-a-likes). Tr. 22. Instead, the overwhelming weight of the evidence adduced at trial demonstrates that pod-based devices and cig-a-likes are not close substitutes and should not be lumped together into a single market. Neither practical indicia nor the hypothetical monopolist test support Complaint Counsel’s market definition. Under *Brown Shoe*, defining the market requires examining “practical indicia,” such as “peculiar characteristics,” “industry . . . recognition of the submarket,” “distinct prices,” “sensitivity to price changes,” and “distinct customers.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *see also FTC v. Wilh. Wilhelmsen Holding ASA*, 341 F. Supp. 3d 27, 47 (D.D.C. 2018) (*Brown Shoe* factors are “evidentiary proxies for proof of substitutability and cross-elasticities of supply and demand”). Each of these factors point to the conclusion that pod-based products and cig-a-likes are not close substitutes, but rather exist in separate markets:

Peculiar Characteristics: Complaint Counsel claims that there is only one distinguishing feature between cig-a-likes and pods—shape—and then seek to diminish this difference as mere aesthetics. Tr. 21. This argument trivializes the functional significance of the products’ dueling “form factors,” which matter both for “stigma” and for battery power.

First, the testimony at trial was undisputed that for a smoker who is trying to convert, cig-a-likes carry a stigma that pod-based products do not.⁶³⁴ When looking at both MarkTen and, for example, NJOY’s now-defunct NJOY King cig-a-like product, it’s easy to see why:



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.”⁶³⁶ Pods, by contrast, do not evoke cigarettes at all. As Begley explained at trial, that “really solves a problem” for the adult smoker, by offering “an emotional benefit . . . because they aren’t viewed as a smoker”: “So it is far more than just an aesthetic issue.”⁶³⁷

Second, by virtue of their larger size, pods also have “larger,” “more effective batteries” than cig-a-likes, allowing them to “fill a gap between low performance easy to use cig-a-likes and

⁶³⁴ FF ¶ 1392 (Begley (Altria) Tr. 1100).

⁶³⁵ FF ¶ 1392 (RX0279 (Altria) at 052 (left, MarkTen cig-a-like); RX2025 (right, NJOY King)).

⁶³⁶ FF ¶ 1392 (PX7036 Garnick (Altria) Dep. at 135).

⁶³⁷ FF ¶¶ 1391, 1393 (Begley (Altria) Tr. 1079).

high performance complex open system devices.”⁶³⁸ [REDACTED]

[REDACTED]
⁶³⁹ Or as another competitor put it, battery performance is an “inherent limitation” of cig-a-likes because a “small battery create[s] less vape; less vape carries less nicotine,[] . . . [and] therefore, the consumer [will] get less satisfaction.”⁶⁴⁰ In an industry in which nicotine satisfaction represents table stakes, that is a critical differentiator. *Bazaarvoice*, 2014 WL 203966, at *24-26 (finding distinct market where other products did “not provide the same functionality” and were not viewed by customers as “substitutes”).

Distinct Customers: As the Court heard from many witnesses, including [REDACTED], pods and cig-a-likes [REDACTED]⁶⁴¹ As Quigley likewise explained at trial, Altria’s consumer research demonstrated that cig-a-likes appealed to “a different consumer;” the products were not “comparable.”⁶⁴² Myers, who was closer than anyone to retailers’ experience with the products, elaborated on the point: the typical cig-a-like user was “generally an older consumer who is not worried about the social friction of cigarettes.”⁶⁴³ Pods, by contrast, explained Garnick, “were used more by the younger adult cohorts.”⁶⁴⁴

Distinct Prices / Sensitivity to Price Changes: Pods and cig-a-likes are also priced without reference to one another. As JLI’s Robbins testified, JLI—which, of course, does not sell cig-a-like products—*never* “change[d] [JUUL’s] pricing as a result of cigalike competition.”⁶⁴⁵ When it did reduce prices, it was in response to NJOY’s and Reynolds’ deep discounting on their pod products, which was exclusively a dynamic of the pod-based market.⁶⁴⁶ As Huckabee explained, Reynolds

⁶³⁸ FF ¶¶ 1394, 1396.

⁶³⁹ [REDACTED]

⁶⁴⁰ FF ¶ 1396 (PX7030 Wexler (Turning Point Brands) Dep. at 35, 60).

⁶⁴¹ [REDACTED]

⁶⁴² FF ¶ 1399 (Quigley (Altria) Tr. 2034, 2038).

⁶⁴³ FF ¶ 1400 (Myers (Altria) Tr. 3350).

⁶⁴⁴ FF ¶ 1401 (PX7000 Garnick (Altria) IHT at 108).

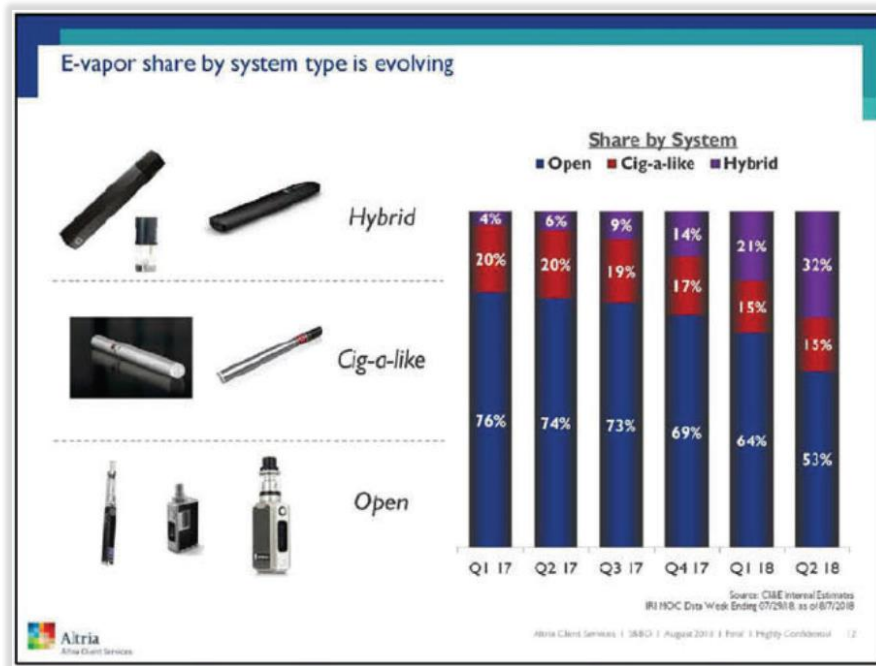
⁶⁴⁵ FF ¶ 1405 (Robbins (JLI) Tr. 3245).

⁶⁴⁶ FF ¶¶ 1308-14.

did not [REDACTED]

[REDACTED]⁶⁴⁷ ITG Brands, the maker of the *myblu* pod product, also “compare[s] pods to pods” when setting prices for its pod products.⁶⁴⁸ And Turning Point Brands’ CEO remarked that, in setting the pod price of pod-based systems, “[i]t would never occur to [him] to look at the price of Cigalikes.”⁶⁴⁹ *Cf. Safeway v. Abbott Labs.*, 761 F. Supp. 2d 874, 888 (N.D. Cal. 2011) (no separate markets where products from each market “impacted each other’s prices”).

Industry recognition: Finally, industry participants view the differences between pods and cig-a-likes as more than mere aesthetics. Contrary to Complaint Counsel’s claim that Altria’s “ordinary course business documents” support Complaint Counsel’s market definition, Tr. 51, Altria regularly and consistently broke out pods (or “hybrids,” as they often called them) on the one hand and cig-a-likes on the other.⁶⁵⁰



651

⁶⁴⁷ [REDACTED]

⁶⁴⁸ FF ¶ 1406 (PX7012 Eldridge (ITG Brands) Dep. at 130).

⁶⁴⁹ FF ¶ 1406 (PX7030 Wexler (Turning Point Brands) Dep. at 51).

⁶⁵⁰ FF ¶¶ 1409-11.

⁶⁵¹ FF ¶ 1410 (PX1424 (Altria) at 012).

Dr. Rothman relies on for his conclusion that Complaint Counsel’s proposed market passes the HMT is based on data from 2017 or earlier, *before the rise of pod products*.⁶⁵⁸ Dr. Rothman’s HMT analysis thus warrants no weight.

Second, Dr. Rothman admits that he made no attempt to use the HMT to analyze whether pods and cig-a-likes were in distinct markets.⁶⁵⁹ Instead he focused solely on whether a closed-system market satisfied the HMT, ignoring the possibility that pods represent their own market. That approach was improper under well-established case law and the government’s own Horizontal Merger Guidelines. *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 22 (D.D.C. 2015) (“The [market] analysis begins by examining the most narrowly-defined product or group of products sold” (internal quotation marks omitted)); *see also United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 59 (D.D.C. 2011) (“[T]he relevant product market should ordinarily be defined as the smallest product market that will satisfy the hypothetical monopolist test.”); HMG § 4.1.1 (noting that the FTC “would not include cars in [a] market in analyzing [a] motorcycle merger” “[u]nless motorcycles fail the hypothetical monopolist test”).

In light of these fundamental flaws in Dr. Rothman’s approach, Complaint Counsel cannot be found to have met its burden to define a relevant market.

C. Complaint Counsel is not entitled to a presumption of anticompetitive harm.

Because Complaint Counsel failed to meet its burden to define a relevant product market, it cannot establish anticompetitive effects and is certainly not entitled to a presumption of anticompetitive harm. But even assuming a closed-system market, Complaint Counsel still would not be entitled to a presumption. While Complaint Counsel contends that it is entitled to that presumption based on its calculation of Herfindahl-Hirschman Index (“HHI”) figures, Tr. 63-64, it improperly makes that calculation as if Altria’s products were still on the market when, in fact, Altria had removed its products prior to the transaction. And its HHI calculation otherwise rests on fundamentally incorrect assumptions in any event.

⁶⁵⁸ FF ¶ 1422 (PX7048 Rothman Trial Dep. at 109); *see also* FF ¶¶ 1324-26.

⁶⁵⁹ FF ¶ 1416.

1. 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.

There is no dispute that by the time of the investment, Altria had discontinued all of its e-vapor products (and in the case of Elite, some two months before). According to Complaint Counsel, the Court should ignore that Altria had removed its e-vapor products prior to the transaction because “[t]he *effect* of the Transaction was the complete elimination of Altria as a competitive presence in the closed-system e-cigarette market.” CC Pretrial Br. 64 (emphasis in original). Complaint Counsel’s argument fails for two reasons:

First, as shown in Section I.B (Discussion), *supra*, Altria did not withdraw its products from the market for pretextual reasons, but rather for independent business reasons. For that reason, Complaint Counsel is wrong to label the withdrawals an “effect” of the transaction within the ambit of the Clayton Act, 15 U.S.C. § 18, and its argument that it is entitled to a presumption based on the one-time share of those products fails. *See* Section I.C (Discussion), *supra*.

