PUBLIC

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 REPLY BRIEF OF RESPONDENTS ALTRIA GROUP, INC. AND JUUL LABS, INC.

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I. INTRODUCTION

When Complaint Counsel brought this rule of reason case, it did so on the theory that Altria and JLI had secretly agreed that Altria would shut down its e-vapor business as a precondition to getting a deal done with the surging upstart. According to Complaint Counsel, such conduct was repugnant to the antitrust laws because Altria was a supposed titan of the e-vapor industry with products that were acting as significant competitive constraints on JLI.

Then we had months of discovery with dozens of depositions, followed by a three-week trial with 20 witnesses testifying. And where Complaint Counsel has ended up is fundamentally different from where it started, though no less devoid of record support.

On the supposed secret agreement, Complaint Counsel no longer alleges that JLI insisted that Altria exit the market as a *precondition* to the transaction. Indeed, in the face of overwhelming evidence that there was no such precondition, Complaint Counsel now contends that JLI merely wanted Altria "ultimately" to exit the e-vapor market at some point. CC Opening Br. 31. Specifically, Complaint Counsel asserts that "JLI did not care" if Altria ultimately exited by divesting or contributing Nu Mark's products after the transaction *as part of the HSR process*. CC Opening Br. 37. Complaint Counsel goes so far as to claim that even if "JLI had just assumed Altria would divest its e-cigarette assets" post-transaction because it was ordered to do so by the FTC, that would "not change the antitrust analysis." CC Opening Br. 3.

And Complaint Counsel offers a new theory, mentioned nowhere in its Complaint, to explain why Altria withdrew Nu Mark's e-vapor products prior to the transaction, despite JLI's clear willingness to leave them on the market subject to review as part of the HSR clearance process. According to Complaint Counsel, Altria was "eager" to take seats on JLI's Board and to offer certain services to JLI that under the antitrust laws could not be provided while Altria still had e-vapor products on the market. CC Opening Br. 45-46. Complaint Counsel alleges that, unwilling to wait, "[t]he path that *Altria* cho[]se" was to "ceas[e] to operate its e-cigarette business." CC Opening Br. 37 (emphasis added).

Even if these new contentions were supported by the record—and as explained below, they are not—Complaint Counsel's fundamental problem is that its theory does not amount to an unlawful *agreement*. Complaint Counsel stresses that "[n]ot every detail needs to be worked out" in an agreement. CC Opening Br. 37. But there still must be an agreement. Unilateral actions by Altria cannot form the basis for a Section 1 agreement.

Complaint Counsel does not even attempt to argue that there was any meeting of the minds between Respondents that Altria would shut down Nu Mark pre-transaction, let alone do so to speed up access to certain services or JLI Board seats. Rather, Complaint Counsel acknowledges that "JLI may not have known exactly how and when Altria" would shut down Nu Mark, CC Opening Br. 37, and repeatedly describes Altria's discontinuation of its e-vapor products as at Altria's "elect[ion]," CC Opening Br. 3. This alone is fatal to Complaint Counsel's case. If one party is completely in the dark as to the other party's plans, as Complaint Counsel concedes was the case here, there can be no meeting of the minds and no agreement between the parties.

There is no dispute that Respondents contemplated that, if Altria were to make this investment, take seats on JLI's Board, and provide services that would give Altria access to sensitive proprietary information, Altria would "ultimately" stop competing with e-vapor products that could benefit from that proprietary information, for as long as Altria had access to JLI's trade secrets and operational strategy. But the critical questions at trial were *how* and *when* Altria would stop selling those products. On these questions, the trial testimony was unequivocal and consistent: JLI wanted and expected Altria to keep its e-vapor products on the market post-deal for purposes of facilitating regulatory review and increasing the likelihood of a successful regulatory outcome. Disposing of assets under FTC scrutiny is the antithesis of a secret agreement to violate the antitrust laws: It cannot possibly violate the law for parties to negotiate over whether certain assets would be divested after FTC review. Yet, that is what Complaint Counsel has argued here, even though JLI was shocked when Altria removed

products prior to the transaction and even though the record is clear that JLI did not view Altria's e-vapor products as competitive threats (far from it).

Complaint Counsel does maintain its contention that Altria's reasons for removing these inferior products were pretextual. But trial has exposed this claim as hollow. Complaint Counsel cannot explain away the "Eureka moment" in the summer of 2018, when Altria's scientists discovered that nicotine salts were "required" to have a competitive product that could deliver nicotine satisfaction. So Complaint Counsel ignores it. Nor can Complaint Counsel explain away the conclusion of Altria's scientists—documented in June 2018, before the exchange of any term sheet—that "no one thinks we can get a PMTA on current Mark Ten product." Again, ignored.

Complaint Counsel has no answer to the documentation that the president of Nu Mark, Brian Quigley, told senior management at the beginning of August 2018 that his business "[l]ack[ed] quality pod products" and "[p]roducts that provide immediate nicotine satisfaction." Complaint Counsel skips over Altria's reset of its e-vapor strategy with the creation of the Growth Teams, even though the very fact that Altria pivoted to a long-shot attempt to develop new products years in the future—at a time when negotiations with JLI were dead—reflects Altria's determination that it could not be successful with Nu Mark's existing products. Complaint Counsel brushes past the alarming letter FDA sent Altria demanding the company take forceful action to address youth use of e-vapor products, suggesting that it remove flavored products, and threatening severe regulatory consequences if it failed to come up with a satisfactory plan. And Complaint Counsel ignores the contemporaneous documentation showing (1) that Nu Mark's e-vapor products suffered from technical flaws that resulted in consumers being exposed to higher levels of formaldehyde (a carcinogen) than from other e-vapor products, (2) that Nu Mark had lost hundreds of millions of dollars since its inception, consistently missing its financial projections, and (3) that by December 2018, Nu Mark was anticipating that it would lose an additional $235 million over the next three years.

At bottom, Complaint Counsel's theory of what Altria should and would have done differently but for the JLI deal simply makes no sense. In Complaint Counsel's view, Altria should and would have continued selling flavored e-vapor products even though FDA itself suggested that Altria remove those products from the market to prevent youth usage and even though FDA itself ultimately banned those products a year later. In Complaint Counsel's view, Altria should and would have continued to sell products to consumers that exposed them to higher levels of formaldehyde, a carcinogen, than other e-vapor products on the market (on Complaint Counsel's theory, that's good for competition). And in Complaint Counsel's view, Altria should and would have consciously chosen to continue to lose hundreds of millions of dollars selling products that were unpopular with consumers and failed to convert cigarette smokers to a potentially less harmful alternative.

Complaint Counsel's theory of anticompetitive effects fares no better. This is not a pre-merger lawsuit where the litigants and the Court must make predictions about what the market might look like after the proposed transaction. This case was tried more than two years after Altria discontinued Nu Mark and more than two years after Respondents consummated the transaction, and we have real-world evidence about what actually happened. And by every metric, the e-vapor market is more competitive today than it was when Altria was on the market: As a result of aggressive discounting by NJOY and Reynolds—two competitors that had what Altria did not, a pod product with nicotine salts—prices of e-vapor devices and cartridges have plummeted since Altria's exit. Output has correspondingly increased. And the market is far less concentrated; indeed, Reynolds has surpassed JLI as the market leader in device share.

Complaint Counsel does not dispute this market evidence. Instead, Complaint Counsel simply shuts its eyes to the real world and asks the Court to accept its intuition that the market would somehow have been substantially more competitive if Altria were participating. According to Complaint Counsel, the "fundamental truth" of this case is that "but for" Altria's investment in JLI, "Altria would be independently competing aggressively" today. CC Opening Br. 1. But there is no question that Nu Mark's existing products were market failures. There

was not a shred of evidence at trial that JLI considered Nu Mark's existing products in setting prices. By the end, Nu Mark's dollar share had declined to under five percent of the market; "[h]ardly a strong competitor," as the Court observed.

Nor is there any reason to accept Complaint Counsel's counterfactual speculation that Altria would have surely been able to develop and commercialize a successful new product in a time frame cognizable under the antitrust laws, whether on its own or by partnering with a different third party than JLI. Altria has spent billions and decades trying to develop innovative alternatives to combustible cigarettes. But notwithstanding those efforts, Complaint Counsel cannot point to a single innovative product that Altria developed that was successful. And even if Altria, or some partner other than JLI, had come up with a new e-vapor design, it is undisputed that Altria could not have launched that design without first navigating the PMTA process and obtaining FDA approval—a process that Complaint Counsel concedes is highly uncertain and would take, in a best-case scenario, at least five years.

In the end, what happened here is not the product of some nefarious, under-the-table conspiracy but rather an illustration of the "creative destruction" that occurs in product markets every day. Altria pulled the plug on products that it had come to realize were failures with no prospects of success. Altria then had two choices as to how it could participate in the growing e-vapor market. One option was to pursue its speculative new strategy of starting from scratch and trying to develop new products that could get to market in 5 to 10 years with the Growth Teams. *That* is the actual "but for" world absent a transaction. But it was an option that, given the FDA regulatory regime and Altria's failed history of electronic innovation, was the equivalent of lobbing a Hail Mary pass. Or Altria could invest in the company that had developed a product that had demonstrated substantial appeal with adult smokers and support it with critical regulatory expertise. Altria's decision to invest in JLI under those circumstances is not a violation of the antitrust laws or anticompetitive. Rather, it is entirely consistent with transactions that routinely pass muster under the rule of reason.

For its part, JLI acted in a manner entirely appropriate for any business negotiating a significant transaction—it strove to protect its legitimate interests consistent with the law. JLI exchanged term sheets prepared by counsel and negotiated with Altria to ensure appropriate disposition of Altria's e-vapor products in connection with FTC review of the transaction. JLI also negotiated a limited noncompete provision to protect confidential information that would be shared with Altria. These are legitimate, normal, and reasonable actions in connection with a strategic investment of the sort at issue here. JLI had no knowledge or control over Altria's actions at any time, and JLI was surprised when Altria announced that it was discontinuing products in response to FDA's letter (and registered no reaction at all when Altria later discontinued its remaining failing products). Complaint Counsel suggests that all of this legitimate conduct—which happens every day in transaction negotiations—amounts to an antitrust violation, an unprecedented and far-reaching theory that threatens to chill legitimate negotiations between parties acting in good faith.

Complaint Counsel had the burden to prove that what happened here violated the antitrust laws. As set forth below in Respondents' reply to Complaint Counsel's opening post-trial brief, Complaint Counsel failed to prove every element of its case.

II. Complaint Counsel Has Not Met Its Burden on Market Definition.

Complaint Counsel bears the burden of defining a relevant product market with respect to both its Section 1 claim and Section 7 claim.[1] *See 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). Complaint Counsel has staked its case on proving a

[1] "RFF," as used in this brief, refers to Respondents' Post-Trial Proposed Findings of Fact, which was abbreviated as "FF" in Respondents' opening post-trial brief. "RRFF" refers to Respondents' Reply to Complaint Counsel's Post-Trial Proposed Findings of Fact, being filed concurrently with this brief. "CCFF" refers to Complaint Counsel's Post-Trial Proposed Findings of Fact. "RRCoL" refers to Respondents' Reply to Complaint Counsel's Post-Trial Proposed Conclusions of Law, being filed concurrently with this brief.

market of all closed-system e-vapor products (*i.e.*, pods and cig-a-likes together). But Complaint Counsel failed to prove that market at trial, unable to overcome the overwhelming evidence that pod products and cig-a-like products do not compete for the same customers or act as competitive constraints on one another. Because Complaint Counsel has not met its burden to define a relevant product market, the Court should dismiss the Complaint in its entirety.[2]

A. Complaint Counsel failed to prove that closed-system e-cigarettes are a relevant product market based on the *Brown Shoe* factors.

The parties agree that *Brown Shoe* requires the examination of "practical indicia" to define a market, which include "peculiar characteristics," "distinct prices," "sensitivity to price changes," "distinct customers," and "industry . . . recognition of the submarket." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962). While Complaint Counsel recognizes the relevance of the *Brown Shoe* factors, CC Opening Br. 17, it discusses only those it believes favor its position and disregards three of the key factors: (i) distinct prices, (ii) sensitivity to price changes, and (iii) distinct customers. And for the factors that Complaint Counsel does discuss, it mischaracterizes or altogether omits portions of the record that are inconvenient to its case.

[2] In a footnote, Complaint Counsel attempts to evade its burden on market definition for purposes of its Section 1 claim on the theory that the market need not be "precisely define[d]" when an agreement not to compete is at issue, citing *Benco*. CC Opening Br. 16 n.5 (citing *In the Matter of Benco Dental Supply Co.*, 2019 WL 5419393, at *70 (F.T.C. Oct. 15, 2019) (initial decision)). But the Court in *Benco* made that observation in connection with finding that respondents in that case had engaged in a "horizontal group boycott of a customer," which was "*per se* unlawful," and it likewise relied on precedents involving either *per se* or "quick look" review. *Id.* at *69-70 (citing *FTC* v. *Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980)). Bypassing market definition could make sense in the *per se* or "quick look" context because, as the Supreme Court observed in *Indiana Federation of Dentists*, "the purpose of the inquir[y] into market definition . . . is to determine whether an arrangement has the potential for genuine adverse effects on competition." 476 U.S. at 460. Where *per se* or "quick look" treatment is warranted, the restraint at issue has an adverse effect on competition virtually by definition, and "therefore, it is not necessary to precisely define the relevant market to conclude that [the] agreement is anticompetitive." *Benco*, 2019 WL 5419393, at *70 (internal quotation marks omitted). That logic does not apply in a case like this one, where the restraint is subject to rule of reason analysis and thus necessarily requires defining the market in which the anticompetitive effects are to be measured. *See also* RRCoL ¶ 19.

Complaint Counsel then attempts to cleave open-tank systems from its market definition by distinguishing them in ways that also distinguish cig-a-likes and pod products. Its gerrymandered approach underscores its failure to meet its burden.

1. Complaint Counsel mischaracterizes the record on market definition.

A complete application of the *Brown Shoe* factors demonstrates that pod-based products and cig-a-likes are not close substitutes, but rather exist in separate markets:

Peculiar Characteristics: Complaint Counsel claims that cig-a-likes and pods "share the same, distinct product features," and that the "only clearly distinguishable product feature between cigalikes and pod-based products is shape." CC Opening Br. 20. In so arguing, Complaint Counsel ignores the well-developed record at trial establishing the critical functional differences that are facilitated by the products' dueling "form factors."

For starters, Complaint Counsel disregards the uncontroverted trial testimony regarding the stigma associated with cig-a-likes and obviated by pods. As the name of the product implies, cig-a-likes resemble traditional cigarettes and, for many adult cigarette smokers, carry the same stigma.[3] Pods, by contrast, do not evoke cigarettes at all, which "really solves a problem" for the adult smoker by offering "an emotional benefit" that comes with not being "viewed as a smoker."[4] Thus, the difference in "shape" between the product categories is not a matter of mere aesthetics. Rather, it goes to the heart of why the products are not "reasonabl[y] interchangeabl[e]" and illustrates why one product category has flourished while the other has floundered. *Brown Shoe*, 370 U.S. at 325.

[3] RFF ¶ 1392; *see also* RFF ¶ 16 (Willard (Altria) Tr. 1347 ("It turned out, people that are quitting cigarettes to pick up vapor don't want a vapor product that looks like a cigarette."); Gardner (Altria) Tr. 2604 ("[A]dult smokers no longer wanted . . . to look like they were smoking a cigarette and the stigma associated with that.")).

[4] RFF ¶ 1393 (Begley (Altria) Tr. 1079).

Complaint Counsel's claim that the products "share the same, distinct product features" is also just wrong. CC Opening Br. 20. Complaint Counsel overlooks that pod products' larger size allows for the incorporation of bigger, "more effective batteries," which in turn makes pods "more effective" at creating vapor and thus "giving consumers an experience they desire."[5] By contrast, cig-a-likes suffer from an "inherent limitation" relative to pods: Their "small battery create[s] less vape; less vape carries less nicotine[,] . . . [and] therefore, the consumer [will] get less satisfaction."[6] The design differences between cig-a-likes and pod products thus render the two products "functionally [dis]similar." *Gen. Foods Corp.* v. *FTC*, 386 F.2d 936, 941-42 (3d Cir. 1967).

As Complaint Counsel recognizes, "[d]efining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other." *Polypore Int'l, Inc.* v. *FTC*, 686 F.3d 1208, 1217 (11th Cir. 2012) (internal quotation marks omitted). Complaint Counsel ignores that with pods and cig-a-likes, it's the very opposite: cig-a-likes are fundamentally *dissimilar* from pods along key dimensions and have shown no ability to "take significant amounts of business away from [pods]."[7] *Id.*

Distinct Customers: Complaint Counsel simply bypasses *Brown Shoe*'s "distinct customers" inquiry. The reason is obvious. The typical cig-a-like user is "generally an older consumer who is not worried about the social friction of cigarettes."[8] As Brian Quigley, Nu Mark's former president, confirmed at trial, cig-a-likes appealed to "a different consumer,"

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[5] RFF ¶ 1394 (PX7030 Wexler (Turning Point Brands) Dep. at 42); *see also* [redacted].

[6] RFF ¶ 1396; *see also* RFF ¶ 225 (PX8003 Wexler (Turning Point Brands) Decl. at 002 ¶ 7 (discussing the limited power of cig-a-likes)).

[7] RFF ¶ 1386 (RX1217 Murphy Report ¶ 113 (explaining that "substitution between cig-a-likes and pod-based vaporizers is limited")).

[8] RFF ¶ 1400; *see also* RFF ¶ 307.

and the products were not "comparable."[9] The breathtaking success of pods in recent years, paired with cig-a-likes' ongoing decline and continued failure to resonate with consumers, proves the point.[10] *See United States* v. *Bazaarvoice, Inc.*, 2014 WL 203966, at *24-26 (N.D. Cal. Jan. 8, 2014) (excluding from market products that did "not provide the same functionality" and were not viewed by customers as "substitutes"). As the Commission has itself argued in a comparable context, "an innovative [product] can create a new product market for antitrust purposes" by "satisfy[ing] a previously-unsatisfied consumer demand." *FTC* v. *Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1048 (D.C. Cir. 2008) (Tatel, J., concurring) (quoting FTC opening brief). "To use the Commission's example, when the automobile was first invented, competing auto manufacturers obviously took customers primarily from companies selling horses and buggies . . . but that hardly shows that cars and horse-drawn carriages should be treated as the same product market." *Id.* So too for pods and cig-a-likes.

Distinct Prices / Sensitivity to Price Changes: Complaint Counsel likewise skips over the *Brown Shoe* factors of "distinct prices" and "sensitivity to price changes" in advocating for its market definition. Again, it's clear why: as Respondents' witnesses and numerous competitors testified, pods and cig-a-likes are not priced relative to one another. JLI *never* "change[d] [JUUL's] pricing as a result of cig-a-like competition,"[11] [redacted][12] As the CEO of

[9] RFF ¶ 1399.

[10] RFF ¶¶ 1324-26.