Second, even assuming Altria removed its products because of the deal, such pre-transaction decisions were not “effects” of the transaction within the meaning of Section 7 as a matter of law. What Section 7 “is concerned with [is] whether an acquisition or merger *itself* may cause antitrust injury.” *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 511 (2d Cir. 2004); *cf.* *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 602 (6th Cir. 2014) (“Unlike a conspiracy or the maintaining of a monopoly, a merger is a discrete act, not an ongoing scheme.”). The analysis logically and “necessarily ‘focus[es] on the future.’” *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 79 (D.D.C. 2017) (quoting *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990)); *see also* HMG § 1 (“[M]erger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds . . .”). This means that Complaint Counsel must take the market as it existed at the time of the investment—*i.e.*, December 20, 2018, when Altria had no products on the market and was pursuing a 5 to 7 year plan with the Growth Teams—and prove that Altria’s stock acquisition would substantially lessen competition from that point forward relative to what would have happened in the so-called “but-for world” absent the acquisition. Complaint

Counsel cannot assume, for purposes of its Section 7 analysis, that events that occurred did not in fact occur.

Aetna is instructive. There, DOJ challenged Aetna’s proposed acquisition of Humana, a competing health insurer, claiming the merger would substantially lessen competition in local public exchange markets. 240 F. Supp. 3d at 8. The government alleged that the transaction would have such an effect in 17 counties for the year 2017. *See id.* After DOJ sued to block the signed deal but before the transaction was consummated, Aetna exited the markets at issue, a decision that the court found was made “at least in part for the purpose of improving its litigation position.” *Id.* at 80. The government urged the court to “act as if Aetna had not taken this action,” given that Aetna had done so “for the purpose of evading antitrust review.” *Id.* at 75. “Instead, the government propose[d], the Court should look to the state of competition as it existed in 2016—when Aetna and Humana competed in all 17 counties—and project forward from there.” *Id.*

The court rejected the government’s position, holding instead that there was *no* competitive effect from the transaction in the year that Aetna exited the exchanges. “[F]or competition to be lessened [in 2017],” the court explained, “there must necessarily be competition to begin with.” *Id.* at 79. And because Aetna had withdrawn from the exchanges in 2017, “there [could] be no lessening of competition for 2017”; the court refused to “adopt the government’s proposed approach of simply ignoring the reality that Aetna [was] not offering plans for 2017 in the relevant markets, and pretend that the facts [were] frozen as they were in 2016.” *Id.*; *see also FTC v. Atl. Richfield Co.*, 549 F.2d 289, 300 (4th Cir. 1977) (requiring “clear proof that [defendant], notwithstanding withdrawal, would probably reenter the market if the merger fails and [that] the loss of [defendant] as such an entrant would significantly lessen an opportunity for increased competition”). While the court took account of the fact of Aetna’s reasons for exiting the market for purposes of assessing the likelihood of reentry, it did *not* treat Aetna’s exit as an effect of the proposed merger. *Aetna*, 240 F. Supp. 3d at 79-80. Doing so, it made clear, would have been inconsistent with the meaning of Section 7.

So too here. Complaint Counsel is peddling the same argument that was rejected in *Aetna*—that because Altria supposedly discontinued its products for supposedly pretextual reasons, the

court should “ignor[e] the reality” that Altria had discontinued its products “and pretend that the facts are frozen as they were in [September 2018].” *Id.* at 79. Altria did not withdraw its products for pretextual reasons. But regardless, *Aetna* makes plain that Section 7 does not permit Complaint Counsel to revise history in making out its *prima facie* case.

2. Complaint Counsel’s calculation of market concentration is methodologically flawed and cannot form the basis of a presumption of anticompetitive harm.

Complaint Counsel is also not entitled to a presumption because its expert’s HHI analysis is flawed with respect to both of its critical inputs: its calculation of pre-transaction concentration and its calculation of post-transaction concentration. Thus, Complaint Counsel is not entitled to a presumption, even assuming it is proper to treat pod and cig-a-likes as part of the same market and to ignore Altria’s withdrawal of its products prior to the transaction.

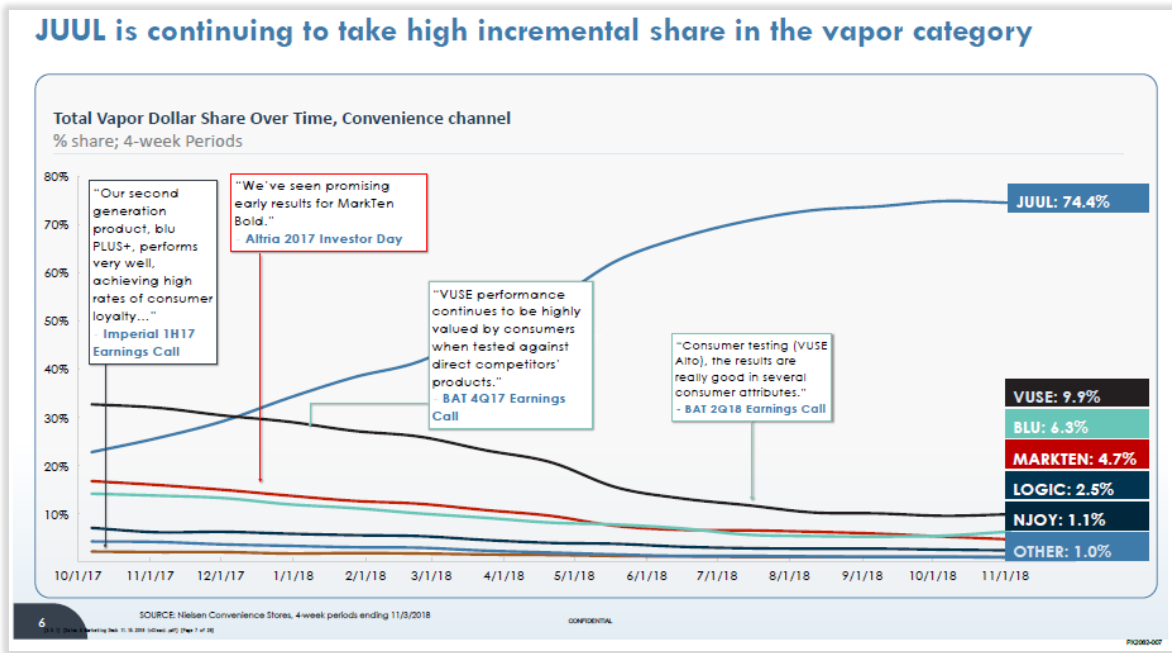
i. Improper Calculation of Pre-Transaction Shares

Dr. Rothman improperly 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.”⁶⁶⁰ In taking that approach, Dr. Rothman is able to manufacture a pre-transaction market share for Altria of 10.1 percent—ignoring that pods went from a minority of the category at the beginning of this period to completely overwhelming it by the end of it.⁶⁶¹ By September 2018, however, Altria’s share of cig-a-likes and pods together (as measured by units) had fallen to 7.5 percent and was continuing to decline, a function of pods’ continued and rapid rise.⁶⁶² According to a JLI slide that Complaint Counsel presented during its opening statement, by November 2018, as measured by dollars, Altria’s share had fallen even lower to 4.7 percent (“[h]ardly a strong competitor,” as the Court observed at the time (Tr. 54)):

⁶⁶⁰ FF ¶ 1434 (PX5000 Rothman Report ¶ 87 (emphasis added)).

⁶⁶¹ FF ¶ 1440 (PX5000 Rothman Report ¶ 89, Tbl. 2).

⁶⁶² FF ¶ 1441 (PX1127 (Altria) at 003); *see also* FF ¶¶ 1324-26.



663

As such, Complaint Counsel’s share in the 12 months before October 2018 is not a reliable proxy for Altria’s pre-transaction share. HMG § 5.2.

ii. Improper Calculation of Post-Transaction Shares

Dr. Rothman’s calculation of market participants’ *post*-transaction share relies on an another demonstrably incorrect assumption: that the remaining competitors took Altria’s share in proportion to those competitors’ share over the same 12-month period.⁶⁶⁴ That is, Dr. Rothman’s 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.⁶⁶⁵ Despite having access to post-transaction data and document productions of various market participants, Dr. Rothman admitted that he did nothing to test this

⁶⁶³ FF ¶ 1442 (PX2062 (JLI) at 007). In response, Complaint Counsel hypothesized that Altria’s share was this low because “at this point in time . . . Altria had taken a few of its products off the market.” Tr. 55. That was incorrect. Altria withdrew its Elite and non-traditional cig-a-like flavors on October 25, 2018. FF ¶¶ 1001-04. This slide—which is based on data through November 3, 2018 measured in four-week periods—demonstrates that Altria’s share had been steadily declining for more than a year and well before Altria withdrew Elite and non-traditional cig-a-like flavors.

⁶⁶⁴ FF ¶ 1444.

⁶⁶⁵ FF ¶ 1444.

3. Dr. Rothman’s HHI calculations are not a reliable indicator of anticompetitive effects in the context of this case.

HHI levels are not a “rigid screen,” HMG § 5.3, and 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,” *id.* § 5.2. Here, even if the Court credits Dr. Rothman’s HHI calculations, any resulting presumption is rebutted by a wealth of evidence showing that this calculation badly overstates Altria’s “future competitive significance.” That is so for at least four reasons:

First, just as the steady and rapid decline of cig-a-likes from October 2017 through September 2018 undermines the reliability of Dr. Rothman’s “12-month average” approach in calculating pre-transaction share, it also overstates the competitive significance of Altria as an e-vapor participant *going forward*. At trial, Complaint Counsel mustered no evidence that Altria’s cig-a-like products—in which Altria had some 90 percent of its e-vapor share—were likely to recover from these “ongoing changes in market conditions,” nor could it.⁶⁷³ HMG § 5.2. And in fact, pod-based products have overwhelmed cig-a-likes as consumers’ form factor of choice—to the point that, as of September 2020, cig-a-likes represented only five percent of closed-system volume share for both devices and cartridges.⁶⁷⁴ For these reasons, Altria’s pre-transaction share, however measured, dramatically overstates its competitive significance and is an unreliable predictor of the transaction’s competitive effect.

Second, the HHI calculation overstates Altria’s “future competitive significance” by obscuring that the market was shifting (and has continued to shift) not just to pods, but to pods *with nicotine salts*—a product category in which Altria never had an offering.⁶⁷⁵ As the FTC 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.” HMG § 5.2. That

⁶⁷³ FF ¶ 1460.

⁶⁷⁴ FF ¶ 1461.

⁶⁷⁵ FF ¶¶ 1464-65.

is precisely the case here, as Altria had no ability to incorporate nicotine salts into its products without traversing FDA’s lengthy and uncertain PMTA pathway.

Third, the HHI calculation does not account for the impact of FDA’s flavor ban, which took effect in February 2020 and which would have forced all or nearly all Elite SKUs off the market had the products remained on shelves after the transaction.⁶⁷⁶

Fourth, and finally, HHI calculations are notoriously unreliable when “market share statistics are volatile and shifting,” as they are here. *Baker Hughes*, 908 F.2d at 986 (internal quotation marks omitted). As discussed in Section XII (Facts), *supra*, and Section II.A.2 (Discussion), *supra*, the market has “fluctuate[d] substantially over short periods of time in response to changes in competitive offerings” over the last several years, undermining the relevance of any HHI figures, however tabulated, from years ago. HMG § 5.3.