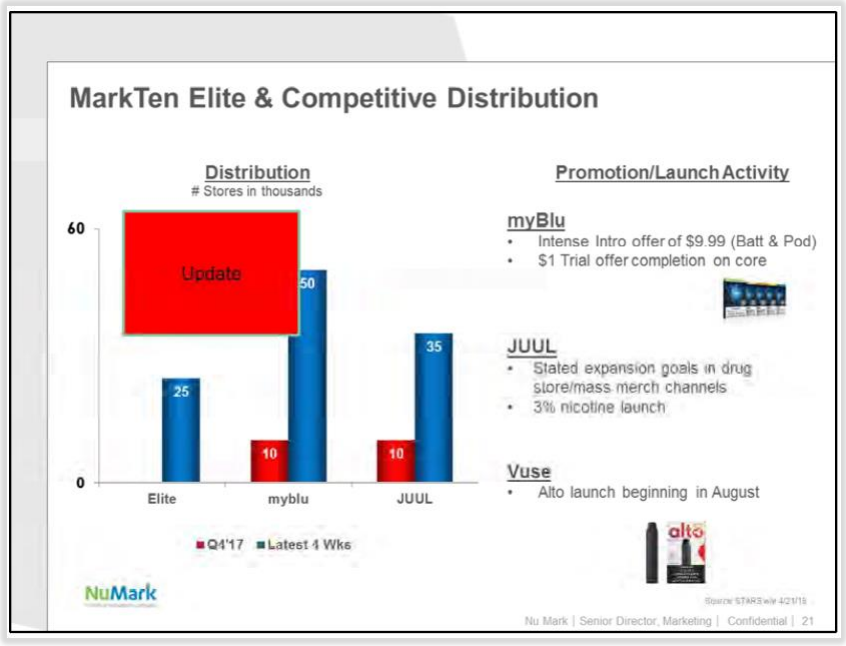
[11] RFF ¶ 1405 (Robbins (JLI) Tr. 3245).

[12] [redacted]

one third-party competitor explained, "[i]t would never occur to [him] to look at the price of Cigalikes" in setting the price of pods.[13]

Industry Recognition: The only *Brown Shoe* factor Complaint Counsel spends any meaningful time discussing is "industry recognition," contending that Respondents' and third parties' ordinary-course documents support its proposed market definition. To arrive at this conclusion, Complaint Counsel plucks excerpts of documents out of context and ignores others that show industry participants track and analyze pods and cig-a-likes separately.[14] For example:

- Complaint Counsel claims that, "in an August 2018 presentation, Altria tracked promotion and launch activities" of "both cigalike and pod-based products."[15] Yet the slide cited by Complaint Counsel discusses only pod products and *does not include cig-a-likes at all*:



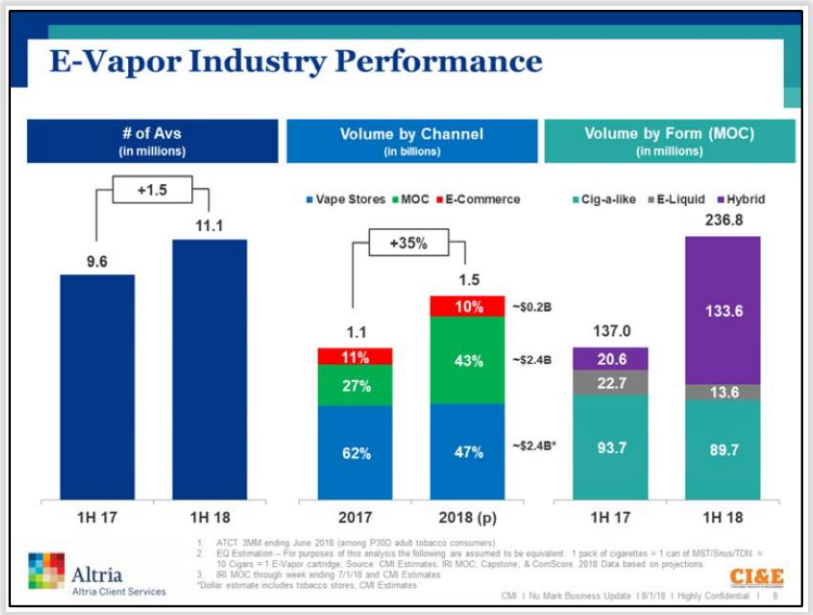
[13] RFF ¶ 1406(d).

[14] Complaint Counsel also repeatedly cites documents that *predate* the rise of pod products in 2017 and, for that reason, cannot be used to justify including pod products in the same market as cig-a-likes. *See* CC Opening Br. 19-20 (citing CCFF ¶¶ 239 (PX4040 (Altria) at 007 (Feb. 2016)), 240 [redacted], 266 (PX3003 (NJOY) (Feb. 2017) at 011-12)).

[15] CC Opening Br. 19 (citing CCFF ¶ 245 (PX1056 (Altria) at 023)).

- Complaint Counsel points to a slide from a draft JLI investor presentation titled "U.S. competition overview" that includes cig-a-like products, but declines to note that the slide *also* includes IQOS (a heat-not-burn product), reflecting the very broad view that JLI took of its competitive set. Indeed, elsewhere in the same presentation, JLI measured its performance and brand awareness against "Cigarettes," "Heat-Not-Burn," and "Other E-Cigs," which Complaint Counsel does not include in its alleged relevant market.[16] As Joseph O'Hara, who oversaw competitive intelligence for JLI, explained at trial, he "tracked everything from cigarettes to nicotine gum to nicotine patches, as well as all kinds of vapor products, including . . . open-pod systems."[17] That JLI, which has *never* had a cig-a-like product, took an expansive view of its competitive set does nothing to support Complaint Counsel's proposed market definition.

- Complaint Counsel ignores that Nu Mark routinely separated out cig-a-likes and pods (referred to as "Hybrids" below) in its internal market analyses because they were "different product forms . . . behaving differently in the market"[18]:

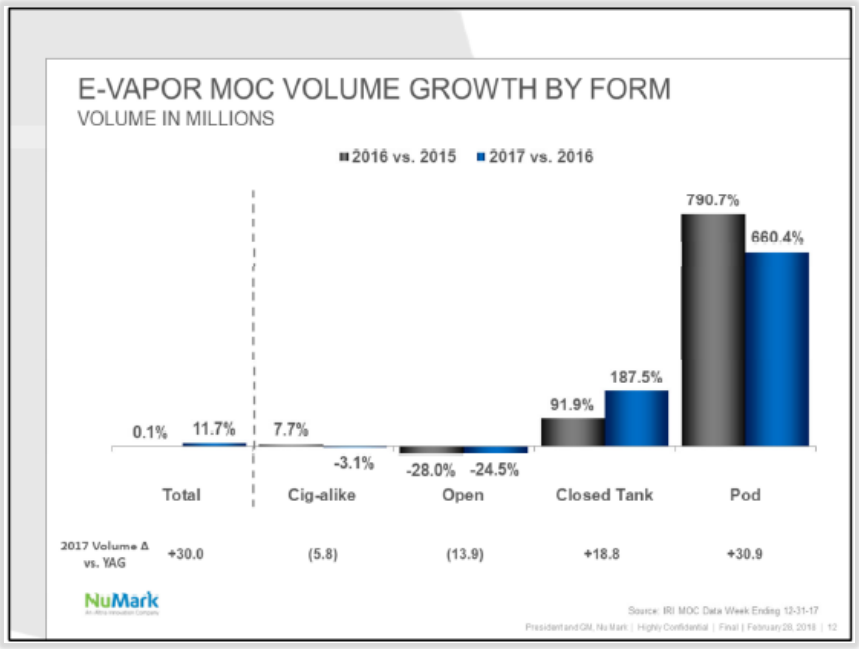


[16] *See* RRFF ¶ 252.

[17] RFF ¶ 1412; *see also* RFF ¶ 754 (PX7039 Robbins (JLI) Dep. at 46 (explaining that "98 or 99 percent of the market was cigarettes. . . . [T]he whole market was cigarettes.")).

[18] RFF ¶ 1408. Complaint Counsel emphasizes the testimony of an Altria employee (whom Complaint Counsel did not call to testify at trial) that "all of the vapor products in closed systems sold in MOC were part of the competitive set for Nu Mark." CC Opening Br. 19. That observation, and other like evidence cited by Complaint Counsel, reflects nothing more than the obvious proposition that a company that has products in multiple product markets will track products and competitors in those various markets.

- Complaint Counsel likewise ignores that Altria senior management routinely broke out pods and cig-a-likes when presenting market data to Altria's Board in order to present an accurate picture of market dynamics:



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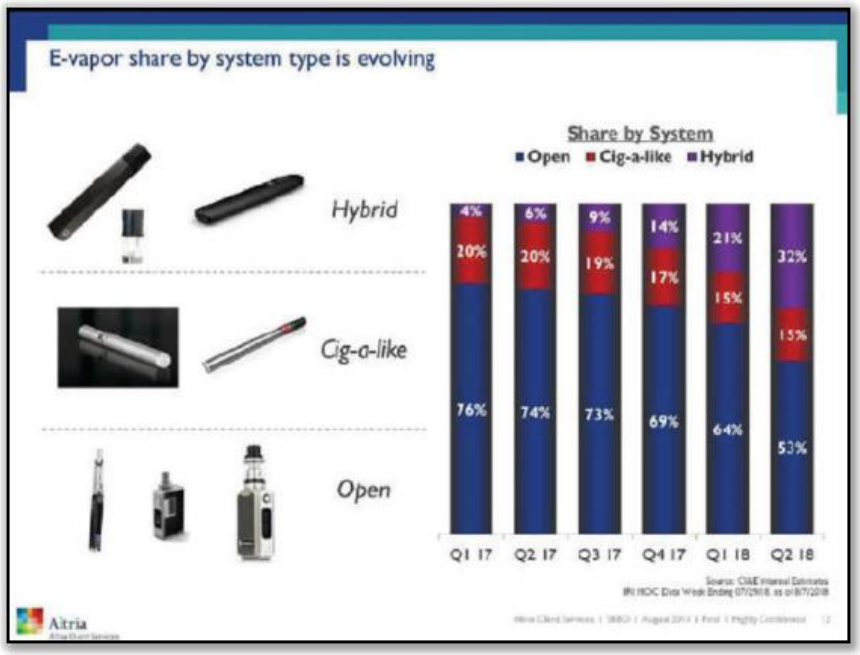

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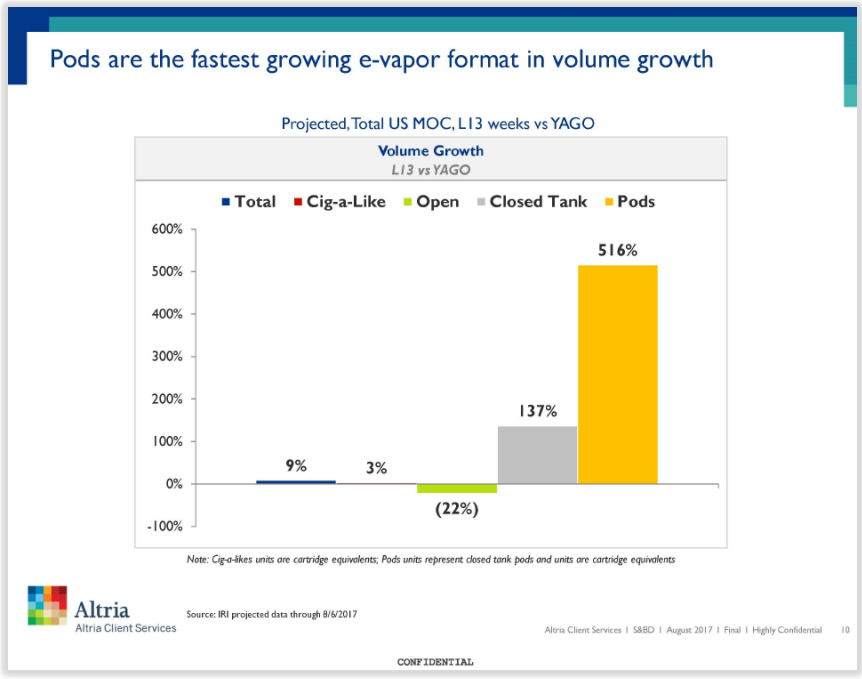
[19] RFF ¶ 1409 (PX4012 (Altria) at 014).

[20] RFF ¶ 1410 (PX1424 (Altria) at 012).



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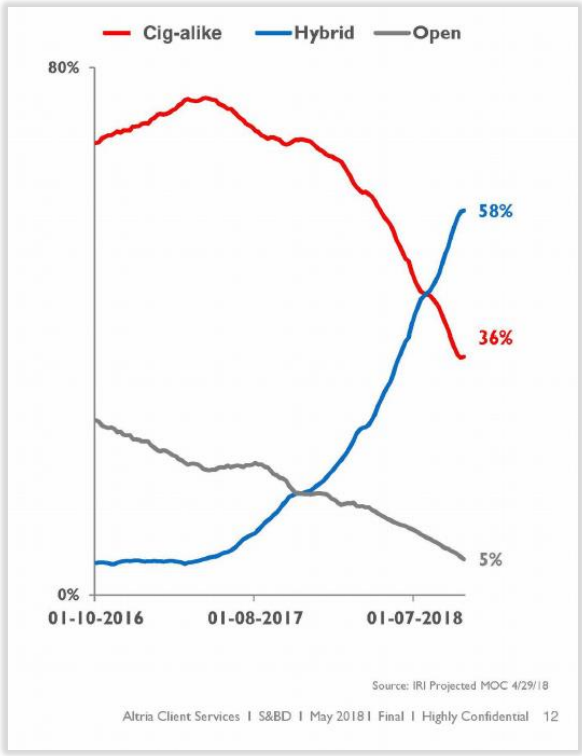


[22]

[21] RRFF ¶ 241 (PX1284 (Altria) at 011).

[22] RFF ¶ 565 (RX0272 (Altria) at 013 (excerpted)).

- Finally, Complaint Counsel fails to account for a wealth of third-party evidence that competitors viewed pod products and cig-a-likes as distinct. For example, [redacted]

2. Complaint Counsel's bases for excluding open-tank e-vapor products from its market definition equally distinguish cig-a-likes and pods from one another.

Complaint Counsel's attempt to exclude open-tank products from its market definition underscores its failure to meet its burden to prove that cig-a-likes and pods comprise a single relevant product market:

First, Complaint Counsel claims that open-tank and closed-system e-cigarettes "have different product characteristics that appeal to different users." CC Opening Br. 25. But as explained above, cig-a-likes likewise have fundamentally different product characteristics as compared to pods and likewise appeal to "different users" than pod consumers. *Id.*[25]

[23] [redacted]

[24] [redacted] Complaint Counsel notes that data analytics companies like Nielsen and IRI "do not distinguish between cigalikes and pod-based products," CC Opening Br. 21, but omits that the cited evidence *also* does not distinguish between open and closed systems, and so would equally support a market consisting of all e-vapor products. RRFF ¶ 275. In any event, such data is of limited use given its lack of specificity, and is only a starting point for manufacturers like JLI who would "split out" pods and cig-a-likes in the data. RRFF ¶ 275. Altria routinely would do the same in the ordinary-course documents it prepared, examples of which are discussed above.

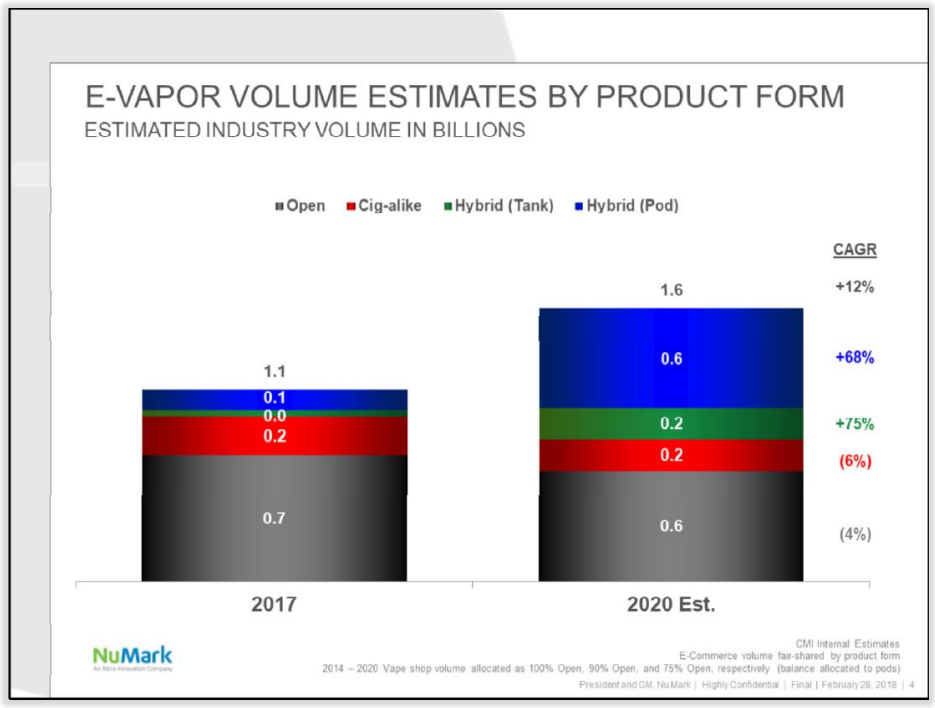
Complaint Counsel also points to FDA's January 2020 flavor ban as evidence that cig-a-likes and pod-based products should be grouped together. CC Opening Br. 21. But Complaint Counsel offers no explanation for how a regulatory measure intended to curb youth use of e-vapor products bears on market definition. *See* RFF ¶ 536.

[25] RRFF ¶ 365; RFF ¶ 1399.

Second, Complaint Counsel observes that open tanks offer "different user experiences" from closed-system products. CC Opening Br. 25. But the same is true of pods and cig-a-likes. As discussed above, pods do not carry the stigma evoked by cig-a-likes and offer a "better experience [for] consumers" because of their larger batteries.[26]

Third, Complaint Counsel emphasizes that closed-system e-cigarette producers "do not consider open-tank products when making sales and marketing decisions for closed-system e-cigarettes." CC Opening Br. 26. But as noted above, the record is replete with evidence that e-vapor manufacturers likewise do not account for cig-a-likes in setting the price of pods.[27]

Fourth, some of the very same "ordinary course" documents to which Complaint Counsel points as covering both pods (sometimes called hybrids) and cig-a-likes also cover open-tank systems:



[28]

[26] RFF ¶ 1396; *see also* RFF ¶ 1394; RRFF ¶¶ 357, 365.

[27] RRFF ¶ 382; RFF ¶¶ 1405-06.

[28] RRFF ¶ 381 (PX4012 (Altria) at 006).

Finally, Complaint Counsel notes that Respondents' noncompete agreement encompasses "both cigalikes and pod-based products," but conveniently overlooks that the noncompete covers open-tank systems as well.[29] Notably, the limited noncompete does not cover cigarettes, heat-not-burn products, or other products, like Altria's oral On! product, because those products are not designed to vaporize a nicotine liquid.[30] This makes sense because the noncompete was tailored to prevent Altria from using confidential JLI information to develop products that could benefit from that information, *i.e.*, products that vaporize liquid. The noncompete was not intended to prevent all competition and certainly wasn't intended to delineate the boundaries of a relevant antitrust product market. And as if to prove the point, in Complaint Counsel's proposed order, Complaint Counsel asks this Court to impose the *exact same restrictions* on Respondents in connection with entering into agreements regarding open systems as it does regarding closed systems. *See* CC Opening Br., Att. A at §§ I.F, II. Complaint Counsel's attempt to use the scope of the noncompete as support for its market definition is without merit.

Complaint Counsel's effort to exclude open-tank systems from its proposed market definition thus demonstrates only that accepting its contention would require the Court to engage in arbitrary line-drawing.

B. Complaint Counsel misapplies the hypothetical monopolist test.

Complaint Counsel's reliance on, and application of, the hypothetical monopolist test ("HMT"), *see* CC Opening Br. 26-27, does nothing to salvage its proposed market definition:

First, the analysis of its expert, Dr. Dov Rothman, began and ended with Complaint Counsel's market definition of choice, the "closed-systems" market. Notwithstanding that Complaint Counsel bears the burden, Dr. Rothman made no attempt to apply the HMT to assess whether pods and cig-a-likes were in distinct markets.[31] That approach contravened

[29] *See* CC Opening Br. 22-23; CCFF ¶ 324.

[30] RFF ¶¶ 1129, 1200.

[31] RFF ¶ 1416.

well-established case law and the government's own Horizontal Merger Guidelines ("HMG"), which adhere to the "narrowest market" principle. *See FTC* v. *RAG-Stiftung*, 436 F. Supp. 3d 278, 292 (D.D.C. 2020) ("Relevant market analysis is based on the 'narrowest market' principle."); *FTC* v. *Peabody Energy Corp.*, 492 F. Supp. 3d 865, 886 (E.D. Mo. 2020) (a fact finder's "task is to identify the *narrowest market* within which the defendant companies compete that qualifies as a relevant product market" (emphasis added)); 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").

The "narrowest market" principle, while not necessarily inviolable under the HMG, exists for good reason: it guards against "overstating" the "relative competitive significance of more distant substitutes." HMG § 4.1.1. Put differently, while "Jif may compete with mayonnaise in the overall marketplace for sandwich spreads, . . . that does not necessarily mean both [products] should be included in the relevant product market for antitrust purposes," given that "only a limited number of buyers will turn" to peanut butter as a substitute for mayonnaise. *RAG-Stiftung*, 436 F. Supp. 3d at 292-93 (internal quotation marks omitted).

While Complaint Counsel insists that "courts and agencies may evaluate a transaction in 'any relevant market satisfying the [HMT],'" CC Opening Br. 23, courts have rejected efforts to rescue an "overbroad market" through resort to the HMT. *See, e.g.*, *RAG-Stiftung*, 436 F. Supp. 3d at 299 n.11; *United States* v. *H & R Block, Inc.*, 833 F. Supp. 2d 36, 59 (D.D.C. 2011) (in a market defined too broadly, "the hypothetical monopolist test . . . cease[s] being useful"). As the district court in *RAG-Stiftung* recently explained, "[t]he hypothetical monopolist test 'is designed to ensure that candidate markets are not overly narrow.' . . . It says nothing about whether a market is overly broad." 436 F. Supp. 3d at 299 n.11.

In other words, that "[a]n initial candidate market might pass the hypothetical-monopolist test . . . [does] not exclude the possibility that the candidate market is too broad." *Sidibe* v. *Sutter Health*, 2019 WL 2078788, at *27 n.209 (N.D. Cal. May 9, 2019). A market for all nicotine products would surely pass the HMT, for example, but Complaint Counsel would never

agree that the relevant market here is all nicotine products. *See* Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 533c. In the face of these well-established principles, Complaint Counsel fails to cite a single case in which a court's analysis did not start with the narrowest possible market.[32]

Second, even if the HMT could be used to justify Complaint Counsel's overbroad market despite consistent precedent saying it cannot, Complaint Counsel's analysis remains fundamentally flawed. Among other things, Complaint Counsel's expert relied on outdated elasticity studies, dating to *before the rise of pod products*, in calculating elasticity.[33] He did so even though elasticity is a critical input in the HMT analysis and even though he acknowledged that elasticity can "change over time . . . as the market evolves and matures" and even though "JUUL's growth" could "imply changes in elasticity."[34] Given the explosion in popularity of pod products, the data Dr. Rothman relied on has no bearing on market conditions in 2018, much less market conditions today, and is not remotely probative of the extent to which consumers substitute from pods to cig-a-likes or vice versa.[35] Dr. Rothman's HMT analysis thus warrants no weight.

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[32] Complaint Counsel admonishes Respondents' expert, Professor Kevin Murphy, for, in effect, declining to do Complaint Counsel's work for it by defining a relevant product market. *See* CC Opening Br. 27. It is Complaint Counsel's burden, not Respondents', to define the relevant market. Nonetheless, Professor Murphy's analysis did not just focus on the defects in Complaint Counsel's analysis: Professor Murphy performed a regression analysis that found that "diversion from cig-a-likes to pod-based vaporizers was far less than proportional to shares within a closed-system e-cigarette market." RRFF ¶ 2088. And he opined that "considerable evidence from the marketplace [shows] that substitution between cig-a-likes and pod-based vaporizers is limited and that cig-a-likes and pod-based vaporizers are in separate relevant markets." RFF ¶ 1386; RRFF ¶ 2087.

[33] RFF ¶ 1422.

[34] RFF ¶¶ 1419-22; *see also* RFF ¶¶ 1324-26.

[35] RFF ¶ 1418.

III. Complaint Counsel Failed to Prove Its Section 1 Claim at Trial.

With the record closed, the "agreement" theory that Complaint Counsel now asserts is fundamentally different from the one upon which this case was originally brought. From the beginning of the case up through trial, Complaint Counsel alleged that Respondents reached a secret agreement that Altria would remove Nu Mark's e-vapor products from the market as a precondition for proceeding with the transaction. *See, e.g.*, Remote Telephonic Prehearing Scheduling Conference Tr. 12 (Aug. 3, 2020) ("The bottom line is this: Juul communicated and Altria knew that it had to get out of the e-cigarette business in order to complete its investment in Juul.").

In its post-trial brief, however, Complaint Counsel abandons that theory. Complaint Counsel now says that "[w]hat mattered to JLI was not how Altria exited, but that it *ultimately* did exit," CC Opening Br. 31 (emphasis added), and that "JLI did not care" if Altria ultimately exited by divesting or contributing Nu Mark's products *after the investment as part of the HSR process*. CC Opening Br. 37. And Altria chose to discontinue its e-vapor business before the deal, Complaint Counsel contends, because it was "eager" to take seats on JLI's Board and to start providing certain services to JLI that it could not provide under the antitrust laws while it was still on the market. CC Opening Br. 45-46.

Shifting theories notwithstanding, Complaint Counsel's Section 1 claim still fails. Even if the record supported Complaint Counsel's new theory—and as explained below, it does not—Complaint Counsel has not alleged the "very essence of a section 1 claim": an agreement. *In the Matter of Benco Dental Supply Co.*, 2019 WL 5419393, at *7 (F.T.C. Oct. 15, 2019) (initial decision) (quoting *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004)). Complaint Counsel demurs that "[n]ot every detail needs to be worked out in order to prove that an agreement exists for purposes of antitrust liability." CC Opening Br. 37. But key, material terms *do* need to be worked out to form an agreement, including "how and when" Altria would dispose of its e-vapor products—the very terms Complaint Counsel admits it can show no agreement regarding. *See id.*

In fact, as was made crystal clear at trial, JLI *always* contemplated that Altria's products would stay on the market post-transaction and be subject to FTC review. And JLI negotiated on that basis. This is indisputably lawful and commendable conduct for a company in JLI's position, and Complaint Counsel's attempt to contort it into an unlawful agreement is baseless and unprecedented. Nor is there a shred of evidence that Respondents discussed discontinuing Nu Mark in order to facilitate the provision of certain services or the taking of Board seats. Complaint Counsel does not even suggest otherwise. And the evidence shows that Altria discontinued its e-vapor products for reasons independent of the transaction, pivoting to a Growth Teams strategy by which it would try to develop and obtain FDA approval for a leapfrog product over a 5 to 10 year time frame.

Complaint Counsel's theory, if accepted, would set a dangerous precedent, casting a pall over parties' ability to negotiate in good faith—as they do every day—around the treatment of one party's assets following a transaction and in connection with FTC review. It is a prime illustration of why the Supreme Court "limit[ed] the range of permissible inferences" that may be drawn "from ambiguous evidence in a § 1 case," in light of the risk that "mistaken inferences" may "chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588, 594 (1986). And it should be rejected here.

Nor did Complaint Counsel come close to proving substantial anticompetitive effects at trial under the rule of reason framework—a nearly impossible task given the intensely competitive environment that prevailed post-transaction and the overwhelming evidence that Altria's e-vapor products were not competitive constraints and could not become so given the applicable regulatory scheme.

The parties did, of course, agree to a reasonable and tailored noncompete in the December 20, 2018 deal documents. But that noncompete only prohibited Altria from developing new products while it was accessing JLI's trade secrets for the purpose of providing critical regulatory support services. The actual noncompete the parties negotiated is thus ancillary to a legitimate transaction and supported by a plain procompetitive rationale.

Complaint Counsel has not proffered an equally viable less restrictive alternative. The Section 1 claim should be dismissed.

A. The totality of the evidence does *not* show that Respondents reached an illegal agreement.

"The existence of an agreement is the very essence of a section 1 claim." *Benco*, 2019 WL 5419393, at *7 (internal quotation marks omitted). Yet, as explained below, Complaint Counsel failed to elicit any evidence at trial that Altria discontinued its products pursuant to an agreement with JLI, nor was it able to show that those product discontinuations were pretextual. Complaint Counsel's opening brief, CC Opening Br. 28-58, does not demonstrate otherwise.

1. Complaint Counsel failed to prove that the parties reached an unwritten agreement contemplating the potential removal of Altria's e-vapor products prior to the execution of the transaction.

To satisfy its burden on the agreement prong of Section 1, Complaint Counsel must prove "a meeting of the minds." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). 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 while Complaint Counsel cites a lone district court case for the proposition that "[c]ircumstantial evidence is no less persuasive than direct evidence," CC Opening Br. 29, the Supreme Court made clear in *Matsushita* that "antitrust law limits the range of permissible inferences" that may be drawn "from ambiguous evidence in a § 1 case," as noted above, 475 U.S. at 588. Indeed, even Complaint Counsel's favored district court case recognized that, under *Matsushita*, "ambiguous conduct is inadequate to support an inference of illegality." *United States* v. *Apple Inc.*, 952 F. Supp. 2d 638, 690 (S.D.N.Y. 2013); *see also Murdaugh Volkswagen, Inc.* v. *First Nat'l Bank of S.C.*, 639 F.2d 1073, 1075 (4th Cir. 1981) ("Where, as here, the plaintiff's case is based entirely on . . . circumstantial evidence, the court must be especially vigilant to [e]nsure that liberal modes of proof do not become the pretext for unfounded speculation.").

Here, Complaint Counsel relies exclusively and unpersuasively on ambiguous, circumstantial evidence in attempting to show an agreement to remove Altria's e-vapor products, notwithstanding anticipated government review, and cannot meet Section 1's "demanding" standard. Indeed, the clear evidence points the other way—there was no such agreement. Rather, JLI anticipated and expected that Altria would dispose of its e-vapor products after the transaction and subject to FTC review. And Altria discontinued those products because of independent regulatory and financial reasons.

a. Complaint Counsel failed to prove a meeting of the minds.

What is left of Complaint Counsel's agreement theory hinges on this claim: "What mattered to JLI was not how Altria exited, but that it ultimately did exit." CC Opening Br. 31. But that is wrong, at least insofar as Complaint Counsel claims that JLI was proposing, contemplating, or otherwise fine with the notion that Altria would dispose of its products pre-deal and outside the HSR review process. Contrary to Complaint Counsel's claim, it was critical to JLI that Altria dispose of its e-vapor assets *pursuant to* that process.

As Nick Pritzker testified at trial, JLI "*wanted* [Altria] to keep [its] products on the market until they could be presented to the FTC for divestiture" and "until the FTC [told Altria] what to do with the product[s]."[36] And as Riaz Valani confirmed, JLI's request that Altria ultimately dispose of its e-vapor assets was "subject to complete and total regulatory sanction"; it was "extremely . . . important to [JLI] that [Altria] use[] the appropriate means" to achieve that outcome "per regulatory sanction."[37] JLI's General Counsel Jerry Masoudi, whom Complaint Counsel declined to call at trial, likewise testified at his deposition that JLI contemplated "that divestiture [or] contribution would be part of the Federal Trade Commission review process and so of necessity, [Altria] would be continuing to operate [its e-vapor business] through . . . some

[36] RFF ¶¶ 1189-90 (emphasis added).

[37] RFF ¶ 1204.

period of time."[38] This mismatch between what JLI *proposed* and *desired* and what Altria actually *did* precludes finding a Section 1 agreement: there was no "meeting of the minds." *Twombly*, 550 U.S. at 557.

Complaint Counsel quotes Pritzker as testifying that "[i]t would not have been acceptable" for Altria to have continued to participate in the e-vapor business if Altria "[had JLI] board seats and—and therefore potential access to Juul information." CC Opening Br. 31. True enough: that has never been disputed. The problem is that Complaint Counsel ignores all of Pritzker's testimony, entirely consistent with that same principle, that it was important to Pritzker that Altria stop competing with certain products only *post*-transaction, once Altria's e-vapor products could be presented to the FTC for the sake of "optimiz[ing] the chance for a successful regulatory outcome."[39] Indeed, Complaint Counsel ignores that Altria would obtain seats on JLI's Board (the subject of the testimony it quotes) *only after* FTC review of the deal, a review that would include an appropriate disposition of Altria's existing e-vapor assets.[40]

Likewise, Complaint Counsel quotes Valani as testifying that a "general precept [] for what it would take for Altria to ever have any involvement with JUUL would be that they couldn't have a directly competitive offering of their own," CC Opening Br. 31, and omits that Valani completed his answer by stating that it was "extremely . . . important to [JLI] that [Altria] use[] the appropriate means . . . per regulatory sanction"[41] to achieve that outcome and that Altria take an "appropriate[,] legally sanctioned route with the regulator to get there."[42]

Complaint Counsel's one-sided recounting of the negotiating history does nothing to undermine this fundamental point either. First, Complaint Counsel points to a July 2018 email from JLI's investment banker, Peter Gross, in which Gross, *whom Complaint Counsel declined*

[38] RFF ¶ 1207.

[39] RFF ¶ 1190.

[40] RFF ¶¶ 823, 1137-38.

[41] RFF ¶ 1204.

[42] RRFF ¶ 897.

to call at trial, told Pritzker that he was under the impression that Altria would "shut down" MarkTen. *See* CC Opening Br. 32. Complaint Counsel ignores (a) Pritzker's responsive email that Pritzker thought Altria would "need to sell [*i.e.*, divest] it," (b) Pritzker's testimony that he "didn't understand where [Gross] was coming from," (c) the context of the email, in which Gross worries that Altria wants JLI to assign value to Altria's e-vapor assets in connection with a potential contribution to JLI of those assets, and (d) Gross's own deposition testimony that he had never heard from *anyone* that Altria was planning to shut down MarkTen and that he simply "assumed [Altria] attributed no value to MarkTen" given that Altria's e-vapor products were "inferior products that had no traction in the market."[43]

Next, Complaint Counsel points to what it presents as two key pieces of evidence—the proposed July 30, 2018 term sheet (the "July 30 Term Sheet")—which contained the "cease to operate" clause—and Valani's August 15 issues list. But those two documents likewise do nothing to advance Complaint Counsel's agreement theory. *See* CC Opening Br. 33-35. As to the July 30 Term Sheet, the proposed "cease to operate" language would have kicked in only after the transaction closed and only after a nine-month process by which Altria would seek to divest or contribute its e-vapor assets.[44] It thus was not even a proposal—much less an "agreement"—that Altria exit the market *pre*-transaction. Only if divestiture or contribution could not be accomplished *after* the deal would the proposed "cease to operate" obligation be triggered.[45] Complaint Counsel quotes Valani as describing the "cease to operate" provision as a "failsafe to ensure that Altria had no outs in its commitment to exit e-cigarettes," but again omits the critical portion of the testimony that makes clear that Valani contemplated this occurring only

[43] RFF ¶¶ 1212-14; RRFF ¶ 675. Complaint Counsel notes that Gross sent this email "shortly after speaking directly to Altria CEO Willard," implying a nefarious connection. CC Opening Br. 32. But as Complaint Counsel notes in its proposed findings of fact, the subject of the call was JLI's valuation, CCFF ¶ 673, not the status of Nu Mark's existing products.

[44] RFF ¶¶ 772-86.

[45] RRFF ¶ 907.

after the transaction in the context of FTC review.[46] And in any case, the "cease to operate" language was discarded. Altria deleted the provision altogether in its proposed August 9, 2018 term sheet (the "August 9 Term Sheet"), and it never appeared again.[47]

As for Valani's August 15 issues list, Complaint Counsel similarly quotes Valani's statement that JLI had "understood that [Altria] would not compete against [JLI] in vapor in the US and that JUUL would be the vehicle for all vapor assets." CC Opening Br. 34-35. And it cites Valani's objection in the same document that Altria, in expanding the carve-out to the noncompete in its August 9 Term Sheet and striking the proposed divestiture term, had "retained the right under certain circumstances to compete not only with existing MarkTen products, but also with products under development and future products." CC Opening Br. 35. Again, the parties are in agreement: these were real and legitimate concerns JLI harbored. What the issues list *does not* say or imply is that JLI wanted Altria to fulfill this proposed obligation pre-deal or outside the scope of HSR review. And as Valani testified at trial in regard to this very document, the noncompetition principle it was setting forth was "*subject to complete and total regulatory sanction*."[48]

Complaint Counsel's treatment of draft talking points that Altria prepared for the parties' August 18 meeting is just as strained. Putting aside that the record evidence is that the draft

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[46] RRFF ¶ 907 (Valani (JLI) Tr. 918-19 ("And then the notional concept of 'cease to operate' was meant to be a sort of fail-safe if the other options had been exhausted, *but I do now need to reiterate to you that this was all in the context of what the regulator deemed as an appropriate—as an appropriate solution* . . . ." (emphasis added))).

[47] RFF ¶ 807.

[48] RFF ¶ 1204 (emphasis added). Complaint Counsel also ignores that Altria's right "to compete with . . . existing MarkTen products" after the transaction, in connection with HSR review, appeared in *every* iteration of the proposed term sheets drafted by *either* party, including JLI's July 30 Term Sheet. RRFF ¶ 722; RFF ¶ 1192. JLI was not worried about Altria's inferior, uncompetitive products staying on the market after the transaction—as JLI witness after JLI witness made clear (RFF ¶¶ 651, 748-61, 1102, 1189-1202)—but it was deeply concerned that Altria could misuse JLI's proprietary information to develop actually competitive e-vapor products that could threaten JLI and injure its business. RFF ¶¶ 1189-1202.

talking points were not delivered,[49] the talking points expressly state that Altria "can't agree to [JLI's initial proposed] terms under antitrust laws prior to receiving HSR approval" and that "[u]pon receiving antitrust approval, [Altria] would contribute MarkTen to [JLI] and become subject to a robust non-compete that makes [JUUL] [Altria's] exclusive e-vapor play."[50] To a neutral observer, the talking points would be evidence that the parties were acting in good faith, striving to comply with the antitrust laws, and contemplating FTC review of Altria's e-vapor products. But to Complaint Counsel's jaundiced eye, the talking points communicate "an attempt to evade antitrust liability [by] refus[ing] to include the exact language written by JLI, [while] reassur[ing] JLI that it agreed to exit e-cigarettes and be bound by a non-compete." CC Opening Br. 35.