D. 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.

Finally, any presumption of harm generated by Complaint Counsel’s market-concentration analysis could not be sustained in the face of the actual market conditions. Respondents “may rebut [a presumption of harm] by producing evidence to cast doubt on the accuracy of the Government’s evidence as predictive of future anti-competitive effects.” *Chi. Bridge*, 534 F.3d at 423. As is well settled, “[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness,” *Baker Hughes*, 908 F.2d at 984. “[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 n.38); *see also New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 217 (S.D.N.Y. 2020).

Here, Complaint Counsel fails to account for the regulatory scheme that pervades this industry and constrains its participants. With respect to Altria’s existing on-market offerings, the

⁶⁷⁶ FF ¶ 1474. Dr. Rothman opines that the flavor ban would have benefitted Altria because most of cig-a-like sales were in traditional flavors. In doing so, he once again disregards cig-a-likes’ precipitous decline in the e-vapor category relative to pods. FF ¶ 1473.

evidence was undisputed at trial that these products were commercial failures that could not convert smokers or obtain regulatory approval. With respect to hypothetical future products, Complaint Counsel cannot come close to satisfying the strictures of the potential competition doctrine in light of FDA’s regime and the undisputed time frame required to navigate it. Complaint Counsel has not shown any actual or likely anticompetitive effect on competition as a result of the transaction.

1. This Court should take account of the regulatory scheme.

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) (citation omitted); *see also In the Matter of Impax Labs*, 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.’ The distinctive features of the pharmaceutical industry provide the context for assessing the agreement challenged in this case.” (citation omitted)). Even in cases where regulations do not *require* particular actions, a court does not “disregard [the party’s] status as a regulated [entity];” such status is a “fact of market life.” *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 737 (9th Cir. 1981), *modified*, (9th Cir. Mar. 15, 1982). Indeed, “[t]he 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 even permit [the 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).

In this case, the paramount importance of the regulatory scheme is undisputed. Through the Tobacco Control Act, Congress provided FDA with authority to regulate tobacco (1) to “ensure that [FDA] has the authority to address issues of particular concern to public health officials, especially the use of tobacco by young people”; (2) to “ensure that there is effective oversight of the tobacco industry’s efforts to develop, introduce, and promote less harmful tobacco products”; and (3) because “[i]t is essential that [FDA] review products sold or distributed for use to reduce risks or exposures associated with tobacco products” and that “manufacturers . . . be required to demonstrate that such products will meet a series of rigorous criteria, and will benefit the health of

the population as a whole.”⁶⁷⁷ As Congress expressly found when articulating these purposes and findings, the *FTC*’s “mission,” on the other hand, “is to regulate activities in the marketplace,” and “[n]either the Federal Trade Commission nor any other Federal agency except [FDA] possesses the scientific expertise needed to implement effectively all provisions of the [Act].”⁶⁷⁸

As all parties agree, FDA exercised this authority through the Deeming Rule, effectively freezing the e-vapor category in place as of August 8, 2016, and thereby preventing Altria from commercializing any new products absent PMTA approval.⁶⁷⁹ And while FDA granted a temporary reprieve for products on the market as of August 8, 2016—like MarkTen and Elite—it did so only as a matter of enforcement discretion (revocable at any time) and prevented manufacturers from making substantive modifications to those products absent PMTA approval.⁶⁸⁰ As such, 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). Accurately assessing the competitive effects of the transaction must therefore be undertaken through the prism of FDA’s regulatory scheme.

2. Altria would not have been a significant competitor with Nu Mark’s existing products.

As explained above in Section II.C.1 (Discussion), *supra*, the Court should not consider Altria’s MarkTen and Elite products in assessing competitive effects because Altria removed those products for independent reasons; they would be off the market with or without a deal. But regardless, they were hardly meaningful competitors.

With respect to Altria’s cig-a-like products, by 2018, Altria’s leadership was acutely aware that its cig-a-like offerings were not converting smokers, were not competitive with pod products,

⁶⁷⁷ Pub. L. No. 111–31, §§ 2(36), 3(2), (4), 123 Stat. 1776, 1779, 1781-82 (2009).

⁶⁷⁸ Pub. L. No. 111–31, § 2(45), 123 Stat. at 1781.

⁶⁷⁹ FF ¶¶ 64-65, 302.

⁶⁸⁰ FF ¶¶ 61, 66.

and were unlikely to obtain FDA approval.⁶⁸¹ The company’s only product with salts, MarkTen Bold, had low nicotine strength and the wrong formulation—a problem that could not be fixed without FDA approval.⁶⁸² And in addition to being in the wrong format for conversion, MarkTen suffered from serious technical defects, including its propensity to generate formaldehyde—yet another problem that both imperiled the product’s chances at obtaining regulatory approval and which could not be fixed without regulatory approval.⁶⁸³

JLI’s O’Hara confirmed the weak competitive position of MarkTen at trial, explaining that Nu Mark’s cig-a-like products “were not viable They didn’t have nicotine salts, they didn’t satisfy nicotine cravings, and they were cig-a-likes.”⁶⁸⁴ Reynolds likewise perceived Nu Mark’s e-vapor products, including its cig-a-likes, as “inferior.”⁶⁸⁵ And as Robbins testified, MarkTen, unlike pod-based NJOY Ace and Vuse Alto, was never a factor in JLI’s pricing or promotional decisions.⁶⁸⁶ The MarkTen cig-a-like products simply were not competitive constraints on JUUL.⁶⁸⁷ Moreover, as discussed above, pods have only further supplanted cig-a-likes in the category since the transaction took place. *See* Section II.C.3 (Discussion), *supra*. Complaint Counsel does not seriously dispute any of this.

As for Elite, although it had a pod form, it lacked what all parties agree is “key” to competitive success: nicotine salts. Tr. 34; *see* Horizontal Merger Guidelines § 5.2 (explaining that unavailability of “new technology that is important to long-term competitive viability” to firm affects “future competitive significance” of that firm). As Altria’s scientists recognized in June 2018 and as Quigley reported to senior management at that month’s Level Setting meeting, this defect meant that Elite could not deliver nicotine satisfaction to adult smokers or, in turn, convert

⁶⁸¹ FF ¶¶ 1504-11.

⁶⁸² FF ¶¶ 1505-07.

⁶⁸³ FF ¶¶ 1509-11.

⁶⁸⁴ FF ¶ 760 (O’Hara (JLI) Tr. 630).

⁶⁸⁵ FF ¶ 483.

⁶⁸⁶ FF ¶ 1644 (Robbins (JLI) Tr. 3245-49); *see also* FF ¶¶ 1308-14.

⁶⁸⁷ FF ¶¶ 744-46, 1639-46.

them. *See* Sections III.B, C (Facts), *supra*. And as with MarkTen, these fundamental problems could not be addressed without obtaining PMTA approval for an improved product years down the line.⁶⁸⁸ Nor is there any dispute that Elite itself could not obtain PMTA approval, dooming its medium- and long-term viability.⁶⁸⁹

Elite’s inability to convert smokers was borne out in its abysmal sales numbers. Despite the aggressive distribution and promotional activities that Scott Myers described at trial, *see* Section II.C (Facts), *supra*, Elite never achieved more than a one percent share of e-vapor cartridge sales prior to its discontinuation.⁶⁹⁰ By August 2018, Quigley had advised Willard and Gifford that Elite was not competitive. *See* Section III.E (Facts), *supra*. And, as Robbins testified at trial, as with MarkTen, JLI never adjusted its pricing or promotions in response to Elite.⁶⁹¹ Competitors and retailers alike—[REDACTED]—understood the product was a failure.⁶⁹² And Complaint Counsel has proffered no basis on which to speculate that Altria would have somehow reversed Elite’s fortunes in the but-for world.

Nu Mark’s products’ lack of competitiveness is underscored by Altria’s decision to transition to “Growth Teams” in September 2018—a fundamental restructuring driven by the recognition that Altria needed to “start from scratch” with respect to e-vapor product development. *See* Section V (Facts), *supra*. Altria made that decision because, as Willard explained, the company understood that “all of the existing NuMark products . . . had failed to be successful in the marketplace” and that it needed a “different approach.”⁶⁹³ In connection with that pivot, Altria downsized Nu Mark and shut down development work on Elite and numerous other projects, instead staking its future competitiveness in the e-vapor industry on products that did not yet exist

⁶⁸⁸ FF ¶¶ 510-18, 692.

⁶⁸⁹ FF ¶¶ 1512-16.

⁶⁹⁰ FF ¶ 1514 (RX1217 Murphy Report ¶ 122).

⁶⁹¹ FF ¶ 1644 (Robbins (JLI) Tr. 3252-54).

⁶⁹² FF ¶¶ 477, 481-85.

⁶⁹³ FF ¶ 900 (Willard (Altria) Tr. 1434).

(even in concept) and which it knew could not be brought to market for years. *See* Section V (Facts), *supra*.⁶⁹⁴

3. With respect to products that Altria had not yet developed or commercialized, Complaint Counsel cannot satisfy the “actual potential competition” doctrine.

Neither can Complaint Counsel carry its burden of demonstrating that Altria would have been a “significant competitor” with any new product it might have developed in the future. New entry must be assessed under the “actual potential competition” doctrine. *See In the Matter of Heublein, Inc.*, 96 F.T.C. 385, 583 (1980) (applying the doctrine to assess whether a company selling imported wines would have, but for a merger, enhanced competition by selling domestic wines). Under that doctrine, to the extent it is viable at all (*see* n. 600, *supra*), 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. Dec. 17, 1984). 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). The 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 *10.⁶⁹⁵

⁶⁹⁴ Complaint Counsel adduced no evidence at trial that the few other e-vapor products in Nu Mark’s portfolio—several of which Altria had not even been able to commercialize because of regulatory concerns—were of any competitive significance. FF ¶¶ 1517-31.

⁶⁹⁵ 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. 73. Complaint Counsel will likely contend (wrongly) that the Court should not adopt the potential competition framework in assessing Altria’s likelihood of developing new products because, on its theory, Altria would not have withdrawn its products but for the transaction, thereby rendering it an “actual competitor.” But even if the Court analyzes Altria as an “actual competitor,” the court must still evaluate the likelihood of future competition “in the context of [the] particular industry” and determine that Altria would be able to bring any as-yet commercialized products to market “in the near future.” *Aetna*, 240 F. Supp. 3d at 78-79, 93. Because Complaint Counsel cannot make that showing, the analysis under either framework yields the same result.

Here, Complaint Counsel cannot show that Altria would have entered with any new products in the “near future” for three reasons: *First*, and most fundamentally, Complaint Counsel has not proven, much less *clearly* proven, that any future e-vapor product Altria developed would be approved by FDA. *Second*, Complaint Counsel cannot show that entry would be in the “near future” in light of the lengthy lead time required to develop an e-vapor product and prepare a PMTA, let alone the time required for FDA to review the application. *Third*, nothing in the record suggests that Altria would have succeeded in developing a competitive product to begin with.⁶⁹⁶

i. Complaint Counsel has not offered “clear proof” of future entry.

Throughout this litigation, Complaint Counsel has repeatedly emphasized the barriers to entry imposed on other companies by FDA’s regulatory regime, stressing that the “regulatory approval process [for e-vapor products] is exceptionally time-consuming and expensive,” and obtaining a declaration speaking to its “uncertain[ty].”⁶⁹⁷ But despite acknowledging that these barriers apply to any “new entrant or current competitor,” Complaint Counsel conveniently glosses over that Altria is subject to precisely the same regulatory regime in discussing what Altria *might* have done had the JLI deal not occurred. CC Pretrial Br. 67.