Again, Respondents agree that JLI and Altria were converging at this time around the principle that Altria would "agree to exit e-cigarettes and be bound by a non-compete." *Id.* But to the extent Complaint Counsel is suggesting that the talking points were some attempt to paper over the record and reflect an unwritten contemplation that Altria could or would remove the products pre-deal, this is a prime example of the precise approach Complaint Counsel is not permitted to take: "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). And while Complaint Counsel observes that "[t]he principal Altria and JLI negotiators met in person and spoke by phone on numerous occasions without an attorney present," it points to no evidence regarding the nature, purpose, or substance of those meetings and calls—indeed, the uniform testimony of those principals is that they never agreed to discontinue the products as alleged by Complaint Counsel[51]—and it is hornbook law that proving an "*opportunity* to conspire" is insufficient. *In the Matter of McWane, Inc.*, 2013 WL 8364918, at *265 (F.T.C.

[49] RRFF ¶ 730.

[50] CCFF ¶ 730.

[51] RFF ¶¶ 1152-60.

May 1, 2013) (initial decision) (emphasis in original); *see also* Resps. Opening Br. 77 (collecting authorities).

Most remarkably, as discussed above, Complaint Counsel tries to embrace the proposed August 19, 2018 term sheet (the "August 19 Term Sheet") that it repeatedly skipped over at trial, including during its questioning of Howard Willard and Pritzker[52]—a significant concession masquerading as advocacy. Complaint Counsel's aversion at trial to JLI's August 19 Term Sheet (the last one Respondents exchanged before Willard's October 5, 2018 letter) was understandable. Far from imposing an obligation on Altria to shut down its e-vapor business as a precondition to the deal, the August 19 Term Sheet 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.[53] And while JLI's August 19 Term Sheet rejected Altria's attempt to expand the proposed noncompete carve-out to allow Altria to work on "under development products" prior to HSR approval—consistent with Valani's objection in the August 15 issues list—the proposed term continued to expressly contemplate that Altria would compete with its existing products "prior to their contribution or divestiture."[54] That is the proposed structure that Willard incorporated into his October 5 letter (once presented by Complaint Counsel as a game-changer, now demoted to almost a non-event) and that laid the groundwork for the final deal documents.[55]

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[52] RFF ¶ 824.

[53] RFF ¶ 826.

[54] RFF ¶ 827.

[55] RFF ¶¶ 985-88. Complaint Counsel wrongly claims that the final agreement did not "include[] a provision requiring Altria to divest or contribute its e-cigarette products." CCFF ¶ 862; *see also* CC Opening Br. 37. The final purchase agreement provided that Altria would divest its e-vapor assets as required to obtain HSR approval. RFF ¶ 1131; RRFF ¶ 862.

Complaint Counsel's claim that the proposed August 19 Term Sheet somehow supports its unwritten agreement theory, to the extent the claim makes any sense at all, is again premised on the notion that JLI did not "care" *when* or *how* Altria disposed of its e-vapor assets—contrary to both what the term sheet itself proposed and the uniform testimony of the witnesses at trial, as described above.[56] But a "plaintiff cannot make [its] case just by asking the [fact finder] to disbelieve the defendant's witnesses" on these key points, and it certainly cannot make its case by rewriting what a critical document says. *McWane*, 2013 WL 8364918, at *267 (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002)); *see* Resps. Opening Br. 76-77 (collecting cases). And the claim is further undermined by the August 22, 2018 issues list in which JLI asked Altria to confirm that the noncompete "commences on signing" "*except* as to MarkTen and MarkTen Elite," which JLI wanted and expected to remain on the market post-signing.[57]

Complaint Counsel gives the game away when it insists that "[n]ot every detail needs to be worked out in order to prove that an agreement exists for purposes of antitrust liability." CC Opening Br. 37. That may be true for immaterial terms of an agreement, but it plainly cannot be true where the key details that Complaint Counsel has left "[un]worked out" are those on which the legitimacy of the agreement under the antitrust laws turns—that is, "how and when Altria would comply with" the divestiture provision and the noncompete. CC Opening Br. 37;

[56] Complaint Counsel also points to the proposed October 15, 2018 term sheet, which contemplated that Altria would provide certain "enhanced" services upon the "earlier of (i) contribution . . . or (ii) [Altria] otherwise exiting the marketing and sale of products in the Field." RFF ¶ 1065. But Complaint Counsel disregards the only record evidence concerning the purpose of this minor addition. The specific "enhanced" 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. RFF ¶¶ 1064, 1066. The proposed term defined when enhanced services could be provided; it imposed no obligations related to Altria's e-vapor products. RRFF ¶ 788. And the proposed October 15 term sheet continued to expressly contemplate that Altria would divest or contribute its e-vapor products, pursuant to FTC review. RFF ¶ 994.

[57] RFF ¶ 837 (emphasis added).

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").

Nor can it be true where the alleged agreement is premised on expressly nonbinding term sheets that left key terms open, including price and valuation, and where the parties' agreement was contingent upon conducting due diligence and entering into definitive transaction documents.[58] *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); *see* Resps. Opening Br. 75. Even taking Complaint Counsel's theory for all it's worth, then, all Complaint Counsel has managed to allege is independent, unilateral conduct, insufficient to make out a Section 1 claim. *See McWane*, 2013 WL 8364918, at *223 (Section 1 "does not reach independent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors").

Ultimately, Complaint Counsel ignores the evidence adduced at trial and developed in Respondents' opening brief demonstrating that: (1) the parties never discussed, let alone agreed on, a pre-deal discontinuation of the products (Resps. Opening Br. 68-79); (2) the parties were assisted by outside counsel throughout the negotiations and cared deeply about structuring the deal in a lawful and compliant manner (*id.* at 40-43, 70); (3) the core disputes during the negotiations were over valuation, ownership, and control, not the disposition of Altria's e-vapor products (*id.* at 24-25, 37-44, 58-60, 69-72); (4) JLI always contemplated and desired that Altria would keep its existing products on the market post-transaction for regulatory review (*id.* at 37-38, 41-42, 69-72); (5) JLI never viewed Altria's inferior e-vapor products as competitive threats (*id.* at 19-20, 77-79); (6) the noncompete was animated by a desire on JLI's part to protect its proprietary information (*id.* at 71-72, 129-30); (7) Altria decided to downsize

[58] RFF ¶¶ 786, 1049, 1104-05, 1171.

Nu Mark, shut down ongoing development work, and reset its e-vapor efforts with the Growth Teams, at a time when deal discussions were dead (*id.* at 44-46, 49-51); (8) Altria decided to discontinue Elite in response to a threatening letter from FDA at a time when deal discussions were dead (*id.* at 46-49, 79-84); (9) JLI had no notice of and was shocked by Altria's decision to discontinue Elite and nontraditional flavors (*id.* at 54-55, 83); (10) JLI had no notice of and did not register Altria's decision to discontinue its remaining cig-a-like products, which Altria did not view as commercially viable or capable of obtaining regulatory approval (*id.* at 58, 79); and (11) the deal was highly uncertain and contingent until the day the deal documents were executed, with valuation remaining unsettled until the very end (*id.* at 58-59, 86).

In the face of this overwhelming record contradicting its theory, Complaint Counsel can muster only speculation. Having failed to prove a "meeting of the minds," Complaint Counsel's unwritten-agreement theory should be rejected.

b. Complaint Counsel's "timeline of events" does not support an inference that Altria exited pursuant to an agreement with JLI and omits critical evidence that negates this theory.

In its opening brief, Complaint Counsel contends that the "timeline of Altria's actions to discontinue its e-cigarette products[] supports an inference" that "JLI's non-compete demand drove key decisions made by Altria's senior leadership" concerning removal of MarkTen and MarkTen Elite. CC Opening Br. 38-39. But Complaint Counsel's timeline consists of nothing more than just lining up dates on which events occurred, ignoring the basis for those events, and speculating about linkages that do not exist. Worse, it rests on mischaracterizations and cherry-picking of the documentary record, painting a ridiculous picture of Altria's senior leadership as erratically lurching between a desire to pull the plug on Altria's e-vapor products and a desire to invest in them, based on the vicissitudes of the negotiations. The actual timeline of events supports precisely the opposite inference—that Altria removed its e-vapor products for independent reasons.

Complaint Counsel's lopsided "timeline" begins with a critical omission: it ignores Altria's discoveries and determinations in June 2018 concerning the challenges facing Nu Mark and its products. In particular, it ignores the "Eureka moment" described at trial by which Altria's scientists determined that its e-vapor products lacked the key ingredient "*required* . . . to provide nicotine satisfaction" to adult smokers—nicotine salts—and their recognition that the problem could not be fixed without obtaining PMTA approval.[59] Complaint Counsel likewise ignores the "sobering" Level-Setting meeting Willard called on June 21 and 22, during which Quigley presented these findings to senior leadership and Joe Murillo called for Altria to "[c]ompletely re-set [Nu Mark's] product and filing plans," in which he had "no confidence."[60] Altria's discoveries and determinations in June 2018—and the related plan for a 100-day review period to determine what to do with its existing business[61]—are essential context to understanding Altria's decision-making on its e-vapor products thereafter. All of these events occurred ***before*** any draft term sheets were exchanged between the companies. And yet Complaint Counsel entirely ignores these facts because they cannot be reconciled with its theory.

1. ***August 3, 2018 Meeting***. Complaint Counsel instead starts its timeline with the early August 2018 meeting in which Quigley presented an interim update to Willard, Billy Gifford, Murray Garnick, and K.C. Crosthwaite on Nu Mark. *See* CC Opening Br. 39. According to Complaint Counsel, senior leadership suggested withdrawing Elite from the market at this meeting because JLI had included the "cease to operate" provision in its proposed July 30 Term Sheet. *See* CC Opening Br. 39. Again, Complaint Counsel misconstrues the proposed and nonbinding term sheet. But regardless, there is zero evidence of a link between the one and the

[59] RFF ¶ 712 (emphasis added); RFF ¶¶ 614-27, 692. In the case of MarkTen Bold, it was undisputed at trial that the product, while imbued with some nicotine salts, did not have the right formula to deliver nicotine satisfaction. RFF ¶¶ 642, 644, 1505.

[60] RFF ¶¶ 706-24.

[61] RFF ¶¶ 676, 904.

other. Complaint Counsel doesn't bother to mention it, but it is undisputed that Quigley told senior leadership at the meeting that Elite was not competitive and that Nu Mark was "limited to competing . . . in the cig-a-like segment," which was "very small" and not "meaningful," and that Nu Mark "[l]ack[ed] quality pod products" and "[p]roducts that provide immediate nicotine satisfaction."[62] As Quigley testified, because of the regulatory scheme, the best plan he could come up with for turning around the business was treading water for years (*i.e.*, continuing to lose hundreds of millions of dollars) in the hope of developing a superior product that could garner FDA approval and be marketed by 2025—a plan Quigley testified was a "long shot," "risky," and "expensive."[63]

Reacting to this alarming presentation, Gifford raised whether Altria should consider pulling Elite from the market—a sensible reaction for the CFO of a major public company who owes fiduciary duties to stockholders.[64] While Quigley was not expecting the question of Elite's fate to come to a head quite yet, he testified that Gifford's question was a reasonable one in light of the "fundamental business gaps" Quigley was highlighting and a question that was being asked "throughout the organization."[65] And contrary to Complaint Counsel's wild suggestion that Altria was motivated to shut down Nu Mark as a result of JLI's proposed July 30 Term Sheet, Quigley left the August 3 meeting with the clear directive from Willard to continue studying the business case for Elite.[66]

2. ***August 10, 2018 Meeting***. Complaint Counsel's next mischaracterization comes in connection with the August 10 meeting the following week. *See* CC Opening Br. 39-40. On Complaint Counsel's telling, Altria decided at this meeting (1) to move forward with a new gasket to address Elite's leaking issue and (2) to continue working on the PMTA for the

[62] RFF ¶¶ 841, 843.

[63] RFF ¶¶ 850-51.

[64] RFF ¶ 852.

[65] RFF ¶ 853.

[66] RFF ¶ 857.

MarkTen cig-a-like. The reason for both decisions, according to Complaint Counsel: Altria had sent JLI a proposed term sheet the day before, striking the divestiture provision. *See id.* As a threshold matter, Complaint Counsel misreads the proposed August 9 Term Sheet. That term sheet did not "reserve[] the right to continue to compete with existing products and products under development" in perpetuity. *Id.* Rather, Altria proposed that these activities be carved out from the noncompete prior to licensing its e-vapor assets to JLI upon HSR approval.[67] Complaint Counsel's theory collapses for that reason alone.

In any case, there is again not an iota of *evidence* linking any of these decisions at this meeting to the status of the negotiations. The suggestion that senior leadership was erratically veering, over a matter of days, from expressing a desire to pull Elite to pushing for continued investment in the product—based on positions (which Complaint Counsel misreads) taken in early proposed term sheets—is absurd. The decisions at issue were hardly monumental, merely reflecting that Altria was continuing to assess its internal path forward in e-vapor pursuant to Quigley's 100-day review of the Nu Mark business.[68] The question of whether to implement the gasket change in light of regulatory risks had been ongoing for months.[69] As for the decision to continue working on a PMTA for MarkTen cig-a-like, the question was "whether or not it made sense to continue the PMTA *for all 14 SKUs versus a smaller subset of those*."[70] Altria decided to continue with all the SKUs because, based on the way the research was structured, discontinuing SKUs would actually *increase* Altria's costs.[71] Notably, the decision had nothing to do with seeking PMTA approval for Elite, the pod product intended to compete with JUUL.

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[67] RFF ¶¶ 805-09.

[68] RFF ¶¶ 676, 904.

[69] RFF ¶¶ 652-71; RRFF ¶ 1364.

[70] RRFF ¶ 1365 (emphasis added).

[71] RRFF ¶ 1365.

No decision had been made in that regard—and in fact, as Quigley testified, it was common ground within Altria that the existing Elite product could not get PMTA approval.[72]

3. ***August 21-23, 2018 Board Meeting***. Next, Complaint Counsel meekly implies that the deck Altria's leadership presented at an August 21-23 Board meeting was pretextual and designed to persuade the Board to favor pursuing a JLI transaction over investing in Nu Mark. CC Opening Br. 40-41. The suggestion is that Altria management flipped yet again, with the negative comments about Altria's existing products being cooked up in response to Altria's reaching common ground with JLI on the ultimate disposition of Nu Mark's products through the proposed August 19 Term Sheet. *Id.* This Board meeting, and Altria management's supposed misleading presentation to its own Board, had been a theme of Complaint Counsel's pre-trial brief. *See* CC Pre-trial Br. 23-25. But, again, Complaint Counsel presents no evidence of any link between the status of the negotiations and the substance of the deck—whether adduced at trial or otherwise.

That's because there is none: Respondents devastated this theory at trial, presenting unrebutted evidence that Altria's scientists and regulatory affairs team—none of whom was involved in the deal—began working on the Board deck in July 2018, before the exchange of any term sheet, to provide the Board with a realistic assessment of the products' dim regulatory prospects.[73] Complaint Counsel's only evidence for its suggestion is an August 14, 2018 email that Quigley sent to Crosthwaite upon reviewing a draft of the deck, stating that it was "clearly only the bad news version of the story" and inaccurate in its assessment of the cig-a-like business as "declining."[74] Continuing its pattern of omissions, Complaint Counsel ignores Quigley's

[72] RRFF ¶ 1297; *see also* RFF ¶ 512.

[73] RFF ¶¶ 725-36.

[74] CCFF ¶¶ 1036, 1367-68. Notably, Quigley sent this email during the period in which Complaint Counsel claims Altria was on board with investing in Nu Mark (*i.e.*, after sending the August 9 Term Sheet but before receiving the August 15 issues list).

testimony explaining that his frustration was personal in nature with Crosthwaite himself, that "the facts in the deck were accurate," and that, although he would have preferred to present the bad news to the Board himself, he too would have informed them of the same profound challenges confronting his business.[75]

4. ***September-October 2018 Decision-Making***. Turning to the September-October 2018 period, Complaint Counsel claims that the timing of the decision to withdraw MarkTen Elite in response to the FDA September 12, 2018 letter supports an inference of agreement. CC Opening Br. 41-44. The evidence tells a different story.

It is undisputed that negotiations broke down in late August 2018 for reasons unrelated to the contemplated treatment of Altria's existing products and that JLI advised Altria on September 11 that it was not interested in further discussions regarding the investment.[76]

It is undisputed that Altria revamped its internal strategy in e-vapor following this breakdown to pivot to "Growth Teams" that would focus on trying to develop leapfrog products that could actually compete years in the future—a hugely significant development that Complaint Counsel does not even acknowledge in its brief and which confirms the *bona fides* of Altria's decision to move past the existing products.[77]

And it is undisputed that the letter and statement FDA issued on September 12 threatened severe regulatory consequences if Altria did not take prompt, bold action to address the youth crisis and called on Altria to consider removing products in response.[78]

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[75] RRFF ¶¶ 1367, 1370. Complaint Counsel implies something nefarious in the fact that senior leadership was both responsible for negotiating the JLI deal and for presenting to the Board on Nu Mark (and otherwise making decisions regarding Nu Mark's future). CC Opening Br. 41. But it is axiomatic that senior leadership would be responsible for overseeing high-level strategic decision-making with regard to both the Nu Mark operating company and a potential investment in JLI.

[76] RFF ¶¶ 878-97.

[77] RFF ¶¶ 898-916.

[78] RFF ¶¶ 917-29, 998.

It was against this backdrop—which Complaint Counsel ignores—that Altria decided, within two weeks, to discontinue its pod products and its nontraditional flavored cig-a-like products in response to FDA's letter.[79] Complaint Counsel's claim that "Altria did not make any announcement (internal or external) about removing Elite from the market until after" negotiations with JLI had resumed is wrong. CC Opening Br. 42. As Willard and Quigley testified at trial, that decision was made by senior management.[80] And as contemporaneous documents prove, that decision was made and presented to the wider Altria leadership team on September 26, well before negotiations with JLI were back on track.[81] As for why Altria did not publicly announce the decision until its October 25 earnings call, management "didn't think it would be appropriate to announce [the decision] before [meeting with FDA]," which it did on October 18.[82] Once Altria had done so, Willard explained, it "thought the cleanest way to communicate this set of actions to the investment community was to time it . . . to coincide with [Altria's] earnings call."[83] And as Gifford likewise explained, Altria needed to get its associated SEC filings in order before releasing the information to investors.[84]

To be sure, as Complaint Counsel observes, Altria's engagement with FDA on youth vaping and its negotiations with JLI proceeded on parallel tracks in October 2018. CC Opening Br. 41-44. But Complaint Counsel's contention that Altria decided to go through with discontinuing Elite because negotiations with JLI had resumed has no basis in the record. Complaint Counsel observes that Willard requested in his October 5, 2018 letter to JLI that JLI respond by October 12, and invites the Court to infer that Willard would have changed his mind

[79] RFF ¶¶ 938-51.

[80] RFF ¶¶ 938-47.

[81] RFF ¶¶ 938-51.

[82] RRFF ¶ 987.

[83] RRFF ¶ 987.

[84] RRFF ¶ 987.

on discontinuing Elite if JLI had not done so favorably. CC Opening Br. 42-43. But Complaint Counsel adduces no evidence in support of that theory.[85] And as this Court has appropriately observed, "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.