It is undisputed that the standards for obtaining a PMTA are “very demanding” and that the outcome is highly uncertain.⁶⁹⁸ Which products will be deemed “appropriate for the protection of the public health” is a determination that is exclusively vested in FDA; Complaint Counsel has no basis on which to speak to it and could never claim that a particular product is “likely” to obtain FDA approval.⁶⁹⁹ For precisely these reasons, Complaint Counsel did not even attempt to proffer

⁶⁹⁶ Complaint Counsel may look beyond its precedent to argue that the potential competition standard is satisfied if the alleged potential entrant had “available feasible means” for entering the market and those means “offer(ed) a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects.” CC Pretrial Br. 73 (quoting *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-78 (8th Cir. 1981)). Complaint Counsel cannot satisfy this version of the standard for the same reasons it cannot satisfy the standard the Commission articulated in *B.A.T.*

⁶⁹⁷ Compl. ¶ 71; *see also* FF ¶¶ 1540, 1543.

⁶⁹⁸ FF ¶¶ 1542-43.

⁶⁹⁹ FF ¶¶ 49, 73-75.

“facts” at trial “permit[ting] [the Court] to speculate as to the likelihood of [FDA approval].” *City of Pittsburgh*, 147 F.3d at 268. Nor did Complaint Counsel offer any FDA expert to render an opinion that any future Altria product could have obtained regulatory approval. There is simply nothing in the record to suggest how some hypothesized product that Altria had yet to develop would fare in terms of “obtaining FDA approval.” *Brotech Corp. v. White Eagle Int’l Techs. Grp., Inc.*, 2004 WL 1427136, at *6 (E.D. Pa. June 21, 2004).⁷⁰⁰

ii. Complaint Counsel cannot demonstrate that entry would occur in the “near future.”

Complaint Counsel also made no attempt to show, and cannot show, that Altria could get to market with a newly developed product in the “near future.” *B.A.T. Indus.*, 1984 WL 565384, at *9. On this point, there is no dispute: Complaint Counsel acknowledged in its pretrial brief that “[p]roduct development . . . takes multiple years” and, assuming a viable product is developed, that the “timeline for submitting a PMTA and receiving FDA approval can take more than three years.” CC Pretrial Br. 67.

Here, all witnesses confirmed that a new product was at least 5 to 7 years out, and that timeline precludes Complaint Counsel from pointing to hypothetical products as evidence of anticompetitive effects.⁷⁰¹ 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 once “five years” have passed, “the degree of concentration in the market becomes so inherently unpredictable that the entire predictive enterprise should be abandoned.” *Mercantile Tex. 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) (explaining that “in an actual potential entrant situation,” there must be “some reasonable temporal estimate related to the near future” for potential entry to be relevant); *FTC v. Steris Corp.*, 133 F. Supp. 3d 962, 977-78 (N.D. Ohio 2015) (dismissing potential competition claim where FTC

⁷⁰⁰ Even if there were such evidence in the record, it is far from clear that the FTC is competent to make that finding in light of the Tobacco Control Act’s admonition that only FDA “possesses the scientific expertise needed to implement” the Act. Pub. L. No. 111–31, § 2(45), 123 Stat. at 1781.

⁷⁰¹ FF ¶ 1545.

failed to show firm would have entered market “within a reasonable period of time”). Any far-reaching predictions would be particularly tenuous in “a heavily regulated industry,” like e-vapor, where “regulatory change can”—and has—“alter[ed] the structure of the market.” *Mercantile Tex.*, 638 F.2d at 1272. That is particularly true here, where FDA is poised to act on hundreds of thousands PMTAs in the coming months and years.⁷⁰²

iii. Complaint Counsel failed to prove that Altria was capable of developing a new, competitive product with which it could attempt to enter.

Finally, whether Altria would have been successful in developing a new e-vapor product at some future date—a fundamental premise of Complaint Counsel’s theory that Altria’s exit harmed consumers—is pure speculation. Complaint Counsel has labeled Altria “a behemoth innovator,” CC Pretrial Br. 57, and proceeds on the assumption that “because [Altria] is large in one aspect of [the tobacco] industry” it is capable of “enter[ing]” and succeeding in every aspect of that industry (or should at least be required to try). *Chem-Nuclear Sys. v. Waste Mgmt.*, 1982 WL 1320, at *3 (W.D. Wash. July 16, 1982).

Sound bites aside, the uncontroverted testimony at trial was that Altria has a poor track record at innovation and lacks the competencies, talent, and expertise needed to develop an innovative electronic product.⁷⁰³ *See Atl. Richfield Co.*, 549 F.2d at 295 (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). As the Court heard from Willard, every potential reduced-risk product that Altria launched in advance of creating Nu Mark was a commercial bust.⁷⁰⁴ Every product Nu Mark launched was, in turn,

⁷⁰² For this reason, Complaint Counsel is also unable to satisfy the other elements of the potential competition doctrine. That is, it cannot show (1) that the market will be “concentrated” in the future; (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.” *B.A.T. Indus.*, 1984 WL 565384, at *7-8.

⁷⁰³ FF ¶¶ 140-69, 181-91, 848, 907, 1564.

⁷⁰⁴ FF ¶¶ 140-69 (Willard (Altria) Tr. 1325-31).

acquired from another company.⁷⁰⁵ And every internal development project that Nu Mark pursued failed to “yield[] fruit.”⁷⁰⁶ The reality, as Quigley surmised when he took over Nu Mark, was that Altria was not “structured” to innovate outside of combustible products.⁷⁰⁷

While Altria had pivoted to the Growth Teams in an attempt to start from scratch, the teams “didn’t even have a product concept in mind” when they were disbanded, and were broadly understood within Altria to be a long shot.⁷⁰⁸ *See United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729, 758 (D. Md. 1976) (rejecting potential competition claim where, despite acquirer’s “clear[] desire[]” to enter, it “lacked the expertise” to do so). There was no specific pod-based concept that they, or anyone at the company, were actively conceptualizing or pursuing after October 5, 2018, when the Growth Teams were announced.⁷⁰⁹ Nor were Altria’s struggles lost on Philip Morris International (PMI), which was “disappointed in the results of the joint [e-vapor] research coming from Altria” and “had not seen a lot of success coming from Altria’s innovation in really any of the reduced-risk product areas.”⁷¹⁰

In sum, Complaint Counsel adduced no evidence at trial to support a finding that Altria would have been likely to develop a viable e-vapor product but for the transaction. That Altria “is a leading figure in the [tobacco] industry as a whole” is insufficient. *Chem-Nuclear*, 1982 WL 1320, at *3. Altria had invested more than \$2 billion in innovative product initiatives without those products having achieved sustainable commercial success.⁷¹¹ There is no reason to think the future held anything different for Nu Mark’s efforts in e-vapor. *See Atlantic Richfield Co.*, 549 F.2d at 299 (“past presence in th[e] market . . . prior to . . . decision to withdraw from the market” was

⁷⁰⁵ FF ¶ 1559 (PX7018 Schwartz (Altria) Dep. at 163-64).

⁷⁰⁶ FF ¶ 191 (Murillo (Altria/JLI) Tr. 2940-41).

⁷⁰⁷ FF ¶ 715 (Quigley (Altria) Tr. 2025).

⁷⁰⁸ FF ¶¶ 970, 1606 (Garnick (Altria) Tr. 1661-62); *see also* FF ¶ 1610.

⁷⁰⁹ FF ¶¶ 1604-11.

⁷¹⁰ FF ¶ 1562 (PX7020 King (PMI) Dep. at 209, 222).

⁷¹¹ FF ¶ 142.

insufficient to support potential competition claim, despite respondent’s substantial “financial resources”).

iv. Complaint Counsel failed to prove that Altria was likely to partner with PMI and enter with PMI’s VEEV product in the “near future.”

Cognizant that Altria’s prospects for developing a competitive e-vapor product internally were dismal, Complaint Counsel pinned its hopes at trial on attempting to show that Altria would have been able to commercialize PMI’s newly developed VEEV product but for the transaction. CC Pretrial Br. 14, 28-29. This contention cannot support Complaint Counsel in showing anticompetitive effects as PMI, one of the world’s largest tobacco companies with significant resources, has made clear both to the Court and to its investors that it plans to come to the U.S. market with or without Altria.⁷¹² In other words, Complaint Counsel cannot show a loss of competition from the VEEV product as a result of the transaction. And in any event, Complaint Counsel’s theory that Altria would have been able to commercialize VEEV is highly speculative for two reasons:

First, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷¹² FF ¶ 1632.

⁷¹³ [REDACTED]

⁷¹⁴ [REDACTED]

⁷¹⁵ [REDACTED]

[REDACTED] Complaint Counsel cannot show that entry “would have occurred within the near future” but for the acquisition. *B.A.T. Indus.*, 1984 WL 565384, at *9.

Second, even assuming that PMI eventually (1) [REDACTED], (2) submits a PMTA, and (3) obtains FDA approval for the product, it is still inherently speculative to assume that Altria would have commercialized VEEV in the United States. As the Court astutely observed, PMI and Altria are separate entities, Tr. 24-25, and whether they would have reached a deal to distribute VEEV is also a matter of pure speculation. Contrary to Complaint Counsel’s suggestion (*see* CC Pretrial Br. 28), [REDACTED]

[REDACTED].⁷¹⁶ [REDACTED]

[REDACTED]

[REDACTED]⁷¹⁷—and, as King testified, “[o]f course, it’s possible that we would not reach terms.”⁷¹⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

And, the version of this product that PMI had commercialized at the time of the JLI transaction was, by all accounts (even PMI’s), not competitive.⁷²¹

716 [REDACTED]

717 [REDACTED]

718 FF ¶¶ 1630 (PX7020 King (PMI) Dep. at 200-01).

719 [REDACTED]

720 [REDACTED] VEEV has been rolled out in the United Kingdom, Finland, Italy, and New Zealand. FF ¶ 1626 (King (PMI) Tr. 2354). [REDACTED]

[REDACTED]

[REDACTED] There is no evidence that speaks to VEEV’s conversion potential in a market, like the United States, without a nicotine cap. FF ¶ 1627.

⁷²¹ FF ¶¶ 1517-23, 1615-16.


In any event, as noted above, PMI has made clear it is coming to the United States with or without Altria, meaning that the market will be no worse off if the product is as successful as PMI might hope.⁷²²

4. Complaint Counsel did not show any harm to price competition, innovation competition, or shelf space competition.

Before trial, Complaint Counsel promised it would show that the transaction harmed consumers by eliminating “price, innovation, and shelf-space” competition between Respondents. CC Pretrial Br. 65. It went 0 for 3.

As discussed above, Complaint Counsel adduced no evidence that Altria’s products constrained JLI’s price. *See* Section II.A.2 (Discussion), *supra*. Dr. Rothman conceded during his trial deposition that he did not analyze whether JLI adjusted its pricing in response to the introduction or removal of Elite.⁷²³ And in fact, the record demonstrates that competitive products with nicotine salts like NJOY Ace and Vuse Alto led JLI to *lower* its prices following the transaction.⁷²⁴

As for innovation, a transaction “can substantially lessen competition by diminishing innovation if it would ‘encourage the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the [transaction].’” *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 229-30 (D.D.C. 2017) (quoting HMG §§ 1, 6.4). Again, however, Complaint Counsel adduced no evidence that the transaction has dampened JLI’s innovation efforts. To the contrary,

⁷²⁵
With respect to Altria’s own efforts, the record is replete with evidence that Altria was not a competent innovator in the e-vapor space, and Complaint Counsel has not identified any evidence that Altria’s exit affected a single other e-vapor competitor’s efforts to innovate.

⁷²² FF ¶ 1632.

⁷²³ FF ¶ 1639 (PX7048 Rothman Trial. Dep. at 171-72).

⁷²⁴ FF ¶¶ 1308-14, 1640-46.

⁷²⁵ 

Finally, Complaint Counsel adduced no evidence of harm to shelf-space competition. As discussed above, Altria’s exit actually *created* opportunities for smaller brands to get on the shelf. *See* Section II.A.2 (Discussion), *supra*. To the extent Complaint Counsel is alleging that retailers were harmed by the transaction’s effect on the market for shelf space, it called no witnesses at trial to offer evidence to that effect. [REDACTED]

[REDACTED]⁷²⁶ And when Sheetz stopped carrying Altria’s e-vapor products, it added at least three products in its place—NJOY’s Ace, ITG’s *myblu*, and EAS’ Leap.⁷²⁷

E. The conclusions of Complaint Counsel’s expert rest on indefensible assumptions and are due no weight.

At bottom, Complaint Counsel relies on the opinion of its economics expert—not the factual evidence established through witnesses, documents, and data—to try to prove its case. But Dr. Rothman’s analysis suffers from serious errors, in addition to those already noted above. The Court should reject Dr. Rothman’s baseless conclusions, both with respect to his *ipse dixit* assertion that Altria would have been a “significant competitor” in the but-for world and with respect to his calculations of harm, which rest on mistaken assumptions and uncognizable theories. *SEC v. Toure*, 950 F. Supp. 2d 666, 675 (S.D.N.Y. 2013).

1. Dr. Rothman’s opinion that Altria would have been a significant competitor is unreliable.

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.

As an initial matter, Dr. Rothman’s determination that Altria would have been a “significant competitor” if not for the transaction depends on his conclusion that “Altria would not have shut Nu

⁷²⁶ [REDACTED]

⁷²⁷ FF ¶ 1365 (Crozier (Sheetz) Tr. 1482, 1490).

Mark down but for the transaction.”⁷²⁸ Because Dr. Rothman is wrong about that factual issue his analysis, which assumes ongoing competition by MarkTen cig-a-like and Elite, collapses.

Setting that to one side, in offering this “opinion” on one of the most critical factual issues in the case, Dr. Rothman flouts the foundational principle that it is “inappropriate for experts to become a vehicle for factual narrative,” *Tourre*, 950 F. Supp. 2d at 675, opining 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). Dr. Rothman’s opinion, which goes to why Altria did what it did, should be disregarded for that reason alone. *See Wolfe v. McNeil-PPC, Inc.*, 881 F. Supp. 2d 650, 661-62 (E.D. Pa. 2012) (“Intent is not a proper subject for expert testimony.”); *In re Baby Food Antitrust Litig.*, 166 F.3d at 134 (declining to give “serious consideration” to expert opinion that rested on the assumption that “defendants had agreed to conspire”).

But even if the Court were to entertain Dr. Rothman’s opinion, Dr. Rothman’s factual conclusion that Altria would not have discontinued Nu Mark but for the deal and would have been a “significant competitor” is premised on a “cherry-pick[ed]” chronology of documents, relying solely on exhibits offered by Complaint Counsel and skipping over critical documents like the August 19 Term Sheet.⁷²⁹ *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 174 F. Supp. 3d 911, 930-32 (D.S.C. 2016) (“cherry-picking” of facts and “fail[ure] to adequately account for contrary evidence” renders expert opinion unreliable). And even with the cherry-picking, Dr. Rothman could not explain *how* Altria would have been a significant competitor in the but-for world.

During both his discovery deposition and trial deposition, Dr. Rothman conceded that he cannot identify: (1) which particular products Altria would have had on the market at any point in time in the but-for world; (2) which products would have received FDA approval; (3) what Altria could have done differently to be successful had it stayed on the market; (4) what MarkTen or

⁷²⁸ FF ¶ 1486 (PX5000 Rothman Report ¶ 121).

⁷²⁹ FF ¶¶ 1487-88.

Elite’s market share would have been had it stayed on the market; and (5) what any competitor would have done differently had Altria stayed on the market.⁷³⁰ Nor did Dr. Rothman have any explanation for how Altria could have been a “significant competitor” in the but-for world given that 90 percent of its market share in 2018 was in the declining cig-a-like category and that it had no pod product with nicotine salts.⁷³¹

Ultimately, then, what Dr. Rothman seeks to elevate to “economic analysis” is not “traceable to a reliable [economic] methodology,” nor does it “convey opinions based on [his] knowledge [or] expertise.” *Tourre*, 950 F. Supp. 2d at 675. As Dr. Rothman testified: “I’m not sure how I would explain to a judge or to another economist [what I did].”⁷³²

2. Dr. Rothman’s harm estimates rest on indefensible and illogical assumptions.

Separate and aside from his empty and unreliable “significant competitor” finding, Dr. Rothman’s calculations of consumer harm depend on indefensible and illogical assumptions, leaving the Court with no reliable basis on which to find any. Dr. Rothman’s quantitative model, the antitrust logit model (“ALM”), predicts a yearly loss of consumer surplus ranging from \$33.6 million to \$66.5 million.⁷³³ That model, which the economic literature recognizes is poorly suited to measure harm deriving from the removal of products from the marketplace,⁷³⁴ turns on at least five unsupported factual and economic assumptions that result in overstatement of the conjectured harm:

First, and as a threshold matter, approximately 80 percent of Dr. Rothman’s total calculated consumer harm derives not from any supra-competitive price that was supposedly charged in the wake of the transaction, but rather from an unsupported assumption that consumers were unhappy with the discontinuation of MarkTen and Elite.⁷³⁵ Specifically, Dr. Rothman’s model manufactures

⁷³⁰ FF ¶¶ 1491-96.

⁷³¹ FF ¶ 1497.

⁷³² FF ¶ 1487 (PX7046 Rothman Dep. at 167).

⁷³³ FF ¶ 1665 (PX5000 Rothman Report ¶ 144 & Tbl. 9).

⁷³⁴ FF ¶ 1672.

⁷³⁵ FF ¶ 1676.

harm by assuming that the value a customer receives from consuming a product is uniquely driven by the identity of the product, rather than by its features and characteristics.⁷³⁶ 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.⁷³⁷ Thus, as Dr. Rothman acknowledged, under his model, consumers would be harmed *even if they switched to a cheaper and more effective product*.⁷³⁸ *Cf. Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986) (the “purpose of the antitrust laws” is “the promotion of consumer welfare”). And Dr. Rothman points to no evidence that MarkTen or Elite were unique or offered features that no other e-vapor products could replace. *See Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd.*, 833 F.3d 680, 690 (6th Cir. 2016) (“[A] loss of consumer choice is often anything but anti-competitive.”).

Second, like his flawed HHI calculation, Dr. Rothman’s model rests on an assumption of proportional diversion, disregarding what actually happened post-transaction. *See* Section II.C.2.ii (Discussion), *supra*. As a result, Dr. Rothman’s model grossly overstates the extent to which JLI benefited from Altria’s removal of the MarkTen products and grossly overstates the associated harm.⁷³⁹

Third, Dr. Rothman unreasonably premises his estimate of harm on the assumption that “Altria would have maintained its 10 percent [market] share” or “grown its share to 20 percent by 2020.”⁷⁴⁰ As Dr. Rothman has testified, these critical assumptions are not based on any “specific opinion” about what Altria’s share would be at any particular time or about what products Altria would have brought to market—and each are illogical.⁷⁴¹ Although Dr. Rothman characterizes 10

⁷³⁶ FF ¶ 1672.

⁷³⁷ FF ¶ 1674.

⁷³⁸ FF ¶ 1676 (PX7048 Rothman Trial Dep. at 135-36).

⁷³⁹ FF ¶¶ 1680-83.

⁷⁴⁰ FF ¶ 1684 (PX5000 Rothman Report ¶ 143).

⁷⁴¹ FF ¶ 1689 (PX7046 Rothman Dep. at 243).

percent as Altria's existing market share at the time of the transaction, it was actually an average of Altria's share for the 12-month period from October 2017 to September 2018, just as in his HHI calculation.⁷⁴² Relying on that figure to estimate harm is error for the same reason it is error to rely on it for purposes of calculating HHI: Altria's share was rapidly declining over that 12-month period and beyond. *See* Section II.C.2.i (Discussion), *supra*.

The 20 percent figure is even more fantastical. It was drawn from a single slide created in February 2018, *made before Elite was even launched*, and premised on the *hope* that Elite would be a runaway success.⁷⁴³ Dr. Rothman ignores that Nu Mark and Elite went on to perform poorly in 2018, thus basing his entire calculation on estimates that lack any "indicia of . . . reliability." *ZF Meritor LLC v. Eaton Corp.*, 646 F. Supp. 2d 663, 667-68 (D. Del. 2009) (disregarding expert opinion that ignored "actual financial data" and which relied on internal estimates without examining "the[ir] validity"). And it is particularly illogical to rely on this single projection given the extensive evidence that every single one of Nu Mark's forward-looking projections turned out to be wrong.⁷⁴⁴

Fourth, Dr. Rothman assumes a closed-system market including both cig-a-like and pod-based products. As discussed above, cig-a-like and pod-based products are substantially differentiated, and Dr. Rothman misapplied the hypothetical monopolist test. *See* Section II.B (Discussion), *supra*. 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.⁷⁴⁵

Fifth, Dr. Rothman inflates the alleged harm by manipulating the model's profit margin input in a manner completely inconsistent with reality or any reasonable forecast of reality. Dr. Rothman asserts that "Altria's margin in 2018 likely understates its competitive significance," and therefore "calibrate[s]" his model using a "hypothetical" (*i.e.*, made up) 27 percent profit

⁷⁴² FF ¶¶ 1434-43, 1685.

⁷⁴³ FF ¶ 1689.

⁷⁴⁴ FF ¶¶ 1077-80, 1693.

⁷⁴⁵ FF ¶¶ 1695-98.

margin for Altria.⁷⁴⁶ As Dr. Rothman concedes in a footnote, Elite’s actual margin was *negative* 47 percent,⁷⁴⁷ and Dr. Rothman cannot explain how or when Altria would improve this margin in the deep-discounting environment that prevailed after the transaction.⁷⁴⁸ Nor can he explain how Altria would have more than doubled the 13 percent margin on its cig-a-like products, particularly with such products rapidly declining in popularity.⁷⁴⁹ Re-running Dr. Rothman’s model using only pod-based product sales and calibrating using Altria’s actual overall margin of 2 percent reduces the predicted harm to only \$0.17 million per year, a 99.5 percent reduction.⁷⁵⁰

3. Dr. Rothman’s harm estimates are offset by expansion and the critical PMTA assistance Altria provided to JLI as a result of the transaction.