[redacted] Unsurprisingly, Complaint Counsel did not raise this document or question any witness about it at trial.[88]

The critical point is that Altria made its determination to discontinue Elite and nontraditional cig-a-like flavors in September 2018, at a time the deal was moribund, and did not waver. The timing of the decision-making thus *defeats* Complaint Counsel's inference. *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). And, if there were any doubt on this score, when Altria announced the discontinuation decision, JLI was shocked and upset: as Pritzker testified, JLI had no notice of the decision and it was contrary to what the company had expected and wanted.[89] And as

[85] RFF ¶¶ 938-49.

[86] [redacted]

[87] [redacted]

[88] [redacted]

[89] RFF ¶ 1016; *see also* RFF ¶¶ 1008-19.

Garnick observed with surprise in an email sent later that day, "[t]he [JLI] folks are still talking to us even in light of the announcement we made today."[90]

5. ***December 7, 2018 Nu Mark Discontinuation***. Finally, Complaint Counsel makes much of the fact that Altria announced the discontinuation of Nu Mark on December 7, 2018, two weeks before executing the transaction with JLI. CC Opening Br. 44. But as Respondents explained in their opening brief—and as Complaint Counsel omits—the trial record demonstrates that the decision was made as part of Altria's annual budgeting process in December to free up resources for either the Growth Teams or the JLI investment. Resps. Opening Br. 56-58, 84-86; *see also In re Online Travel Co. (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526, 539 (N.D. Tex. 2014) ("Just because [a corporate defendant's] rational business interests can be recast in a suspicious light does not mean the allegations actually suggest a conspiracy was formed."). Altria did not just discontinue its remaining cig-a-like products on December 7, moreover, but also its oral "Verve" product—which, like the cig-a-likes, was "not profitable," "did not have a pathway to profitability," and was "not converting smokers."[91] And as all relevant witnesses testified, and as the documentary record reflects, the JLI deal was uncertain until the documents were fully executed and almost fell apart several times *after* December 7, including over the critical open issue of valuation.[92] The JLI

[90] RFF ¶ 1019.

[91] RFF ¶¶ 1093-95.

[92] RFF ¶¶ 1104, 1111-12, 1115, 1122. The isolated emails Complaint Counsel points to do not support its claim. First, Complaint Counsel cites a November 15, 2018 email in which Garnick suggested that Altria "consider canceling Mark Ten now" if the transaction goes forward, but *omits* the end of the sentence reflecting Garnick's explanation that doing so would "sav[e] money by not doing the HPHC analysis"—a scientific analysis that Altria would have otherwise been required to conduct. RRFF ¶ 1396. The email, in which Garnick also observed that Altria might never come to terms with JLI, in no way supports an inference of conspiracy.

Next, Complaint Counsel invokes a December 1, 2018 email, in which Garnick was simply describing what Altria's focus would be if it entered into a transaction with JLI (*i.e.*, its "core" tobacco products). RRFF ¶ 1399.

witnesses did not even notice Altria's announcement that it was shutting down Nu Mark, a fact irreconcilable with the proposition that Altria made that decision in response to a JLI demand.[93]

At bottom, Complaint Counsel's "timeline" is a textbook case of "first assuming a conspiracy and then explaining the evidence accordingly." *Blomkest Fertilizer, Inc.*, 203 F.3d at 1033. And it is an excellent illustration of why the Fourth Circuit was right to worry that cases "based entirely on . . . circumstantial evidence" can readily "become the pretext for unfounded speculation." *Murdaugh Volkswagen, Inc.*, 639 F.2d at 1075. In any event, for the reasons discussed above and in Respondents' opening brief, the actual timeline of events adduced at trial—in particular, the June 2018 Level-Setting meeting, and the transition to the Growth Teams and decision to discontinue products at a time the deal was off—strongly reinforces the *bona fides* of Altria's independent business justifications for discontinuing its e-vapor products. *See* Resps. Opening Br. 81-83, 86-87.

c. Complaint Counsel failed to prove that Altria discontinued its e-vapor products in order to speed up the provision of services to JLI and the taking of seats on JLI's Board.

In the face of clear evidence that JLI anticipated and wanted Altria to divest or contribute its e-vapor products subject to FTC review post-transaction, and that Altria removed the existing products pre-transaction for independent business reasons, Complaint Counsel attempts to rescue its case with a newfound search for a "common motive" to support the supposed illegal agreement. CC Opening Br. 45. The motive on which Complaint Counsel settles is that the existing products posed a barrier to Altria's providing certain services to JLI and obtaining Board seats and thus needed to be removed quickly. Given that Complaint Counsel adduced absolutely

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Finally, Complaint Counsel cites Dr. Maria Gogova's deposition testimony in an effort to bolster its conspiracy theory. CC Opening Br. 44. Dr. Gogova, a scientist at Altria, had no involvement in the negotiations and no knowledge of the JLI transaction until it was announced on December 20, 2018. RRFF ¶ 1402. And Complaint Counsel omits that Dr. Gogova clarified that she was referring to the discontinuation of the Growth Teams, not the discontinuation of MarkTen, as a consequence of the JLI deal. RRFF ¶ 1402.

[93] RFF ¶¶ 1101-02, 1113.

no evidence to support the notion that Respondents agreed on or even discussed this course of action, it is not clear why Complaint Counsel thinks these allegations support a Section 1 claim. *See McWane*, 2013 WL 8364918, at *223 (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"). And just as fundamentally, Complaint Counsel has adduced no evidence to support its suggestion that Altria discontinued its products for this reason:

First, the theory fails to comport with the evidence for the same reason Complaint Counsel's Section 1 agreement fails more broadly: JLI affirmatively wanted and expected Altria to maintain its products on the market in connection with HSR review.[94]

Second, Complaint Counsel cites no evidence in support of its claim, introduced for the very first time in its post-trial brief, that Altria was champing at the bit to convert its shares and to get on JLI's Board. The proposed findings that Complaint Counsel cites in support of that proposition (CCFF ¶¶ 936 and 937) do not support the claim and merely reflect the self-evident point that Altria assigned value to the governance rights for which it had negotiated and which it ultimately hoped to exercise. Under all circumstances, Altria's conversion of its shares and obtaining of Board seats would depend on the outcome of HSR review.[95] And Complaint Counsel ignores Willard's testimony that "both sides were fairly flexible" regarding the timing of the provision of those services that might need to be delayed.[96]

Third, Complaint Counsel likewise offers no reliable evidence for its implication that JLI was so eager to commence the so-called "enhanced services" that Altria shut down Nu Mark in order to facilitate that desire.[97] Many of the services the parties were contemplating—including the critical regulatory services—were *not* "enhanced services" and could be provided regardless

[94] RFF ¶¶ 1008-17.

[95] RFF ¶¶ 823, 1137-38.

[96] RFF ¶ 1073.

[97] RRFF ¶ 829.

of whether Altria still had e-vapor products on the market.[98] Pritzker testified that he viewed the regulatory services as the most important and that delaying certain other services was not a "problem" and "would not have been consequential to [him]."[99] And Complaint Counsel again engages in flagrant cherry-picking when it notes that JLI "expressed concern . . . that the full support services and non-compete 'effectively may last only 3½ years due to antitrust delay' in making HSR filings," CC Opening Br. 46, while omitting that the parties addressed this issue in the final term sheet by modifying the six-year services term to expire only upon "the sixth anniversary *of the filing date of the HSR application*."[100]

Fourth, as Complaint Counsel implicitly concedes, its theory cannot possibly explain Altria's discontinuation of Elite and nontraditional cig-a-like flavors in October 2018. As Complaint Counsel recognizes, the draft deal documents exchanged *after* Elite's discontinuation provided that Altria had until July 2020 to make its HSR filing to address the very issue Complaint Counsel suggests led Altria to discontinue its products before the transaction (*i.e.*, that its agreement with PMI potentially restricted its ability to divest its e-vapor products until July 2020). CC Opening Br. 45. It would have made no sense to propose this solution if Altria intended to sidestep the issue by discontinuing its products before the deal or if it had already discontinued certain products for that purpose.

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[98] RFF ¶¶ 1062-73.

[99] RFF ¶ 1072.

[100] RRFF ¶ 809 (emphasis added). The December 9, 2018 email exchange between Garnick and Masoudi that Complaint Counsel cites also disproves its speculation. In that email, which was sent *after* Altria discontinued Nu Mark, Garnick advised JLI's Masoudi that "*if* the businesses want to start enhanced services right way [sic], the do not compete provision could start running based on when providing enhanced services begins." RRFF ¶ 851 (emphasis added). In other words, Garnick had no idea whether the companies would want to commence the enhanced services right away or not. [redacted]

At bottom, Complaint Counsel's "common motive" theory is nothing but lawyers' speculation, unsupported by any evidence adduced at trial. By contrast, as discussed in Respondents' opening brief, there is overwhelming record evidence that Altria discontinued its existing e-vapor products for independent business reasons, including FDA's September 2018 letter and well-documented concerns regarding the products' lack of commercial viability and inability to obtain regulatory approval. *See* Resps. Opening Br. 79-88.

d. Discontinuing Nu Mark was not against Altria's economic interest.

Just as there was no common motive to discontinue Altria's e-vapor products prior to the transaction, Complaint Counsel cannot bolster its agreement case by pointing to Altria's own economic motives. Complaint Counsel argues that "Altria's discontinuation of its e-cigarette business was against its economic interest" and "economically irrational" because Altria was publicly committed to the e-vapor category and "would never have exited e-cigarettes in the absence of the JLI transaction." CC Opening Br. 47-48. This, Complaint Counsel says, is "plus-factor evidence that supports a finding of conspiracy." CC Opening Br. 47.

As an initial matter, Respondents dispute that "plus-factor" evidence, which is relied on in cases involving parallel conduct by rivals in an oligopolistic market, has any application to a case like this involving parties that negotiated a complex, multibillion-dollar investment.[101]

In any event, Complaint Counsel's factual premise is wrong: Altria did not walk away from the e-vapor category when it discontinued its remaining MarkTen cig-a-like flavors in early December 2018. Rather, as Gifford explained at trial, Altria discontinued Nu Mark—which Complaint Counsel concedes had been deeply unprofitable[102]—in favor of funding the Growth Teams that it had established in early October 2018 to develop next-generation products on a 5 to 10 year timeline.[103] Complaint Counsel does not even *acknowledge* the Growth Teams in its

[101] RRCoL ¶ 25.

[102] *See, e.g.*, CCFF ¶ 1077.

[103] RFF ¶¶ 898-916, 1074-75, 1090.

briefing, even though Altria's commitment to them demonstrates why Complaint Counsel's claim is simply not true: Altria moved to Growth Teams but understood that given the science involved and regulatory scheme, no commercial product would be available for years, even under the best of circumstances.[104] Complaint Counsel implicitly recognizes the point when it observes that Altria executives sometimes referred to a JLI deal as "Plan A" and Altria's internal efforts as "Plan B." CC Opening Br. 13. "Both plans," Complaint Counsel correctly notes, "clearly involved Altria participating in the closed-system e-cigarette market, either through JLI or on its own." *Id.* And Complaint Counsel further gives up the point when it asserts, in discussing the actual noncompete, that "Altria did, in fact, cease conducting any e-cigarette R&D following the Transaction." CC Opening Br. 71.

Complaint Counsel's reliance on third-party reactions to Altria's public announcement is misplaced for the same reason. For example, Complaint Counsel cites PMI's Martin King as testifying that it "would have been [] unusual for a major tobacco company . . . not to have some initiative or way to deal with the growth of e-cigarettes." CC Opening Br. 49. And it cites a Morgan Stanley analyst report that expressed surprise "to see [Altria] forgo this business altogether." *Id.* at 50. But as explained above, Altria *did* continue to have an e-vapor "initiative . . . to deal with the growth of e-cigarettes" and *was not* "forgo[ing] this business altogether."[105] Third parties' uninformed reaction to the December 7 announcement is of no evidentiary weight.[106]

Nor was the Nu Mark discontinuation against Altria's economic interest. Where the evidence reflects a company's "strategic planning as to whether and when to pursue particular

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[104] RFF ¶¶ 898-916, 1074-75, 1090.

[105] Complaint Counsel's citation of an ITG executive's testimony regarding the withdrawal of Elite is inapposite. *See* CC Opening Br. 49. As discussed above, *see* Section III.A.1.b, *supra,* Altria withdrew Elite months earlier in direct response to FDA's September 12, 2018 letter.

[106] Notably, one of the third-party analysts was more on point, observing that Nu Mark was a "failing business[]" and that "there is no point in throwing more money at products which are not as good as competitors[']." RRFF ¶ 1024.

business opportunities," both courts and the Commission are "unwilling to question such business judgment." *In re Baby Food Antitrust Litig.*, 166 F.3d at 127; *see also Williamson Oil Co.* v. *Philip Morris USA*, 346 F.3d 1287, 1310 (11th Cir. 2003) (courts "must exercise prudence in labeling a given action as being contrary to the actor's economic interests, lest [they] be too quick to second-guess well-intentioned business judgments of all kinds"); *In the Matter of B.A.T. Indus., Ltd.*, 1984 WL 565384, at *11 (F.T.C. Dec. 17, 1984) (the Commission should not "substitute[e] its business acumen for that of the acquiring firm" by second-guessing its profitability determinations).

As Gifford explained at trial, Altria discontinued its remaining MarkTen cig-a-like flavors in early December 2018 as part of its annual budgeting process in light of the products' poor financial outlook.[107] By that time, Nu Mark had lost hundreds of millions, and Altria was projecting at least another $235 million in losses for Nu Mark over the next three years with no hope of growing volume.[108] And as Willard, Gifford, and Jody Begley all testified, there was no reasonable path to long-term profitability with these products.[109] The products lacked nicotine salts (or, in the case of MarkTen Bold, lacked the right formulation), could not deliver nicotine satisfaction or convert smokers for that reason, and were generating high levels of formaldehyde compared to other e-vapor products.[110] And as is not disputed, Altria could not fix these problems under FDA's regulatory regime without obtaining FDA approval of new and improved products—which was the mandate *of the Growth Teams*, not Nu Mark.[111]

So as Gifford testified, Altria decided, "let's shut [Nu Mark] down, let's not lose additional money, and let's look at how [to] continue the growth teams."[112] *See In re Citric Acid*

[107] RFF ¶¶ 1074-90.

[108] RFF ¶¶ 1077-83.

[109] RFF ¶¶ 567, 900, 1082, 1090.

[110] RFF ¶¶ 1504-10.

[111] RFF ¶¶ 902-03, 1507.

[112] RFF ¶ 1090 (Gifford (Altria) Tr. 2841).

Litig., 191 F.3d 1090, 1100 (9th Cir. 1999) (rejecting claim that action was taken against economic interest where defendant "explicitly weigh[ed] the costs and benefits"); *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))).

That was a reasonable and sensible business judgment, with which Nu Mark executives like Quigley and Craig Schwartz agreed.[113] *See* Resps. Opening Br. 84-87. The antitrust laws do not require companies to keep unprofitable products on the market forever. And while Complaint Counsel seeks to arrogate that business judgment to itself, it is not competent to second-guess it. *See In re Baby Food Antitrust Litig.*, 166 F.3d at 127 (rejecting plaintiff's theory that defendant's "decision not to invest in [particular] markets" was evidence of Section 1 agreement because "such investment required substantial . . . resource commitments" and "[o]nly [defendant] was in a position to decide whether it was in its best interest to make such commitments").

e. Complaint Counsel misconstrues the January 2020 amendments to the transaction.

Finally, Complaint Counsel argues that the January 2020 amendments to Respondents' transaction, which revised the circumstances under which the noncompete would terminate, make clear that Altria "would never have exited this important market in the first place if not for its Transaction with JLI." CC Opening Br. 51. But this argument, like the one just discussed, relies on the same mischaracterization of Altria's discontinuation of its remaining cig-a-like products in December 2018.

As explained above, Altria did not turn its back on the e-vapor category in December 2018. It discontinued unprofitable cig-a-like products that had no path to profitability in favor of

[113] RFF ¶ 1098.

diverting finite resources to developing leapfrog products that it hoped to bring to market in 5 to 10 years with PMTA approval.[114] The choice was not between a JLI deal and "exiting" e-vapor by discontinuing Nu Mark, but between a JLI deal and starting over with the Growth Teams. For that reason, Complaint Counsel's claim that the January 2020 amendments support an inference that Altria would not have "exited" but for the deal collapses.

2. Complaint Counsel did not come close to proving that Altria discontinued its failing e-vapor products for pretextual reasons.

Complaint Counsel contends that the commercial and regulatory challenges facing Altria's e-vapor products, testified to by witness after witness at trial, were in fact pretextual. CC Opening Br. 51-58. To support that claim, Complaint Counsel was required to adduce evidence at trial 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). It did not do so. To the contrary, Complaint Counsel can make its bald claim only by glossing over critical points established at trial and otherwise disregarding the evidence. Although it is not Respondents' burden to prove as much, the record is clear that Altria withdrew its e-vapor products for *bona fide* and independent business reasons having nothing to do with a potential transaction with JLI.

a. Altria's commercial justifications for discontinuing Nu Mark in December 2018 were not pretextual.

Notwithstanding the fact that Nu Mark incurred more than $700 million in losses while it was in operation,[115] Complaint Counsel contends that "Altria's purported commercial challenges are pretextual." CC Opening Br. 51 (capitalization omitted). Complaint Counsel's primary argument in this regard is that Altria recognized that e-vapor was an important space and "was willing to sacrifice short-term profits in the category in order to gain long-term success," so

[114] RFF ¶¶ 900, 903, 905.

[115] RFF ¶¶ 1077-81.

Nu Mark's discontinuation must have been because of the deal. CC Opening Br. 52. There are two problems with that claim:

First, as discussed above, when Altria withdrew its e-vapor products, Altria *had* a plan to continue to try to "gain long-term success" in the e-vapor category: the Growth Teams, which Complaint Counsel again ignores.[116]

Second, and relatedly, Complaint Counsel does not and cannot contend that Altria's existing, unsatisfying products had a path to profitability or "long-term success," however defined. As demonstrated at trial, every year that Begley was CEO of Nu Mark, the point at which Nu Mark hoped that it would break even or make a profit was pushed out further—from 2017 to 2018 to 2019, until Altria finally realized profitability was not attainable with its existing products.[117] By early December 2018, Altria was projecting $235 million in additional losses for Nu Mark through 2021, even though the operating company had already been downsized.[118] And these losses were mirrored by declining market share: By September 2018, Nu Mark's unit share of the alleged market had declined to 7.5 percent—made up almost entirely of the declining cig-a-like product—far below projections in early 2018.[119] Complaint Counsel's

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[116] RFF ¶¶ 898-905, 962-70.

[117] RFF ¶¶ 1080-83. Complaint Counsel claims that "Nu Mark's financial performance was actually improving and Altria was meeting the strategic benchmarks it had set for itself." CC Opening Br. 52. Tellingly, Complaint Counsel cites no proposed findings for this incorrect contention. It notes elsewhere that Altria's e-vapor revenues [redacted], CC Opening Br. 10, but omits that Altria had *missed* volume projections and that this growth in absolute terms was attributable to cig-a-likes, which Altria correctly recognized was a rapidly declining segment. *See* RRFF ¶ 1097.

Likewise, Complaint Counsel cites no proposed finding for its assertion that "Nu Mark gave Altria a valuable toehold" in the category. CC Opening Br. 53. To the contrary, as Scott Myers testified at trial, retailers were not disappointed to see Altria discontinue Nu Mark's struggling products. RFF ¶¶ 1020-23, 1100.