Dr. Rothman’s doctored harm estimates are also readily offset—and independently so—by competitor expansion and the value of Altria’s services to JLI.

First, Dr. Rothman sidesteps the effect of the expansion that occurred post-transaction by focusing solely on whether expansion is likely going forward.⁷⁵¹ In reality, NJOY and Reynolds have already expanded more than *twice* the amount necessary to offset Dr. Rothman’s predicted harm.⁷⁵² *Cf. Rothery Storage*, 792 F.2d at 229 (where defendant had a roughly six percent market share, it was not “conceivable” that alleged restraint had caused “an adverse effect upon output”). And while Complaint Counsel will assert (without evidence) that this expansion was not a consequence of the transaction, this Court has recognized, without qualification, that “[t]he ability and willingness of current competitors to expand their foothold in the market . . . greatly reduces the anticompetitive effects of a merger.” *Otto Bock*, 2019 WL 2118886, at *28 (internal quotation marks omitted).

⁷⁴⁶ FF ¶ 1699 (PX5001 Rothman Rebuttal ¶ 91; RX1217 Murphy Report ¶ 182).

⁷⁴⁷ FF ¶ 1701 (PX5000 Rothman Report ¶ 116 n.294).

⁷⁴⁸ FF ¶ 1702 (PX7048 Rothman Trial Dep. at 166).

⁷⁴⁹ FF ¶ 1704 (PX5000 Rothman Report ¶ 116 n.294).

⁷⁵⁰ FF ¶ 1706.

⁷⁵¹ FF ¶ 1710.

⁷⁵² FF ¶ 1711.

Second, Dr. Rothman entirely ignores the offsetting consumer benefit that derives from Altria’s regulatory assistance to JLI. As discussed further below, Altria provided invaluable and transaction-specific regulatory services to JLI in support of its PMTA. *See* Section III.B (Discussion), *infra*. Even a one percent increase in the probability that JLI will obtain regulatory approval would be sufficient to offset approximately 25 percent of the hypothetical harm deriving from higher predicted prices predicted by Dr. Rothman.⁷⁵³

* * *

Dr. Rothman’s many oversights underscore Complaint Counsel’s failure at trial to prove anticompetitive effects. Confronted with evidence of an intensely and increasingly competitive post-transaction market, Complaint Counsel’s expert ignored it for purposes of his analysis, improperly opined on the credibility of Altria’s decision to shut down Nu Mark (invading the role of this Court), and relied on illogical, outcome-oriented assumptions in a futile effort to predict harm that did not occur. Dr. Rothman’s “opinion” notwithstanding, the trial record yields no evidence of anticompetitive effect. And both of Complaint Counsel’s claims warrant dismissal for this independent reason.

III. Complaint Counsel Cannot Meet Its Burden to Prove that the Actual Noncompete Is Anticompetitive

As discussed above, Complaint Counsel’s case at trial was premised on an imagined agreement between the parties, one that it failed to prove. *See* Section I (Discussion), *supra*. But there is an *actual* noncompete in this case—Altria agreed not to develop new e-vapor products while it was providing services to JLI.⁷⁵⁴ That agreement is what reflects the parties’ “meeting of the minds.” *Twombly*, 550 U.S. at 557. And to the extent Complaint Counsel is even challenging the actual noncompete, it failed to meet its burden to prove that it is anticompetitive under the antitrust laws.

⁷⁵³ FF ¶ 1725.

⁷⁵⁴ FF ¶ 1128 (PX1276 (JLI) at 025-26).

A. The actual noncompete is ancillary to a legitimate business integration.

“[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.” *Lektro-Vend.*, 660 F.2d at 265. The first prong of that standard is easily met here. Altria’s agreement not to compete through the development of new e-vapor products—subject to a carve-out for existing products—is “ancillary” to a complex, interwoven, and “legitimate” integration. *See Perceptron, Inc. v. Sensor Adaptive Machs., Inc.*, 221 F.3d 913, 919 (6th Cir. 2000) (internal quotation marks omitted).

In its pretrial brief, Complaint Counsel suggested that the actual noncompete is not ancillary “because . . . the Transaction itself is an unlawful agreement under Section 1 of the Sherman Act, and an . . . illegal acquisition under Section 7 of the Clayton Act.” CC Pretrial Br. 59. That argument is circular and simply assumes the conclusion that Complaint Counsel has proven a Section 1 or Section 7 violation—in which case analyzing whether the actual noncompete is ancillary would be academic. In effect, Complaint Counsel has conceded that if it fails to prove its imagined-agreement and Section 7 claims—as it has—the actual noncompete is ancillary for purposes of the Section 1 analysis.

B. The actual noncompete is reasonable and facilitated Altria’s provision of unique and critical regulatory services to JLI in support of JLI’s PMTA.

Because it is ancillary to a legitimate business integration, the noncompete agreed upon by the parties must be “examined under the rule of reason,” and upheld “[s]o long as the[] covenant[] [is] reasonable in scope.” *Eichorn v. AT&T Corp.*, 248 F.3d 131, 144-45 (3d Cir. 2001); *see also Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1560-61 (11th Cir. 1983) (“[T]here 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.”). Complaint Counsel makes no argument to the contrary. And “[t]he recognized benefits of reasonably enforced noncompetition covenants are by now beyond question.” *Lektro-Vend Corp.*, 660 F.2d at 265.

Here, for all the reasons explained in Section II (Discussion), *supra*, Complaint Counsel failed at trial to meet its burden of proving “a substantial anticompetitive effect that harms consumers in the relevant market” under Step 1 of the rule of reason analysis. *Am. Express*, 138 S. Ct. at 2284. In particular, the actual noncompete restricts Altria’s ability to develop new products—and given the complexities involved, the regulatory overlay, and the fact that any new product would be many years out, Altria’s ability to do so is completely speculative. *See* Section II.D.3 (Discussion), *supra*.

Even if Complaint Counsel could carry its burden at Step 1, any potential anticompetitive effect is readily offset by the “procompetitive rationale for the restraint.” *Id.* As Pritzker told the Court, for JLI, “getting PMTA approval is literally existential”—if it fails, the company’s domestic business will be extinguished.⁷⁵⁵ The noncompete was an essential precondition of the parties’ services agreement, which allowed—and continues to allow—Altria to provide critical support for that existential effort. To act in the critical capacity that it has, Murillo testified, Altria needed access to JLI’s “most sensitive product composition information.”⁷⁵⁶ As Murillo further explained, Altria also needed access to “forward-looking product strategy” and “marketing strategy,” “which was super important for purposes of [drafting the PMTA’s] narrative and also to conceptualize the population health impact.”⁷⁵⁷ In short, “it was *absolutely necessary*,” in Murillo’s view, that Altria have this information in order for Altria to provide the regulatory services it did to JLI.⁷⁵⁸ And, as both Pritzker and Valani explained, it was absolutely necessary from JLI’s perspective that Altria be subject to a noncompete concerning future products before obtaining this information, lest Altria be in a position to use JLI’s trade secrets to compete with JLI.⁷⁵⁹ The noncompete was thus

⁷⁵⁵ FF ¶ 1188 (Pritzker (JLI) Tr. 820).

⁷⁵⁶ FF ¶ 1246 (Murillo (Altria/JLI) Tr. 3007).

⁷⁵⁷ FF ¶ 1246 (Murillo (Altria/JLI) Tr. 3007).

⁷⁵⁸ FF ¶ 1246 (Murillo (Altria/JLI) Tr. 3007 (emphasis added)).

⁷⁵⁹ FF ¶¶ 1178-84. Moreover, the parties’ agreement contemplates that Altria will eventually obtain seats on the JLI Board once the transaction obtains regulatory clearance. FF ¶ 1127. JLI could not grant Altria access to competitively sensitive Board-level information without a guarantee that such information would not be used competitively against JLI. FF ¶¶ 1181-84.

“reasonably necessary” to accomplish the purpose it was intended to serve. *See United States v. Brown Univ.*, 5 F.3d 658, 679 (3d Cir. 1993). And it went no further than necessary, allowing Altria to compete with products that would not likely benefit from JLI’s confidential information, like the IQOS heat-not-burn and oral On! products that Altria sells today.⁷⁶⁰

These procompetitive benefits are not merely hypothetical: As Murillo told the Court, JLI would “[a]bsolutely not” “have made its PMTA filing without Altria’s assistance.”⁷⁶¹ As Complaint Counsel concedes, for “inexperienced competitors” like JLI, the PMTA process would “constitute a significant hurdle.” CC Pretrial Br. 67. But “[a]s one of the few U.S. tobacco companies with a track record of successful PMTAs, Altria was better positioned to comply with FDA regulation than its competitors.” *Id.* at 53. Although Altria was ill-equipped for electronic product innovation, “Altria’s [regulatory] team was the best in the country,”⁷⁶² with “dozens of experts” and deep experience with the PMTA process specifically.⁷⁶³

Ultimately, as Murillo and Dr. Gardner explained, Altria leveraged this expertise to assist JLI with virtually all aspects of its application, including analysis of chemical composition of aerosol; in vitro toxicology studies; animal studies; consumer behavior studies; population modeling (using Altria’s model); compilation of literature reviews; stability studies; gas chromatography and mass spectrometry fingerprinting (a process for which Altria had proprietary methods); and perception studies.⁷⁶⁴ In support of this effort, Altria devoted dozens of its scientists, including many on a full-time basis.⁷⁶⁵ And when Covid-19 struck, threatening JLI’s ability to meet the fast-approaching PMTA deadline, numerous Altria scientists “hole[d] up” in JLI’s offices with JLI personnel to form a “PMTA pod.”⁷⁶⁶ All told, Altria’s assistance accelerated JLI’s PMTA

⁷⁶⁰ FF ¶ 1129. IQOS is a reduced-risk product that heats, rather than burns, tobacco, and is being marketed by Altria in the United States, pursuant to a distribution agreement with PMI. FF ¶ 85.

⁷⁶¹ FF ¶ 1250 (Murillo (Altria/JLI) Tr. 3009).

⁷⁶² FF ¶ 1221 (Pritzker (JLI) Tr. 820).

⁷⁶³ FF ¶¶ 1225-30 (Murillo (Altria/JLI) Tr. 2973).

⁷⁶⁴ FF ¶¶ 1236-42, 1261.

⁷⁶⁵ FF ¶ 1260.

⁷⁶⁶ FF ¶ 1261 (Murillo (Altria/JLI) Tr. 3008).

submission by 17 to 28 months,⁷⁶⁷ ensuring that JLI met the PMTA deadline and substantially improving the “quality” of JLI’s PMTA and thus its likelihood of success.⁷⁶⁸

C. Complaint Counsel has not proffered a viable, less restrictive alternative.

Complaint Counsel’s only response is that the parties could have accomplished the same objective through means other than the noncompete. CC Pretrial Br. 56-57. To carry its burden, 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) (internal quotations marks and emphasis omitted). And, 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.