[118] RFF ¶¶ 950-51, 962-66, 1083.

[119] RRFF ¶ 137; *see also* RFF ¶¶ 1688-93.

claim, based on a December 2017 document, that "even after JLI's entry, Altria still held the #3 position," is an empty one for that reason. CC Opening Br. 53 (citing CCFF ¶ 1738).

Complaint Counsel objects that other tobacco companies did not pull their existing products. CC Opening Br. 53. But Complaint Counsel ignores that the only e-vapor products with material share of its alleged market are pod products that have nicotine salts[120] and that competitors *have* pulled e-vapor products that failed to resonate.[121] In fact, PMI, which had commercialized MarkTen cig-a-like in a test market under a different brand name, *itself* pulled the product from distribution after it performed poorly.[122] [redacted]

Complaint Counsel's remaining suggestions of pretext with respect to the products' commercial challenges are easily dismissed. Complaint Counsel notes that Elite "was in the market less than nine months when Altria pulled it, having lasted a mere fraction of the more than 75 years Altria has taken developing its Marlboro brand." CC Opening Br. 52. This comparison is, of course, absurd. Complaint Counsel does not seriously contend that Elite, which never achieved more than a 1 percent cartridge share and which lacked nicotine salts, could ever have been a successful product as constituted.[124] According to Scott Myers, who was

[120] RFF ¶ 1332.

[121] RFF ¶ 251 (Farrell (NJOY) Tr. 353-54, 357-58 (describing the discontinuation of NJOY Loop and NJOY King, two cig-a-like products)); *see also* RFF ¶ 259 (describing ITG's discontinuation of a vapor product called Salt of the Earth after a "quick introduction").

[122] RFF ¶ 482.

[123] [redacted]

[124] RFF ¶¶ 478-80, 1514.

on the front lines of Elite's performance in retail, Elite was Altria's *worst-performing* product rollout in his decades of experience.[125] And as Willard testified, he had "enough time [by late September] to evaluate MarkTen Elite" and to determine that "[i]t was not successful"—not unlike Altria's experience with Marlboro Moist Smokeless Tobacco, which was only on the market for about a year before Altria pulled the plug.[126]

Complaint Counsel next suggests there was a place for Altria's unsatisfying products on the market, because the products would appeal to a "subset of consumers, particularly those who were seeking lower nicotine strength." CC Opening Br. 54. But the antitrust laws do not require a competitor to keep failed, money-losing products on the market merely because they had some sales and customers, however insignificant. And Complaint Counsel overlooks the conclusion of Altria's scientists that "[a]ll newly developed e-vapor products, ***regardless of nicotine content***" should utilize nicotine salt technology.[127] That was because, as Richard Jupe testified, products like Elite that lacked salts delivered "almost zero percent of [the] nicotine . . . into the lung[,] the way it would be delivered in a cigarette."[128]

Finally, in a strange turnabout from its claim that Altria did not give Elite enough time on the market, Complaint Counsel suggests that it is somehow "suspicious[]" that Altria did not act on its scientists' June 2018 findings earlier and did not discontinue any products until October 2018. CC Opening Br. 54. Inconsistent arguments aside, Complaint Counsel ignores that Altria was only at the beginning of its 100-day assessment in June 2018, that Altria removed Elite and nontraditional cig-a-like flavors in direct response to FDA's September 12, 2018 letter, and that

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[125] RFF ¶ 455.

[126] RFF ¶¶ 165, 940. Complaint Counsel misleadingly quotes Quigley as testifying that he "did not feel it made sense to walk away from the pod business." CC Opening Br. 52. Quigley was testifying regarding his "bridge" plan, explaining his mindset as of early August 2018. Complaint Counsel omits Quigley's testimony that he was "fully supportive of pulling Elite off the market" in response to FDA's September 12, 2018 letter. RFF ¶ 946.

[127] RRFF ¶ 1177 (emphasis added).

[128] RRFF ¶ 1177.

Altria removed its remaining cig-a-like flavors a few months later in connection with its annual budgeting process. *See* Section III.A.1.b, *supra*.

As explained above and in Respondents' opening brief, there can be no dispute that Nu Mark was a deeply money-losing enterprise for Altria. *See* Resps. Opening Br. 56-58, 84-86. As Willard, Gifford, Quigley, and Begley each testified, there was nothing pretextual about the profound commercial challenges it faced.[129] Complaint Counsel's conclusory suggestion that Altria, a public company that must answer to its stockholders, is overstating the importance of the loss of hundreds of millions of dollars with no end in sight betrays the weakness of its evidentiary case.

b. Altria's decision to remove Elite and nontraditional flavored cig-a-like products in response to FDA's call for action was not pretextual.

Complaint Counsel next claims that Altria's citation of youth-use concerns when withdrawing Elite and nontraditional cig-a-like flavors in response to FDA's September 12, 2018 letter was pretextual. CC Opening Br. 54-56. Its theory is that Altria could not have legitimately been concerned about youth use, as it explained it was in response to FDA's letter, while simultaneously pursuing an investment in JLI.

Complaint Counsel misses the distinction between the products that Altria discontinued and JUUL. As FDA recognized throughout 2018, the e-vapor category presented the promise of moving adult smokers down the continuum of risk from cigarettes to potentially less harmful products.[130] But at the same time, e-vapor products also presented the risk of attracting nontobacco users—and, most concerningly, youth.[131] As Willard explained when addressing precisely this issue in his testimony, Elite was not converting adult cigarette smokers, and,

[129] RFF ¶¶ 1077-84, 1090-98.

[130] RFF ¶¶ 528-36, 917-29.

[131] RFF ¶¶ 528-36, 917-29.

although it did not have a known youth-use issue, it therefore had no reason to remain on the market from a public-health perspective; JUUL, by contrast, was [redacted].[132] Moreover, it is up to FDA to determine whether JUUL is "appropriate for the protection of public health" considering JUUL's switching-capability versus its potential use by youth. And it was Altria's belief—which Complaint Counsel has not impugned with any evidence—that it could leverage its immense experience and expertise in youth tobacco prevention to partner with JLI in fighting youth use.[133] There was thus no contradiction between Altria's words and its actions.[134]

Moreover, Complaint Counsel ignores the high-stakes regulatory context in which Altria was responding to FDA. FDA's letter and associated press statement demanded that Altria take "prompt action" with a "forceful plan[]" to address what it labeled an "epidemic," threatened "regulatory consequences" and "criminal enforcement" if Altria failed to do so, and urged Altria to consider "[r]emoving flavored products from the market until those products [could] be reviewed by FDA."[135] Willard, who had previously served as Altria's senior vice president for youth smoking prevention, testified at length at trial regarding his sensitivity to FDA's concerns and his commitment to addressing the youth-use issue, which he recognized "was a real threat to the [tobacco] industry overall."[136] As Murillo explained, FDA's threat to revisit the continuum

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[132] [redacted]

[133] RFF ¶¶ 935, 1030-31.

[134] Complaint Counsel cites Commissioner Gottlieb's negative reaction to Altria's investment in JLI as evidence that Altria acted pretextually. CC Opening Br. 55. But Commissioner Gottlieb was not a witness in this case, and Complaint Counsel's reliance on his post-transaction statement is no substitute for the actual evidence of Altria's state of mind in making its decision as provided by numerous Altria witnesses and corroborated by contemporaneous documents.

[135] RFF ¶¶ 917-29, 998.

[136] RFF ¶¶ 934-35.

of risk—for which Altria had fought long and hard—would be of "potential catastrophic consequence" to the company.[137] And as Willard testified, if FDA was not satisfied with Altria's response, the consequences could spill over onto Altria's cigarette business.[138] Altria's incentives for taking significant steps to satisfy FDA are thus a matter of common sense—hardly the stuff of pretext. *See Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) (an antitrust analysis must "careful[ly] account" for "the pervasive federal and state regulation characteristic of [an] industry"); *Phonetele, Inc.* v. *Am. Tel. & Tel. Co.*, 664 F.2d 716, 737 (9th Cir. 1981), *modified* (9th Cir. Mar. 15, 1982) ("regulated . . . status is relevant" to antitrust analysis; "it is a fact of market life" (internal quotation marks omitted)).

In short, as Respondents demonstrated at trial and in their opening brief, there was nothing pretextual about Altria's decision to withdraw Elite and nontraditional cig-a-like flavors. Resps. Opening Br. 79-84. Complaint Counsel's claim that Altria actually was doing so to "satisfy JLI's terms," CC Opening Br. 56, is impossible to square with the record for numerous additional reasons:

First, as discussed above, JLI's proposal was that Altria's products *remain* on the market post-deal to be reviewed and addressed by the FTC. JLI did not want Altria to remove its pod product from the market in response to FDA's letter and had no notice of Altria's planned action.[139] As Garnick testified, he "was not sure [the parties] would still be talking" after Altria made its announcement.[140] Garnick's concern was well-founded: JLI was "shocked" by the announcement, did not welcome it, and viewed the letter as a "hostile action towards JUUL."[141] *See Rickards* v. *Canine Eye Registration Found., Inc.*, 704 F.2d 1449, 1453 (9th Cir. 1983) (no

[137] RFF ¶ 937.

[138] RFF ¶ 953.

[139] RFF ¶ 1016.

[140] RFF ¶ 1019.

[141] RFF ¶¶ 1013, 1016.

Section 1 violation where members of the alleged conspiracy "voiced their disapproval" of other alleged co-conspirator's conduct). When JLI was willing to continue negotiating with Altria notwithstanding its frustration, Altria was relieved. As Garnick wrote after Altria made its announcement, with pleasant surprise, "[t]he [JLI] folks are still talking to us even in light of the announcement we made today."[142] *See* Resps. Opening Br. 54-55, 70-74, 83.

Second, as discussed above, and as contemporaneous documents reflect, Altria had determined by September 26, 2018—at a time when the deal discussions were off—that it would withdraw Elite from the market.[143] *See* Resps. Opening Br. 46-49, 83.

Third, JLI undertook a similarly significant action in response to FDA's letter, announcing that it would cease selling its flavored products in retail stores.[144] At the time, flavors comprised roughly 50 percent of JLI's revenue.[145] That JLI independently undertook a similar course of action to Altria, at great cost to its business, flies in the face of Complaint Counsel's contention that Altria was acting pretextually in responding to FDA. *See* Resps. Opening Br. 55-56, 81.

Fourth, Complaint Counsel cannot explain why, if FDA's scrutiny were merely a "convenient alternative justification for actions Altria had already planned to take in order to

[142] RFF ¶ 1019.

[143] RFF ¶¶ 878-97, 938-49. [redacted]

[144] RFF ¶¶ 1032-38.

[145] RFF ¶¶ 1036-37.

satisfy JLI's terms," CC Opening Br. 56, Altria did not seize the opportunity to discontinue its traditional-flavored cig-a-like products at the same time. *See* Resps. Opening Br. 87.

Fifth, and finally, Complaint Counsel ignores that Elite's own commercial and regulatory challenges also figured meaningfully in Altria's decision-making in response to FDA's September letter.[146] Altria had been considering for some time whether to discontinue Elite in light of its challenges, and it is hardly surprising that FDA's concerns served as the tipping point.[147] *See* Resps. Opening Br. 48-49, 81-84.

c. Altria's regulatory justifications for removing its products were not pretextual.

Complaint Counsel also argues that Altria's concerns that its products would not obtain PMTA approval were pretextual and inconsistent with the evidence. *See* CC Opening Br. 56-58. Complaint Counsel maintains this position as if the trial never occurred. Complaint Counsel fails to grapple with the unrebutted fact that it was the consensus of Altria's *scientists*—whose integrity Complaint Counsel has never impugned and who had no involvement with the JLI deal—that Nu Mark's products would not be able to obtain PMTA approval from FDA.[148] As one Altria scientist bluntly informed Garnick in a June 2018 email, "*no one thinks we can get a PMTA on current Mark Ten product*."[149] The reasons for that conclusion were straightforward: among other things, the products lacked nicotine salts, a prerequisite for converting adult tobacco smokers, and lacked dry-puff prevention (meaning that they generated higher levels of formaldehyde compared to other e-vapor products)—problems that Altria's scientists only came

[146] RFF ¶¶ 938-51.

[147] RFF ¶¶ 852-53.

[148] RFF ¶¶ 676-99, 1501-31. As Murillo testified, the "appropriate for the protection of the public health" standard that must be met under the Tobacco Control Act to warrant PMTA approval is unique to tobacco products. RFF ¶ 74. For pharmaceuticals, the standard is "safe and effective." RFF ¶¶ 73-74. But "tobacco products are not inherently and cannot be safe and effective, so a different standard had to be devised." RFF ¶ 74.

[149] RFF ¶ 698 (emphasis added).

to appreciate fully in 2018.[150] It is undisputed that Altria could not modify its products to address these problems without PMTA approval.[151]

Rather than accept the import of this evidence, Complaint Counsel steps into the shoes of FDA and suggests that Altria's scientists were wrong to reach the conclusion that Nu Mark's products could not obtain PMTA approval. CC Opening Br. 57. According to Complaint Counsel, Respondents are "myopically focus[ed] on the MarkTen products' ability to convert smokers" and insufficiently attentive to the fact that Altria's products were not associated with youth use. *Id.* Complaint Counsel called no expert on this issue and thus has no basis for this contention. Regardless, Complaint Counsel's effort to speak for FDA is blatantly improper: as Congress specified in enacting the Tobacco Control Act, only FDA, and specifically *not* the FTC, "possesses the scientific expertise needed to implement" the Act.[152]

Complaint Counsel also, once again, misses the point. Whatever Complaint Counsel may think about how FDA should do its job in reviewing PMTAs, the relevant question is whether *Altria* believed its on-market products could obtain FDA approval. And on that score, there is no genuine dispute: it did not.[153] As for Complaint Counsel's half-hearted suggestion that the Court should question whether Altria's products could convert smokers because Altria supposedly did not "test" conversion potential, CC Opening Br. 57, Complaint Counsel ignores

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[150] RFF ¶¶ 351-67, 486-527, 614-51. In the case of MarkTen Bold, the product had nicotine salts, but the wrong formulation. RFF ¶¶ 638-51. It was "100 times less acidic" than JUUL and some 60 percent of its nicotine was "not getting to the lung" where it could be absorbed and deliver satisfaction. RFF ¶¶ 641-43.

[151] RFF ¶¶ 492-509, 692. Complaint Counsel's observation that Altria was attempting to design products that cured these issues, like Elite 2.0, is thus a red herring. CC Opening Br. 56-57. Complaint Counsel's claim is that Altria's regulatory justifications for discontinuing its *existing* products were pretextual. Elite 2.0 was a concept, not an existing product, and Complaint Counsel does not dispute that Elite 2.0, whatever form it may have taken (if any) in a counterfactual world, would require FDA approval. RFF ¶¶ 1597-1603; CCFF ¶¶ 1281-1300.

[152] Pub. L. No. 111–31, § 2(45), 123 Stat. 1776, 1781 (2009).

[153] RFF ¶¶ 693-700, 711-22, 743, 861.

the products' dismal sales performance, the testimony of *15* Altria witnesses who testified that the products lacked conversion potential, and the determination of Altria's scientists in June 2018 that nicotine salts were "*required*" to drive conversion.[154]

Complaint Counsel next trots out the argument that Respondents are overstating the constraints imposed by FDA's regulatory scheme, because Altria implemented a new gasket to address Elite's leaking issue. CC Opening Br. 57. Once again, this is just lawyer speculation without any expert evidence in support. Regardless, there is no dispute that Altria could not make the changes to its existing products that were critical to conversion and PMTA approval: incorporating nicotine salts and adding dry-puff prevention to address the formaldehyde problem.[155]

Finally, Complaint Counsel claims that these "regulatory hurdles were not unique to Altria," citing nothing other than the mere fact that all manufacturers are subject to FDA regulation. CC Opening Br. 57. Complaint Counsel has pointed to no other successful competitor that has marketed or continues to market a product that lacks nicotine salts, fails to convert adult smokers, or lacks dry-puff prevention. More generally, Complaint Counsel's cavalier treatment of these regulatory issues highlights a significant flaw in its case: the regulatory scheme here was crucial, and any credible and creditable attempt to assess Respondents' actions, and their competitive effect, must take it into account. Complaint Counsel repeatedly fails to do so. *See* Resps. Opening Br. 108-21.

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[154] RFF ¶ 622 (emphasis added); *see also* RFF ¶¶ 431-59, 603 (dismal sales), RFF ¶ 743 (conversion potential), RFF ¶¶ 614-27 (nicotine salts required for conversion).

[155] RFF ¶¶ 1512-16. Complaint Counsel absurdly claims that because certain witnesses recalled in good faith that the gasket was never implemented [redacted], RFF ¶¶ 669-73, Altria has been "dishonest[]" about a "material fact," which the Court should take as "affirmative evidence of guilt," CC Opening Br. 57 n.16. The claim makes no sense: as the record makes clear, the gasket was implemented because Willard's decision was not communicated to Nu Mark's operations team. RRFF ¶ 1224. And as soon as Altria realized that the gasket had in fact been implemented, it notified Complaint Counsel. RRFF ¶ 1224. Complaint Counsel's desperate bid for an adverse inference shines a spotlight on the weakness of its merits case.

* * *

The record at trial was unequivocal: Altria withdrew its e-vapor products for independent business reasons having nothing to do with JLI. There is no evidence that Altria's focus on the commercial and regulatory challenges plaguing the products was in any way pretextual. To the contrary, these concerns were shared across the organization: From the C-suite to the company's laboratories, Altria's senior executives and longtime scientists all concluded that Altria's products were not converting smokers and could not obtain FDA approval. At minimum, Complaint Counsel has not met its burden to adduce evidence that "tend[s] to rule out the possibility that [Altria was] acting independently." *Twombly*, 550 U.S. at 554 (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 588).

B. Complaint Counsel failed to prove substantial anticompetitive effects at trial and therefore failed to meet its burden under the rule of reason.

Complaint Counsel acknowledges that its Section 1 claim is subject to the rule of reason. Compl. ¶ 79; Tr. 64.[156] As the Supreme Court made clear in *Ohio* v. *American Express*, under the rule of reason, Complaint Counsel must prove "the challenged restraint has a *substantial anticompetitive effect* that harms consumers in the relevant market." 138 S. Ct. 2274, 2284 (2018) (emphasis added). This is "no slight burden," and "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." *NCAA* v. *Alston*, 141 S. Ct. 2141, 2160-61 (2021) (citing amicus brief with approval).

Complaint Counsel's effects case reduces to the claim that Altria, as the "largest tobacco company in the U.S. with access to tremendous resources and relationships," should be precluded from joining forces with JLI, despite Altria's commercially unviable products, despite

[156] Respondents' discussion of effects cuts across both Complaint Counsel's Section 1 claim and Section 7 claim. Respondents discuss effects here, and then again in the Section 7 discussion, in compliance with the Court's post-trial order to address Complaint Counsel's arguments in the order it makes them.

the regulatory scheme, and despite its historic challenges in e-vapor. CC Opening Br. 62. But notwithstanding Complaint Counsel's misleading nod to the language of *per se* cases (*e.g.*, describing noncompetes as the "*bête noir[e]*" of antitrust law, CC Opening Br. 59), this is concededly not a *per se* case, and Complaint Counsel's intuition that Altria should be forced to go it alone is not supported by the antitrust laws.[157] For purposes of its Section 1 claim, Complaint Counsel must point to actual evidence of anticompetitive effects. *See Alston*, 141 S. Ct. at 2144 (Section 1 requires courts "to assess a challenged restraint's *actual effect on competition*" (internal quotation marks omitted; emphasis added)). And whether considering the competitiveness of Altria's existing products, Altria's potential to compete in the future, or any potential collaboration with PMI, Complaint Counsel has failed to do so.

1. Complaint Counsel failed to meet its burden of proving substantial anticompetitive effects.

Complaint Counsel's effects case is premised on Complaint Counsel's gut sense that consumers of e-vapor products would benefit more from Altria's independent presence in the market than through Altria's partnership with JLI. *See, e.g.*, CC Opening Br. 60 ("Altria had every incentive and ability to compete and, without the Transaction, Altria would have continued to be a significant competitive constraint in the closed-system e-cigarette market."). But Complaint Counsel fails to grapple with the mountain of evidence demonstrating that Altria's on-market offerings were not competitive constraints. As for any hypothetical future products,

[157] Complaint Counsel drops a footnote suggesting, without actually arguing, that the conduct it alleges "may well amount to a *per se* violation of Section 1." CC Opening Br. 58 n.17. Complaint Counsel did not plead that and has never argued it, presumably because it recognizes that it is not actually challenging a market allocation agreement but rather an ancillary term in an integrated agreement designed to promote the provision of procompetitive services. To the extent Complaint Counsel's footnote could be construed as an invitation to review the challenged restraint under anything other than the rule of reason theory on which this case has been exclusively litigated, the claim is waived, and the Court should ignore it. *See, e.g.*, *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 7 n.2 (2006) (declining to review Section 1 claim under rule of reason because plaintiffs had pled a *per se* theory); *United States* v. *eBay, Inc.*, 968 F. Supp. 2d 1030, 1037-38 (N.D. Cal. 2013).

Complaint Counsel ignores that FDA's regulatory scheme prevented Altria from bringing any such products to market absent navigating the arduous PMTA pathway. And Complaint Counsel ignores the overwhelming evidence that competition has *intensified* since the transaction.

a. Complaint Counsel cannot meet its burden on effects because it failed to define a relevant product market.

As discussed above, *see* Section II, *supra*, Complaint Counsel has not met its burden to define a relevant product market, and its claims should be dismissed for that reason. Complaint Counsel cites a case for the proposition that where a plaintiff can show actual anticompetitive effects, a "full-blown market analysis is not necessary." CC Opening Br. 60. But that principle traces to *Indiana Federation of Dentists,* which applied quick-look review.[158] Again, as much as Complaint Counsel might wish it could forgo its various burdens as the antitrust plaintiff in this case, it is expressly proceeding under the rule of reason framework. *See* Compl. ¶ 79; Tr. 64; CC Opening Br. 58 n.17. And in a rule of reason case, "[w]ithout 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). That is the case here. And in any event, as set out below, Complaint Counsel cannot show actual anticompetitive effects.

b. Complaint Counsel ignores the overwhelming record evidence that MarkTen and Elite were not competitive.

Complaint Counsel contends that "Altria's exit eliminated beneficial present . . . competition" and that its on-market products were "significant competitive constraint[s] in the closed-system e-cigarette market." CC Opening Br. 60. But asserting it does not make it so, and the trial record proves otherwise. With respect to MarkTen cig-a-like, by 2018, Altria leadership understood that its cig-a-like products were not converting smokers, could not compete with pod

[158] RRCoL ¶ 64.

products, and were declining at an astonishingly rapid rate as a product category.[159] Nu Mark's share (most of which derived from cig-a-likes, assuming Complaint Counsel's market definition) was in free fall in response to the rise of pods. By September 2018, 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.[160] By November 2018, as measured by dollars, Altria's share had fallen even lower to 4.7 percent.[161] As the Court noted when presented with Complaint Counsel's own slide illustrating this data, "[Altria was] [h]ardly a strong competitor." Tr. 54.

JLI's Joseph O'Hara summed up the problem: the MarkTen cig-a-likes "were not viable . . . . They didn't have nicotine salts, they didn't satisfy nicotine cravings, and they were cigalikes."[162] JLI thus "really didn't look at . . . cigalike products as a product category that [it was] competing against,"[163] and never altered its pricing in response to MarkTen cig-a-like products.[164] But to the extent the company had a view on Altria's cig-a-likes, it was that MarkTen Bold, Altria's only product with any nicotine salts, was a "terrible product" that Altria "didn't get [] right."[165]

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[159] RFF ¶¶ 1504-11. As discussed further at Section IV.A, *infra*, the discontinuation of Altria's on-market e-vapor products is not properly part of the effects analysis under Section 1 or Section 7. Altria removed those products for independent business reasons, and they would be off the market regardless of any deal or prospective deal with JLI. For that reason, their removal was not an "effect" of the transaction, nor the product of any associated agreement, and their performance on the market does not bear on the effects analysis (except insofar as it demonstrates that Altria was facing long odds to ever succeed in the e-vapor space). For the sake of being responsive to Complaint Counsel's theory, however, Respondents address the competitiveness of MarkTen and Elite below.

[160] RFF ¶¶ 1440-41; *see also* RFF ¶¶ 1324-26.

[161] RFF ¶¶ 1442-43; *see also* RFF ¶ 1081.

[162] RFF ¶ 760 (O'Hara (JLI) Tr. 630).

[163] RFF ¶ 1412.

[164] RFF ¶ 1644.

[165] RFF ¶ 744.

Other competitors concurred. As Reynolds' Wade Huckabee confirmed at trial, Reynolds viewed both MarkTen and Elite as "inferior."[166] PMI's Martin King likewise explained that after PMI commercialized MarkTen cig-a-like in an international test market, it discontinued it based on its poor performance.[167] And as Dr. Bill Gardner explained at trial, because MarkTen was not converting smokers and was generating formaldehyde, a carcinogen, the consensus of Altria's scientists was that it would not obtain PMTA approval—meaning that there was a near-term cap on how long Altria could keep the products on the market.[168]

Elite, whose prospects Complaint Counsel discusses solely with reference to documents predating its disastrous rollout, was an even starker failure. *See* CC Opening Br. 62. JLI knew it, retailers knew it, and other competitors knew it. Immediately after Elite launched, one of JLI's founders determined it was "not a threat": because Elite had no nicotine salts, it was "an absolute nonstarter" from JLI's perspective.[169] *See* HMG § 5.2 (explaining that unavailability of "new technology that is important to long-term competitive viability" of firm affects "future competitive significance" of that firm). Not surprisingly, then, JLI *never* adjusted its pricing or promotions in response to Elite.[170] Reynolds likewise viewed Elite as "inferior": When Altria withdrew the product, Reynolds' CEO observed in an internal email that it was a "relatively easy call for Altria because they have never had that much success in vapour."[171] As Myers detailed at trial, Altria was forced to implement increasingly desperate promotional measures in hopes

[166] RFF ¶ 483; RRFF ¶ 1018.

[167] RFF ¶ 482.

[168] RFF ¶¶ 499, 599-613, 698-99, 1510. The same was true of Elite. RFF ¶¶ 1512-16.

[169] RFF ¶ 480.

[170] RFF ¶¶ 1641-44.

[171] RFF ¶ 483; RRFF ¶ 1018.

that the Elite product would catch on, offering store clerks substantial bonuses for selling the product, assuaging frustrated retailers, and even "giving the device away for free."[172]

But none of these efforts worked: As Sheetz's Paul Crozier testified, Elite had not "res[o]nate[d]" with consumers and had not made "any dent in JUUL's share."[173] In fact, as noted above, Elite would never obtain more than a 1 percent share of e-vapor cartridge unit sales.[174] O'Hara made the point bluntly in a July 2018 email: Elite's "US sales ha[d] been absolutely terrible, no traction whatsoever."[175] PMI concurred, [redacted]. Cognizant that Elite was neither "achieving success in the marketplace" nor "converting adult smokers,"[176] [redacted].[177]

Elite was an abject failure—the worst-performing product rollout for Altria in decades according to Myers—and Complaint Counsel has not pointed and cannot point to any evidence to the contrary.[178]

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[172] RFF ¶¶ 422-59; *see also* ¶ 755 (citing RX1461 (JLI) at 001-02 (describing retailers "getting fed-up holding space [for MarkTen] on the back-bar," given that MarkTen was "dead")). As O'Hara observed, Elite was "shockingly cheap." CCFF ¶ 1433.

[173] RFF ¶ 1021.

[174] RFF ¶ 442.

[175] RFF ¶ 443. Complaint Counsel notes that Willard observed on an earnings call in July 2018 that Elite was "getting traction" with consumers. As Willard testified at trial, he meant that "at least this first phase of getting [products] distributed in stores and getting consumers to try them had been successful," RRFF ¶ 1113—though, as Myers and [redacted] explained, consumers were not returning for the product after trying it, RFF ¶¶ 433-38, 453-54.

[176] RFF ¶ 481 (PX7020 King (PMI) Dep. at 169, 226).

[177] [redacted]

[178] RFF ¶ 455. As Complaint Counsel observes, Altria was also selling PMI's Apex product in limited quantities in e-commerce, until it discontinued the product in October 2018 in response to FDA's September 12, 2018 letter. CC Opening Br. 64; RFF ¶ 1518. But the notion that Apex was a commercially viable product was rebutted at trial by PMI itself. As PMI's Martin King testified, Apex was "test" technology, placed on the market with the intent to "move to the next generation as soon as possible." RFF ¶ 1523. The product had a "[c]lunky," "baton"-like shape and lacked nicotine salts. RFF ¶¶ 1520, 1522. As King explained, PMI "never intended [for

c. Complaint Counsel failed to show any harm to price, shelf space, or innovation competition deriving from the discontinuation of MarkTen and Elite.

Complaint Counsel asserts that Respondents' agreement resulted in the "complete elimination" of price, shelf space, and innovation competition between Altria and JLI. CC Opening Br. 59-65. Given the presence of a noncompete in the parties' actual agreement and the fact that Altria was off the market by the time the parties entered into the transaction, that is a truism. But in a rule of reason case, Complaint Counsel must demonstrate substantial anticompetitive effects along these dimensions to shift the burden to Altria. This it cannot do. Nu Mark put no pricing pressure on JLI. Nu Mark was not fostering shelf-space competition. And there is no evidence that any of Altria's activities in e-vapor spurred JLI (or any other market participant) to innovate.

Price Competition (CC Opening Br. 60-61): JLI *never* changed its prices in response to MarkTen or MarkTen Elite.[179] As Sheetz's Crozier observed, and as JLI's Bob Robbins confirmed, JLI just ran its "normal" seasonal promotion after Altria launched Elite, which had been pre-planned roughly six months earlier.[180] And as Robbins likewise testified, when Altria discontinued Elite in October 2018 and then its remaining cig-a-like products in December 2018, JLI did not react on price at all.[181] The absence of any competitive reaction from JLI is not surprising. As O'Hara explained at trial, Nu Mark was not "a competitive entity in the market," and "[i]t was not meaningful at all . . . to [JLI's] competitive stake" when Altria shut it down.[182]

Apex] to be successful on its own" and "never really had any idea or plan that it would be anything other than a limited test." RFF ¶ 1523.

[179] RFF ¶¶ 1639-46.

[180] RFF ¶¶ 1641-42. Complaint Counsel's expert conceded during his trial deposition that he did not analyze whether JLI altered its price in response to the introduction or removal of Elite. RFF ¶ 1639. Professor Murphy did, however, concluding—consistent with the testimony of each of the relevant fact witnesses—that Altria did not constrain JLI's pricing. RFF ¶¶ 1640, 1646.

[181] RFF ¶ 1643.

[182] RFF ¶ 1102.

Complaint Counsel cites just one piece of documentary evidence in its brief in support of its claim that JLI reacted to Nu Mark's products on price: [redacted] Complaint Counsel chose not to call any ITG executive at trial to offer testimony as to this document's provenance or basis. As such, the document is owed no evidentiary weight. And in any event, the document was wrong and is uncorroborated by any other evidence in the record. As noted above, JLI *never* reacted to MarkTen or Elite on price.[183]

Shelf-Space Competition (CC Opening Br. 61): To the extent Complaint Counsel is suggesting consumers were harmed by diminished shelf-space competition, it has never bothered to explain why or how a retail consumer (as opposed to a retailer) would benefit from Altria competing with other distributors for shelf space.[184] Complaint Counsel contends that JLI was concerned about Altria's ability to invest in premium shelf space and the effect it would have on JLI's ability to stay on the shelf. CC Opening Br. 61. But that is hardly evidence that Altria's ability to acquire shelf space for its inferior products benefitted e-vapor consumers.

If anything, the evidence shows the opposite: After MarkTen left the shelves, the average number of e-vapor products in the top 20 retailers *increased* from 3.0 to 3.8.[185] Sheetz, in particular, added at least three new e-vapor products to its shelves in the wake of Altria's departure, including NJOY's Ace, ITG's *my*blu, and EAS's Leap.[186] [redacted]

[183] RFF ¶ 1644.

[184] Nor has Complaint Counsel ever articulated its shelf-space theory by reference to harm to retailers.

[185] RFF ¶ 1364.

[186] RFF ¶ 1365.

[redacted][187]

Innovation Competition (CC Opening Br. 62): As for innovation competition, Complaint Counsel states the obvious: Altria was trying to come up with a product that could compete with JLI. But it omits the salient point and the one that matters for purposes of assessing competitive effects: Altria failed.[188] Notwithstanding Complaint Counsel's laughable suggestion that Altria was a "behemoth innovator" in e-vapor, CC Opening Br. 67, there is no evidence that any of Altria's e-vapor products, none of which were developed in-house, were a competitive constraint on JLI.[189] Indeed, notwithstanding billions in investments and decades of efforts, there is no evidence that Altria has ever been able to develop a successful innovative tobacco product.[190]

In its brief, Complaint Counsel offers only two other pieces of evidence of supposed head-to-head innovation competition between Altria and JLI:

First, Complaint Counsel claims that Altria and JLI "competed by offering different nicotine strengths in response to consumer preferences," observing that Robbins advised JLI's CEO at the time, Kevin Burns, that "[a]ll viable competitors . . . offer variable Nicotine Strengths . . . We should too." CC Opening Br. 62. But Complaint Counsel declined to ask Robbins or Burns about this document at trial, and there is no evidence that Robbins was referring to Altria, whose e-vapor products JLI regarded as "terrible" and "nonstarter[s]."[191] Moreover, Robbins' reference to "all" viable competitors shows that differentiation on nicotine strength, even if that

[187] [redacted]

[188] RFF ¶¶ 431-85.

[189] RFF ¶¶ 193, 431-85, 1501-16.

[190] RFF ¶¶ 140-73.

[191] RRFF ¶¶ 1433, 1474, 1476, 1836. Moreover, the evidence shows that, regardless of nicotine strength, nicotine salts were necessary to achieve the nicotine satisfaction needed to convert smokers. RRFF ¶¶ 1177, 1472.

could be considered innovation, was widespread in the market (however, defined) and certainly not a unique feature of any Nu Mark e-vapor product.

Second, Complaint Counsel claims that "after Altria introduced a magnetic pod insertion in its MarkTen Elite, JLI explored magnetic pods for its next generation JUUL devices." CC Opening Br. 62. But the sole document Complaint Counsel cites for this assertion, which was never shown to a JLI witness, dates to January 2018, *before* Altria launched Elite.[192] And the cited page (PX2012-024), says nothing about Elite and virtually nothing about a magnetic pod connection. In fact, nowhere does the presentation even observe that Elite employed a magnetic pod mechanism. Complaint Counsel's puzzling characterization of this document is a prime illustration of Complaint Counsel's cavalier treatment of a record that simply does not support the claim that the transaction harmed competition, let alone substantially.

In fact, the record reflects the opposite of what Complaint Counsel contends: innovation not only continued, but also increased following the transaction. [redacted][193]

d. Complaint Counsel ignores the real-world evidence that competition intensified following the investment, gutting its claim of anticompetitive effects.

"[P]roving an adverse effect on competition without showing increased price, reduced output, or reduced quality in the market has remained possible in theory but elusive in practice." *MacDermid Printing Sols. LLC* v. *Cortron Corp.*, 833 F.3d 172, 184 (2d Cir. 2016). While it prefers to ignore it, Complaint Counsel does not dispute that the post-transaction evidence of robust and intensifying competition is properly before the Court on both its Section 1 and

[192] RRFF ¶ 1481.

[193] [redacted]

Section 7 claims, nor could it. *See* Resps. Opening Br. 90-91; CC Opening Br. 82; *see also* Section IV.D.1, *infra*. Respondents extensively briefed this evidence in their opening brief. *See* Resps. Opening Br. 63-67, 90-96. And because Complaint Counsel does not deal with the post-transaction evidence, Respondents will not dwell on it here other than to highlight a few salient points that readily rebut Complaint Counsel's case on effects:

- ***Price***: Pod-based devices saw their prices *fall* from about $27 in September 2018 to around $8 in September 2020, driven by a wave of deep discounting among competitors to $0.99.[194] And the price of pod cartridges likewise fell by over 15 percent during the same period.[195] Amidst this "price war," JLI began aggressively discounting in direct response to discounting by Reynolds and NJOY, something it had never done in reaction to Altria's promotional activities.[196]
- ***Output***: Following the transaction, pod-based device sales increased by more than 20 percent and cartridge sales increased by more than 30 percent.[197] Indeed, other competitors "were able to expand [] sales . . . dramatically, 31 times what would be required to offset the loss of Elite in this case."[198]
- ***Market shares and concentration***: JLI's market share plummeted following the transaction as a result of Reynolds' and NJOY's introduction of competitive offerings with nicotine salts. As of September 2020, Reynolds' Vuse Alto had displaced JUUL as the leader in device share, with a 60 percent share.[199] JLI has correspondingly lost some 40 points of device share and 20 points of cartridge share, and has been forced to lay off roughly 70 to 75 percent of its workforce due to the impact on its revenues and margins.[200]

The bottom line is that, on any quantifiable measure of the real-world evidence, Complaint Counsel has not and cannot show anticompetitive effects, let alone "substantial anticompetitive effect[s]." *Am. Express*, 138 S. Ct. at 2284. This evidence should be dispositive, particularly given that Complaint Counsel does not—and could not—contend in its brief that this

[194] RFF ¶¶ 1347, 1350-51.

[195] RFF ¶ 1349.

[196] RFF ¶ 1311; *see also* RFF ¶¶ 1297, 1312.

[197] RFF ¶ 1356.

[198] RFF ¶ 1360.

[199] RFF ¶ 1371.

[200] RFF ¶¶ 1313, 1372, 1374.

post-transaction evidence is the product of manipulation to avoid antitrust scrutiny. *See Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 276-77 (7th Cir. 1981) (post-acquisition evidence of "dramatically declin[ing]" market share was highly probative because it could not "arguably have been subject to the defendant's deliberate manipulation, nor [was] it likely that the market was less competitive after the acquisition than it would have [] otherwise [been]").

e. Complaint Counsel failed to show any harm from competition deriving from future potential products.

Unable to show any competitive effect from Altria's existing products, Complaint Counsel falls back on the claim that the transaction cut off future, potential competition from Altria, pointing both to internal efforts and a possible partnership with PMI. *See* CC Opening Br. 62-65.