For these reasons, Complaint Counsel “cannot just point to” a hypothetical alternative without demonstrating “equivalent viability.” *N. Am. Soccer League, LLC v. U.S. Soccer Fed’n, Inc.*, 883 F.3d 32, 45 (2d Cir. 2018). Yet that is precisely what Complaint Counsel seeks to do, suggesting, without any evidence, that an information firewall would have served the parties’ objectives just as well. CC Pretrial Br. 56-57. Not so. As the Antitrust Division of the Department of Justice itself has recognized, “no matter how well crafted, the risk” that a firewall will be breached is “great.” U.S. DOJ, *Merger Remedies Manual* 15 (Sept. 2020). On top of that concern, a firewall would have disincentivized Altria from putting its best people, like Dr. Gardner, on the

⁷⁶⁷ FF ¶ 1263.

⁷⁶⁸ FF ¶¶ 1247-64 (Murillo (Altria/JLI) Tr. 3009). Complaint Counsel’s argument that Respondents’ “claimed efficiencies are insufficient to rebut the presumption of harm,” are not “merger-specific,” within the meaning of the Horizontal Merger Guidelines, and have not been adequately quantified are all specific to its Section 7 claim. CC Pretrial Br. 69-72. Complaint Counsel does not lodge these arguments in connection with its Section 1 claim, nor could it. *See id.* at 55. Under Section 1, Respondents need only “show a procompetitive rationale for the restraint” in order to shift the burden “back to the plaintiff.” *Alston*, 141 S. Ct. at 2160. In any case, the record adduced at trial and discussed above makes clear that the procompetitive benefits deriving from the services *were* merger-specific and well substantiated—yet another reason why Complaint Counsel’s Section 7 claim fails.

job, undermining the value of the services. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 1914c (a finding of a less restrictive alternative should be based on alternatives “that are either quite obvious or of proven success”).

Complaint Counsel’s claim that JLI could have done without Altria’s assistance fares no better. As Murillo explained, JLI could not simply have hired away Altria’s “chemistry and toxicology groups”—nor would that have been sufficient, as Altria provided “unique” “equipment[,] methodologies[,] and systems.”⁷⁶⁹ Nor could a patchwork of third-party contractors serve as a viable substitute for Altria’s deep regulatory expertise and experience.⁷⁷⁰

At bottom, the noncompete is narrowly tailored to accomplish its legitimate, procompetitive objective. It circumscribes Altria’s ability to compete during the pendency of Altria’s provision of services pursuant to the services agreement, which is subject to a six-year term, and for no longer. Once the services agreement expires, the noncompete does as well.⁷⁷¹ In other words, the parties did not agree to a noncompete that unnecessarily runs beyond the period in which the servicer has access to proprietary information (which, in any event, has been upheld, *Lektro-Vend Corp.*, 660 F.2d at 266-67). The noncompete is thus ancillary to a legitimate business integration, reasonable in scope, and does not violate the antitrust laws. It should be upheld.

IV. JLI Cannot Be Found to Have Violated Section 7 of the Clayton Act

The claim against JLI under Section 7 of the Clayton Act (“Count II—Illegal Acquisition”) is without merit because Section 7 only applies to acquirers. That section 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. Courts have consistently held that this section 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) (“By its express terms § 7 proscribes only the act of acquiring, not selling, when the forbidden effects may occur.”); *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 852 (N.D. Cal. 2004) (“[B]y its express

⁷⁶⁹ FF ¶ 1277 (Murillo (Altria/JLI) Tr. 3073).

⁷⁷⁰ FF ¶¶ 1278-83 (Murillo (Altria/JLI) Tr. 3009).

⁷⁷¹ FF ¶ 1129.

terms, [S]ection 7 of the Clayton Act is directed only against the acquiring corporation.”) (quoting *Tim W. Koerner & Assocs., Inc. v. Aspen Labs, Inc.*, 492 F. Supp. 294, 300 (S.D. Tex. 1980), *aff’d*, 683 F.2d 416 (5th Cir. 1982)); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 488 (5th Cir. 1967) (affirming dismissal of Section 7 claim as to seller and explaining that “§ 7 by its terms proscribes only the acquiring corporation”).

The complaint in this case alleges, as it must, that JLI is the seller in the transaction at issue. *See* Compl. ¶ 81 (“The Transaction, in which Altria received a substantial ownership stake in JLI . . . substantially lessened competition in the U.S. market for e-cigarettes.”). Complaint Counsel therefore has no legal basis to allege that JLI violated Section 7, and the Court should find as a matter of law that JLI did not do so.

V. FTC Administrative Proceedings Are Unconstitutional

The FTC’s enforcement regime suffers from multiple constitutional flaws. While Respondents recognize that this Court is unlikely to pass on these arguments, they are included here for the sake of preservation.⁷⁷²

A. FTC Commissioners are unconstitutionally shielded from removal.

FTC Commissioners are heads of an Executive Branch department, but can only be removed “for inefficiency, neglect of duty, or malfeasance in office.” 15 U.S.C. § 41. That restriction on presidential supervision and control violates Article II of the Constitution, which vests all “executive Power” in the President alone and charges him with executing the laws. U.S. Const. Art. II, § 1, cl. 1; *id.* Art. II, § 3. 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). For that reason, the Supreme Court recently held that the structure of the Consumer Financial Protection Bureau (“CFPB”)—headed by a single director removable only for inefficiency, neglect of duty, or malfeasance—was unconstitutional. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191-92 (2020).

⁷⁷² Altria also reserves the right to seek pre-enforcement relief against these proceedings before their conclusion.

Seila Law recognized a narrow “exception[] to the President’s unrestricted removal power” under *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), which upheld for-cause removal restrictions on FTC Commissioners in 1935. *Seila Law*, 140 S. Ct. at 2198. But *Seila Law* explained that *Humphrey’s Executor* is limited to agencies sharing the specific characteristics of the FTC “as it existed in 1935,” *id.*, when the FTC “was said not to exercise any executive power,” *id.* at 2199. The Supreme Court recognized that this “conclusion that the FTC did not exercise executive power has not withstood the test of time.” *Id.* at 2198 n.2; *accord Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988). *Humphrey’s Executor* thus should not control; and if *Humphrey’s Executor* were applicable, it should be overruled.

Further, the Supreme Court recently concluded that “the nature and breadth of an agency’s authority is not dispositive in determining whether Congress may limit the President’s power to remove its head.” *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021). Whenever “an agency does important work,” its leaders must be removable by the President, regardless of the agency’s “size or role.” *See id.*

Under *Collins* and *Seila Law*, the present-day FTC Commissioners must be removable at will for the FTC’s structure to be constitutional. FTC Commissioners exercise vast executive power. FTC Commissioners initiate administrative complaints, enjoy broad powers of investigation, prosecute companies for alleged violations of law, and ultimately determine whether to penalize regulated companies. This same combination of powers underpinned the Supreme Court’s conclusion in *Seila Law* that the CFPB Director wields significant executive power and thus must be removable at will. *See* 140 S. Ct. at 2203-04. Irrespective of these powers, the FTC undoubtedly performs “important work,” and thus the President must have the power to remove its Commissioners. *See Collins*, 141 S. Ct. at 1784. The Commissioners’ for-cause removal restrictions are accordingly unconstitutional.

B. The Court is unconstitutionally shielded from removal.

FTC proceedings before this Court are independently unconstitutional because multiple layers of tenure protection insulate the Court from presidential oversight. By vesting the President alone with “the executive Power,” U.S. Const. Art. II, § 1, cl. 1, the Constitution requires that the

President have a means of directing personnel within the Executive Branch as to the execution of the law. *See Free Enter. Fund*, 561 U.S. at 492-93. And because “removal at will” is the “most direct method of presidential control,” *Seila Law*, 140 S. Ct. at 2204, “the Constitution gives the President ‘the authority to remove those who assist him in carrying out his duties,’” *id.* at 2191 (quoting *Free Enter. Fund*, 561 U.S. at 513-14).

Insulating Executive Branch officers from presidential supervision by imposing multiple layers of restrictions on removal compromises the President’s supervisory authority. The Supreme Court in *Free Enterprise Fund* accordingly invalidated the structure of the Public Company Accounting Oversight Board (“PCAOB”), a multimember body of inferior officers who could be removed for good cause only by SEC Commissioners—who themselves could be removed only for cause. 561 U.S. at 486-87, 495, 498. Inserting two layers of for-cause tenure protection, the Court concluded, defeats presidential supervision, “contrary to Article II’s vesting of the executive power in the President.” *Id.* at 496.

As the United States government has acknowledged, the supervisory chain for ALJs raises the same problems. *See* Br. for the Respondent at 20-21, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130); Br. for Respondent Supporting Petitioners at 45-48, *Lucia*, 138 S. Ct. 2044 (No. 17-130). Like PCAOB members, this Court is presided over by an officer of the United States, occupying a continuing office established by law, and exercising “significant authority pursuant to the laws of the United States.” *Lucia*, 138 S. Ct. at 2051 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

Even looking at the Court’s adjudicatory functions alone, the ALJ performs myriad important executive functions. The Court receives testimony, conducts hearings, rules on evidence, compels admissions, and makes initial decisions that become the FTC’s absent an appeal to the Commissioners or Commissioner intervention. 16 C.F.R. §§ 3.41-44, 3.51. *Lucia* held that SEC ALJs, who exercise materially identical powers, are “Officers of the United States.” *Lucia*, 138 S. Ct. at 2049; *accord* U.S. Dep’t of Justice, Memorandum: Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) at 2 (July 2018) (“[W]e conclude that all ALJs and similarly situated administrative judges should be appointed as inferior officers under the Appointments Clause.”); *accord United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021) (“While the duties of

[Administrative Patent Judges] ‘partake of a Judiciary quality as well as Executive,’ APJs are still exercising executive power and must remain ‘dependent upon the President.’”).

The Court, however, is removable only “for good cause.” 5 U.S.C. § 7521(a). And the two actors involved in removal proceedings—the FTC’s Commissioners and the Merit Systems Protection Board (MSPB)—are themselves removable only for cause. 15 U.S.C. § 41 (FTC Commissioners); 5 U.S.C. § 1202(d) (MSPB). The FTC’s Commissioners initiate any removal proceeding, and the MSPB—the agency that manages the civil service—determines whether “good cause” exists for removal. 5 U.S.C. § 7521(a).

Just as in *Free Enterprise Fund*, the multiple layers of tenure protection for the Court are inconsistent with “the President’s ability to ensure that the laws are faithfully executed—as well as the public’s ability to pass judgment on his efforts.” *Free Enter. Fund*, 561 U.S. at 498. The President’s removal power is the critical supervisory tool in his arsenal. *See id.* at 501. Yet the President cannot meaningfully exercise this power in light of the FTC’s dual-layer structure. Bifurcating responsibility for removal between the FTC—the employing agency—and the MSPB creates an even greater disconnect for presidential oversight. In a recent decision, the Ninth Circuit thus saw “substantial questions about whether the FTC’s dual-layered for-cause protection for ALJs violates the President’s removal powers under Article II.” *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021); *accord Fleming v. U.S. Dep’t of Agric.*, 987 F.3d 1093, 1113-18 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part).

C. The FTC’s enforcement regime violates Due Process and Equal Protection.

The FTC’s enforcement regime also violates the Due Process Clause and Equal Protection Clause for two reasons:

First, the FTC and DOJ share responsibility for enforcing federal antitrust law, but the decision as to which agency will lead the investigation occurs in a black box devoid of public scrutiny, violating due-process and equal-protection guarantees. If DOJ is in the lead, proceedings occur in federal court, where the Federal Rules of Evidence and Civil Procedure apply. By contrast, if the FTC is in the lead, the FTC can opt (as here) to proceed internally within the agency, *see* 15 U.S.C. § 45(b), where the administrative law judge presides over an administrative hearing and, per

FTC regulation, the same stringent evidentiary and procedural rules as obtained in federal court do not apply, *see* 16 C.F.R. §§ 3.21-43. Further, different standards of review apply in federal court depending on where the case originated. *Compare* Fed. R. Civ. Proc. 52(a)(6) (clear error standard applies to a district court’s factual findings), *with* 15 U.S.C. §§ 21(c), 45(c) (FTC’s factual findings accepted if supported by “substantial evidence” or, in certain cases, just “evidence”).

Due process demands some scrutiny of how the government makes such consequential decisions. *Cf. Beckles v. United States*, 137 S. Ct. 886, 892 (2017) (“the 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) (Tax Court cannot exclude special trial judge reports from the record on appeal); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (government has a “duty” to “follow a fair process of decisionmaking when it acts to deprive a person of his possessions”). Further, arbitrary decisions as to which agency will take the lead violate equal-protection guarantees and unfairly prejudice parties subject to the lesser protections of FTC proceedings. *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).

Second, FTC enforcement proceedings also violate due-process guarantees by making the FTC Commission the judge, jury, and executioner of any case. Commissioners decide whether to initiate agency action. 15 U.S.C. § 45(b). Then, after the case goes before this Court for an initial decision, it goes back to the Commission, which adjudicates *de novo* the very case the Commission decided to initiate. 16 C.F.R. §§ 3.51, 3.52, 3.54(a). The Commission owes no deference to the factual findings of the Court that observed the trial and testimony, and it is empowered to “exercise all the powers which it could have exercised if it had made the initial decision.” 16 C.F.R. § 3.54(a); *see also In the Matter of Impax Labs., Inc.*, 2019 WL 1552939, at *14 (F.T.C. March 28, 2019) (“The Commission reviews the ALJ’s findings of fact and conclusions of law *de novo* The *de novo* standard of review applies to both findings of fact and inferences drawn from those facts.”).

“[I]n 100 percent of cases in which the administrative law judge” rules in the FTC’s favor, “the Commission affirm[s] liability; and in 100 percent of the cases in which the administrative law

judge” finds “no liability, the Commission reverse[s].” Joshua D. Wright, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority* at 6 (Feb. 26, 2015). “Even the 1972 Miami Dolphins would envy [this] record,” where the FTC gets “to emerge as the victor every time.” *Axon Enter.*, 986 F.3d at 1187. And 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 in favor of Commission that reversed ALJ decision in favor of respondent).

Forcing parties to go through a convoluted process that allows the Commission to attain its preferred outcome regardless of the preceding steps deprives parties of a “fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

VI. Complaint Counsel Is Not Entitled to the Remedy It Seeks

Because Complaint Counsel has not proven an antitrust violation, it is not entitled to a remedy. But even were the Court to find a violation, Complaint Counsel’s request that the Court terminate the noncompete and compel Altria to divest its shares should be denied for at least four reasons:

First, the lynchpin of an antitrust remedy must be the “restor[ation] [of] competition,” not the “punish[ment] [of] antitrust violators.” *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). The idea is to “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.*, No. 9315, 2007 WL 2286195, at *77 (F.T.C. Aug. 6, 2007). Here, that is not possible in light of the regulatory regime. Because the PMTA deadline has passed, Altria has *no* e-vapor product that it could market in the absence of a PMTA.⁷⁷³ The FTC could have sought a

⁷⁷³ FF ¶¶ 60-66, 119.

divestiture of Altria’s e-vapor assets long ago that would have avoided this scenario.⁷⁷⁴ But it did not, 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.

Moreover, “[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)); *see also* Sherman Act Section 2 Joint Hr’g: Remedies Hr’g Tr. 60 (Mar. 29, 2007) (Remarks of William H. Page) (“[R]emedies should be proportional to the strength of the proof that [defendant’s] illegal actions actually reduced competition [W]here you have that relatively weak evidence of likely anticompetitive effect, then you need more evidence to support more [d]raconian remedies.”). Here, as discussed above, *see* Section II.A (Discussion), *supra*, competition flourished in the wake of the transaction, and Complaint Counsel has made no showing that nullifying the parties’ deal would enhance it.

Second, termination of the noncompete and divestiture of Altria’s stake—at this delicate moment in JLI’s existence—would harm “the interest of the general public.” *United States v. Am. Tobacco Co.*, 221 U.S. 106, 185 (1911). It is the investment paired with the noncompete, to protect JLI’s sensitive information, that enables Altria to provide ongoing critical regulatory support to JLI. JLI, with the benefit of Altria’s guidance, is actively responding to questions raised by FDA in response to JLI’s PMTA, and Altria is supporting JLI [REDACTED] and a Modified Risk Tobacco Product application.⁷⁷⁵ These benefits to consumers are cognizable even if the Court deems them insufficient to offset any claimed anticompetitive effects and even if the Court deems them not “merger-specific” within the meaning of the Horizontal Merger Guidelines. *See* DOJ, Merger Remedies Manual 16 (Sept. 2020).

⁷⁷⁴ Altria’s e-vapor assets could still, of course, be divested to a third party to address any regulatory concerns. As Garnick explained at trial, Altria still owns the intellectual property for MarkTen Elite and MarkTen. FF ¶ 1130.

⁷⁷⁵ FF ¶¶ 1265-66; [REDACTED].

The Commission’s decision in *Evanston* is instructive. There, respondent’s acquisition of Highland Park Hospital was found to have violated Section 7, and Complaint Counsel urged that respondent be required to divest Highland Park as the remedy. Chief Administrative Law Judge McGuire ordered divestiture, but the Commission reversed in that respect. Respondent had “integrated . . . operations” and “made improvements at Highland Park since the merger.” *In the Matter of Evanston*, 2007 WL 2286195, at *78. “[W]hile the improvements [did] not vindicate the merger under the antitrust laws, they [were] relevant to determining whether divestiture is appropriate because divestiture may reduce or eliminate the resulting benefits for a material period of time.” *Id.* For these reasons, the FTC rejected divestiture in favor of an “injunctive remedy.” *Id.* at *79.

In the event the Court finds a violation, the same logic obtains here. Unwinding the deal in its entirety would place JLI in the precarious position of potentially being unable to marshal the evidence necessary to achieve a successful outcome on its PMTA, to the detriment of the very consumers Complaint Counsel claims it is seeking to protect—all while Altria, undisputedly, cannot enter the market with its own products. A remedy that allows Altria to maintain its passive investment and continue providing regulatory services to JLI would avoid this senseless result and “fit the exigencies of [this] particular case.” *Ford Motor Co. v. United States*, 405 U.S. 562, 575 (1972) (internal quotation marks omitted).⁷⁷⁶

Third, “the current situation is always relevant to the question of equitable relief,” *Areeda & Hovenkamp*, *Antitrust Law* ¶ 1205a, and under the unique circumstances of this case, divestiture would be fundamentally inequitable to Altria in a manner that is tantamount to punishment. “Economic hardship” to Altria is appropriately considered when choosing among “effective remedies,” and the Supreme Court has long held that a remedy must take “proper regard for the vast interests of private property which may have become vested in [for example, stockholders] as a result of the acquisition . . . without any guilty knowledge or intent.” *du Pont*, 366 U.S. at 327-28. For the reasons discussed above, requiring Altria to divest would do absolutely nothing to promote

⁷⁷⁶ Altria would not be in a position to provide regulatory services to JLI in the event it were forced to divest its stake. FF ¶¶ 1178-1188, 1271-74.

competition in the short- and medium-term—or potentially ever. At the same time, requiring divestiture before JLI works through its regulatory and litigation challenges would ensure that Altria and its stockholders would not be able to see *any* return on its investment, which it has already written down by over \$11 billion (almost 90 percent).⁷⁷⁷ In the absence of any near- or medium-term benefit to competition, ordering Altria to divest its stake in a fire-sale type setting would thus serve only to “punish” Altria and its stockholders. *du Pont*, 366 U.S. at 326.

Fourth, unwinding the transaction in its entirety is unwarranted here because a passive stake in JLI—which is what Altria currently possesses in light of its decision not to vote its shares pending the outcome of this action—would fall within the “solely for investment” exemption to the Clayton Act.⁷⁷⁸ 15 U.S.C. § 18. 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) (“solely for investment” exemption applied to defendant’s acquisition of 22.6 percent of target’s stock).⁷⁷⁹

For that reason, 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.

⁷⁷⁷ FF ¶¶ 1141-50.

⁷⁷⁸ Although Altria has converted its shares in JLI to voting shares, it has agreed not to vote those shares or appoint any designees to JLI’s Board during the pendency of these proceedings, such that its position remains passive. FF ¶¶ 1138-39.

⁷⁷⁹ Respondents submit that the investment, even as originally structured, falls with the “solely for investment” exemption, as “[t]he ultimate definitive factor the courts have looked to” in applying the exemption is “whether the stock was purchased for the purpose of taking over the active management and control of the acquired company.” *Tracinda*, 477 F. Supp. at 1099. Here, the deal was structured to *prevent* Altria from acquiring control over JLI, so the exemption applies. FF ¶¶ 980-84, 1126-27, 1166-68; *see also Tracinda*, 477 F. Supp. at 1101-02 (exemption applied notwithstanding a consulting provision requiring the partially acquired company to consult with and be advised by the defendant’s principal on “certain major and material financial matters”). Respondents recognize, however, that this broader argument concerning Section 7 liability is foreclosed in this forum by FTC precedent and include it here only for preservation purposes. *See In the Matter of Golden Grain Macaroni Co.*, 78 F.T.C. 63, 73 (1971).

The government has recognized as much on numerous occasions, structuring consent decrees to permit passive investments and acknowledging that it must take account of the “investment exemption” in seeking an appropriate remedy. *See, e.g.*, *United States v. The Gillette Co.*, Civil No. 90-0053-TFH (D.D.C.), 55 Fed. Reg. 28312, 28322 (July 10, 1990) (government criticizing third-party comment on proposed consent decree for “ignoring the ‘passive investment’ exception to Section 7”); *Medtronic, Inc.; Analysis to Aid Public Comment*, 63 Fed. Reg. 53919, 53920 (Oct. 7, 1998) (advocating for proposed consent order that would address Section 7 concerns by converting acquiring company’s position in a competitor company to a passive stake). And Areeda recognizes that “[a] court’s choice between divestiture and more limited relief . . . may be influenced by the fact that the stock purchase was primarily, though not solely, for investment.” *Areeda & Hovenkamp, Antitrust Law* ¶ 1204d. Thus, even were the Court to find a violation, it should reject Complaint Counsel’s proposed remedy and instead impose a remedy that aligns with the purposes and text of the Clayton Act, allowing Altria to maintain its passive 35 percent stake in JLI and permitting JLI, and by extension consumers, to continue to reap the benefits of Altria’s regulatory assistance.

CONCLUSION

For the foregoing reasons, the complaint should be dismissed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2021, I caused a true and correct copy of the foregoing to be filed 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
Administrative Law Judge
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I hereby certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: August 23, 2021

s/ Beth Wilkinson

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