With respect to internal efforts, the only specific effort Complaint Counsel cites in its Section 1 effects analysis is "Project Panama," which it claims was "intended to create a superior e-cigarette product to 'leapfrog everything that was already in the marketplace.'" CC Opening Br. 63. Complaint Counsel omits that Altria abandoned work on Project Panama in March 2018, long before the exchange of the first term sheet, frustrated with its inability to get the "heater to work properly."[201] Complaint Counsel also contends Altria was exploring "flavor sensates" and "Smart-Pod technology," CC Opening Br. 63, leaving out that the planning document it relies on merely reflected "technologies [Altria] would consider," along with Jupe's testimony that Altria was only "imagining" the possibility of smart pods.[202]

In any case, there is no dispute that, as witness after witness testified, any such product or technology would have taken years to develop, years of PMTA preparation, and years for FDA to decide whether to grant regulatory approval.[203] And there is also no dispute that there is

[201] RRFF ¶ 1569; RFF ¶¶ 1578-84.

[202] RRFF ¶¶ 1570, 1574.

[203] RFF ¶¶ 1545-52. The PMTA for the oral tobacco product Swedish Match, for example, was pending for four years before FDA approved it. RFF ¶ 125.

"substantial uncertainty surrounding the FDA's PMTA process and requirements," CC Opening Br. 66, and that it is "'difficult for anybody' to predict whether a PMTA submission[] will be successful," CC Opening Br. 91. *Verizon Commc'ns Inc.*, 540 U.S. at 411 (an antitrust analysis must "careful[ly] account" for "the pervasive federal and state regulation characteristic of [an] industry"). Given these concessions by Complaint Counsel, Complaint Counsel cannot seriously contend that the cessation of Altria's research and development efforts has caused "a substantial anticompetitive effect that harms consumers in the relevant market." *Am. Express*, 138 S. Ct. at 2284.

Tellingly, at trial, Complaint Counsel did not attempt to prove that Altria was likely to develop a successful product internally. It would have been hard-pressed to make that showing in the face of testimony from Willard, Quigley, Dr. Gardner, Jupe and others that Altria faced severe, institutional challenges with respect to e-vapor innovation and was not "structured appropriately" to develop innovative, electronic products.[204] Instead, Complaint Counsel pinned its hopes at trial on attempting to persuade the Court that Altria could and would have commercialized PMI's VEEV product. CC Opening Br. 63-65. It failed.

As an initial matter, Complaint Counsel has never offered a coherent explanation for why the antitrust laws would prohibit Altria's investment in JLI in favor of requiring it to partner with a *different* (better-resourced) third-party competitor—particularly when, as PMI America's Martin King told the Court, PMI is committed to commercializing VEEV in the United States on its own, assuming PMTA approval.[205] It is well settled that "[t]he antitrust laws are not meant to realign competitors to assist certain competitors over others." *USAirways Grp., Inc.* v. *Brit. Airways PLC*, 989 F. Supp. 482, 489 (S.D.N.Y. 1997). Rather, "[a]ntitrust laws are designed to protect *competition*, not competitors." *Adaptive Power Sols., LLC* v. *Hughes Missile Sys. Co.*,

[204] RFF ¶ 715; *see also* RFF ¶¶ 184-91, 848, 1563-65.

[205] RFF ¶ 1632. As explained below, Altria could not simply commercialize VEEV. [redacted]

141 F.3d 947, 951 (9th Cir. 1998) (emphasis added). Yet "realign[ing] competitors to assist certain [ones] over others" is exactly what Complaint Counsel seeks to do here. *USAirways Grp., Inc.*, 989 F. Supp. at 489.

Taking Complaint Counsel's PMI theory at face value, it suffers from the same defects as Complaint Counsel's speculation about Altria's internal efforts. Just like any other product that was not on the market as of August 8, 2016, VEEV must obtain PMTA approval before it can be marketed in the United States. [redacted]

Nothing more need be shown to defeat the claim that the foreclosure of a potential partnership with PMI on VEEV renders Respondents' transaction anticompetitive. But for the

206 [redacted]
207 [redacted]
208 [redacted]
209 [redacted]
210 [redacted]

sake of completeness, it is likewise highly speculative to assume that, but for the JLI investment, Altria would have commercialized VEEV in the event of FDA approval, as Complaint Counsel does. CC Opening Br. 65.

As King testified, Altria and PMI have been [redacted] and, under the JRDTA that governed the two companies' relationship, each "independently develop[ed] and execute[d] . . . plans that [were] specific to [each] party's territory."[211] The JRDTA expired in [redacted], and there is no basis in the record to assume Altria and PMI—two independent, often adversarial companies—would have extended it.[212] The collaboration had been troubled, Altria believed PMI was unlikely to renew the JRDTA, and King testified that "[i]t would have all depended on [a] further discussion and whether . . . it [made] sense."[213] And even if Altria and PMI had extended the JRDTA, [redacted].[214] Indeed, Altria had signed a separate distribution agreement with PMI in 2016 in connection with PMI's Apex product, [redacted].[215] [redacted]

Complaint Counsel's PMI-based theory thus requires piling inference upon inference—that PMI [redacted] and submit a PMTA for VEEV, that FDA will grant

[211] RRFF ¶ 1645.

[212] RRFF ¶¶ 518, 1646.

[213] RRFF ¶ 1646.

[214] [redacted]

[215] [redacted]

[216] [redacted]

VEEV PMTA approval, that such approval will be granted on a cognizable time frame, that PMI and Altria would have renewed the JRDTA, [redacted], and that VEEV would make a material difference to whatever the competitive landscape will be years down the road. The theory is impermissibly speculative as a matter of law and should be rejected. *Cf. BOC Int'l, Ltd.* v. *FTC*, 557 F.2d 24, 29 (2d Cir. 1977) (explaining there must be "some reasonable temporal estimate related to the near future" for potential entry to be relevant).[217] It also fails to show any anticompetitive effects. PMI remains free to pursue FDA authorization for the product and, if authorized, to sell VEEV in the United States. Whether it would do so in partnership with Altria or not is of no moment.

2. Any anticompetitive effects are outweighed by procompetitive effects.

Complaint Counsel analyzes procompetitive effects at pages 65 to 68 of its opening brief in discussing its secret-agreement theory and then repeats material elements of its analysis at pages 68 to 72 of its brief. Because the analysis of procompetitive effects and less restrictive alternatives overlaps as between Complaint Counsel's two Section 1 theories, Respondents address procompetitive benefits and the absence of equally viable less restrictive alternatives in Section III.C, *infra*, in the context of discussing the parties' actual agreement.

To be clear, for the reasons discussed in Section III.C, even if Complaint Counsel had proven its secret-agreement theory, any anticompetitive effects associated with the agreement would be outweighed by the deal's procompetitive effects.[218] Significantly, Complaint Counsel

[217] Complaint Counsel's naked claim that the noncompete "also eliminated the possibility of Altria collaborating with or acquiring other e-cigarette companies" fails for similar reasons. CC Opening Br. 65. The few opportunities Complaint Counsel musters in its proposed findings were neither concrete nor attractive. *See* RRFF ¶¶ 1717-30.

[218] Complaint Counsel's suggestion that the rule of reason framework contemplates a fourth step—a balancing of anticompetitive and procompetitive effects even if Complaint Counsel fails to demonstrate a less restrictive alternative—is incorrect. *See* RRCoL ¶ 60. When discussing the actual noncompete, Complaint Counsel does not contend that it is appropriate to engage in an

all but abandons Dr. Rothman's made-up predictions of harm, which, as Respondents detailed in their opening brief, were exposed during Dr. Rothman's trial deposition as outcome-oriented, premised on demonstrably incorrect assumptions about Altria's share and margins, and willfully blind to real-world market evidence.[219] *See* Resps. Opening Br. 121-27. Unwilling to stake its claim on Dr. Rothman's useless harm estimates, Complaint Counsel is left only to repeat its catchphrase that the agreement "resulted in the complete elimination of Altria" as an independent competitor. CC Opening Br. 67. In a rule of reason case, that is not enough.

C. Complaint Counsel failed to meet its burden of proving that the actual noncompete violates Section 1.

As a fallback, Complaint Counsel challenges the noncompete in the actual agreement, claiming that, "standing alone," it too fails to satisfy the rule of reason. CC Opening Br. 68-72. But the actual noncompete is perfectly ordinary and serves critical procompetitive purposes. Because Complaint Counsel does not come close to proffering an equally viable less restrictive alternative for achieving the procompetitive benefits of the deal, its challenge to the actual noncompete fails.

1. Complaint Counsel's claim that the actual noncompete is not ancillary to an otherwise lawful transaction is circular and illogical.

"[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."

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independent balancing of effects if it cannot proffer a viable less restrictive alternative. *See, e.g.*, CC Opening Br. 70-72. Nevertheless, whether the Court engages in a fourth step of balancing or not, the result is the same: Complaint Counsel has failed to meet its burden.

[219] Among other problems, 80 percent of the harm Dr. Rothman manufactured derived not from higher prices, but rather from the supposition that MarkTen and Elite consumers preferred those products to substitutes. Indeed, as Dr. Rothman acknowledged, under his model, consumers would be harmed *even if they switched to cheaper and more satisfying products*. RFF ¶ 1676. There is no basis for that assumption in the record or in economics. As Respondents explained in their opening brief, Dr. Rothman's assumption, on this record, is akin to assuming commuters are harmed when a new bus route operator replaces a blue bus with a red bus. Resps. Opening Br. 123-24. That is not a cognizable theory of harm under the antitrust laws.

Lektro-Vend Corp., 660 F.2d at 265. Rather than meaningfully address these elements, Complaint Counsel claims that "Respondents cannot demonstrate that the Non-Compete is ancillary . . . because the underlying Transaction is invalid under both the Sherman and Clayton Acts." CC Opening Br. 69. That is circular.

The point of Complaint Counsel's challenge to the actual noncompete is that, in its own words, "*[e]ven setting aside the agreement for Altria to exit its existing e-cigarette business*, the written Non-Compete . . . is *by itself* unlawful." CC Opening Br. 28 (emphasis added). But then, rather than "set aside" its theory that Altria discontinued its existing e-cigarette business pursuant to an agreement with JLI, Complaint Counsel asserts that the actual noncompete is unlawful because of precisely that alleged unwritten agreement.[220] CC Opening Br. 69. Complaint Counsel engages in this circular argument because it is plain that, if the unwritten agreement theory Complaint Counsel presses is rejected, the actual noncompete easily satisfies the test for ancillarity. That is, to use Complaint Counsel's test, the actual noncompete does not "suppress[] competition without creating efficiency," *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), and, as explained further below, it is "necessary to achieve otherwise unattainable procompetitive benefits," *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827, 872 (N.D. Ill. 2010).

Because the actual noncompete is ancillary in nature, it is "examined under the rule of reason" and must be 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, 1560-64 (11th Cir. 1983). And Complaint Counsel concedes that only *potential* competition from Altria can be considered in conducting the

[220] Similarly, Complaint Counsel contends the actual noncompete is not ancillary because the transaction violates Section 7. CC Opening Br. 69. That again simply assumes the conclusion; it does not reflect any independent analysis of whether the actual noncompete is ancillary in nature.

analysis, where Altria discontinued its e-vapor products for independent business reasons. *See* CC Opening Br. 68.

2. The actual noncompete facilitated the provision of unique and critical services to JLI, yielding substantial procompetitive effects.

Complaint Counsel claims that the value of the regulatory services Altria provided JLI is "highly speculative given the substantial uncertainty surrounding the FDA's PMTA process and requirements," CC Opening Br. 66, and dismisses Respondents' objective of accelerating and improving the quality of JLI's PMTA as "abstract," CC Opening Br. 71.

To the contrary, even if Complaint Counsel could meet its burden at Step 1 of the rule of reason analysis, and it cannot, any potential anticompetitive effect is readily offset by the "procompetitive rationale for the restraint."[221] *Am. Express*, 138 S. Ct. at 2284. As Pritzker testified, Altria's regulatory services were "a key part of the deal," and "one of the most critical" components from JLI's perspective.[222] That is because, for JLI, "getting PMTA approval is literally existential."[223] If JLI cannot get PMTA approval, it would no longer be able to sell any of its products in the United States.[224]

And notwithstanding the high stakes, JLI had relatively little experience in regulatory matters, while "Altria's [regulatory] team was the best in the country,"[225] having assembled "dozens of experts" in the area and having submitted "hundreds, if not thousands of applications."[226] In addition to covering all of the "very specific expertises" required for the

[221] For the reasons discussed above, Complaint Counsel has not met its burden at Step 1 to show substantial anticompetitive effects. *See* Section III.B.1, *supra*. Complaint Counsel's challenge to the actual noncompete thus does not get out of the starting gate.

[222] RFF ¶ 1220.

[223] RFF ¶ 1221.

[224] RFF ¶ 1222.

[225] RFF ¶ 1221; *see also* RFF ¶ 1223 (PX7021 Pritzker (JLI) Dep. at 161 (describing JLI as a "neophyte[]" with respect to the regulatory process)).

[226] RFF ¶¶ 1223, 1225.

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.[227] As Murillo testified, this expertise 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."[228]

But as Pritzker, Valani, and Murillo all explained, in order to obtain the benefit of Altria's unique expertise in this area (as well as other services Altria was offering), JLI needed to provide Altria access to its highly sensitive trade secrets and confidential information—what JLI viewed as "the most cutting-edge technolog[y] of any group in the world."[229] For that reason, the parties negotiated a narrowly tailored noncompete that (1) does not reach products that would be unlikely to be enhanced by JLI's proprietary information (like the heat-not-burn IQOS product and oral On! product that Altria markets today), and (2) is in effect only so long as Altria continues to provide services to JLI.[230]

And though 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, the procompetitive effects are not merely hypothetical. Shortly after the deal, Altria quickly determined that JLI "needed help in every aspect of [its PMTA]."[231] [redacted]

[227] RFF ¶ 1225.

[228] RFF ¶ 1225.

[229] RFF ¶ 1272; *see also* RFF ¶¶ 1178-84, 1246.

[230] RFF ¶ 1129. Complaint Counsel attacks a straw man in claiming that Respondents are defending the reasonableness of the noncompete by reference to the carve-out in the final deal documents for Altria's e-vapor products "as such business is presently conducted." CC Opening Br. 70. Not so. Respondents' point is that, regardless of the carve-out's application (given that Altria had already discontinued its e-vapor products for independent business reasons), the noncompete passes muster under the rule of reason.

[231] RFF ¶ 1255.

[redacted] Among other things, JLI had not undertaken many of the scientific studies needed to support its PMTA.[233] JLI had not prepared a narrative to "explain the data."[234] And JLI had not identified a drafter for the applications and was planning to employ "an outside contractor" that Altria previously "determined . . . [was] incapable of doing scientific writing for a tobacco product application."[235]

Against this challenging backdrop, Altria's regulatory team moved quickly to assist JLI with meeting the accelerated PMTA deadlines.[236] Altria provided JLI with one of its top program directors as the full-time program lead, offered the full-time services of Dr. Gardner, and contributed a dozen scientists on a full-time basis and several dozen more on a part-time basis.[237] As Dr. Gardner explained at trial, Altria drafted the bridging and chemistry stability sections of JLI's PMTA and oversaw countless studies.[238] 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.[239]

Ultimately, buoyed by Altria's expert guidance and assistance, JLI filed a timely PMTA that remains pending with FDA.[240] As Murillo testified, JLI would "[a]bsolutely not" "have made its PMTA filing without Altria[]," [241] which substantially improved the quality of JLI's

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[232] [redacted]

[233] RFF ¶ 1255.

[234] RFF ¶ 1255.

[235] RFF ¶ 1255.

[236] RFF ¶ 1260.

[237] RFF ¶ 1260.

[238] RFF ¶ 1261.

[239] RFF ¶ 1261 (Murillo (Altria/JLI) Tr. 3008).

[240] RFF ¶¶ 1247, 1265.

[241] RFF ¶ 1250.

PMTA and its prospects for approval. Complaint Counsel adduced no evidence at trial to call into question the value of Altria's regulatory services.

3. Complaint Counsel failed to prove the existence of an equally effective, substantially less restrictive alternative at trial.

Because the noncompete is supported by a procompetitive rationale, the burden shifts back to Complaint Counsel under the rule of reason to proffer a viable less restrictive alternative. *Alston*, 141 S. Ct. at 2160. In attempting to do so, *see* CC Opening Br. 66-67, 71-72, Complaint Counsel mischaracterizes the nature of its burden. Less restrictive alternatives are not merely "those that would be less prejudicial to competition as a whole." CC Opening Br. 66 (internal quotation marks omitted). As the Supreme Court emphasized just a few months ago, "[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.

It is thus Complaint Counsel's burden to prove that any proffered alternative is "viable," "substantially less restrictive," and "virtually as effective in serving the legitimate objective [of the parties] without significantly increased cost." *Cnty. of Tuolumne* v. *Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159-60 (9th Cir. 2001) (internal quotation marks and emphasis omitted). As the case cited by Complaint Counsel itself makes clear, 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 here, suggesting, without any evidence, three hypothetical alternatives to the noncompete: (1) that JLI could have relied only on its own experts and other third-party contractors to assist in its PMTA submissions; (2) that Respondents could have limited the noncompete to a shorter time period or set it to expire upon completion of JLI's initial PMTA submission; and (3) that Respondents could have implemented firewalls within Altria to limit the flow of competitively sensitive information. *See* CC Opening Br. 71-72. None of these withstands scrutiny.

First, Complaint Counsel has not demonstrated that JLI could have hired external experts and third-party contractors sufficient to replicate the benefits of Altria's regulatory support. As Murillo explained, the value of Altria's regulatory support is not in any one person that JLI could have hired away from Altria; it is in Altria's equipment, Altria's unique methodologies, and Altria's institutional "know-how" derived from its decades of regulatory experience, including its experience successfully obtaining PMTA authorization for IQOS.[242] Altria invented many of the methods used to assess products and had "unique" "[e]quipment and methodologies and systems" that no individual or third-party laboratory could duplicate.[243] Nor could JLI replicate Altria's expertise communicating complex scientific information to FDA.[244] In fact, it was because qualified third-party laboratories were difficult to find that Altria expanded its internal capacity to run the large volume of tests required for JLI's PMTA.[245] As Murillo testified, the suggestion that JLI could have relied on third-party contractors to replace Altria is "completely unrealistic."[246] Complaint Counsel thus cannot show that relying on individual hires and third parties would be "virtually as effective in serving [Respondents'] legitimate objective without significantly increased cost." *Sonora Cmty. Hosp.*, 236 F.3d at 1159-60 (quoting Areeda & Hovenkamp, *Antitrust Law* ¶ 1760d). Nor should it be permitted to speak out of both sides of its mouth, claiming, on the one hand, that Altria was uniquely positioned to compete because of its "regulatory expertise" and "vast resources," CC Opening Br. 62, and contending on the other that JLI could have done just as well without it, CC Opening Br. 67.

Second, in blithely suggesting that the noncompete could be "shorter," CC Opening Br. 72, Complaint Counsel overlooks that Respondents tied the duration of the noncompete to the

[242] RFF ¶¶ 1228, 1276-78.

[243] RFF ¶¶ 1277, 1279.

[244] RFF ¶¶ 1280-81.

[245] RFF ¶ 1283.

[246] RFF ¶ 1278.

duration of the Services Agreement to protect JLI's proprietary information from potential misuse by Altria.[247] And in musing that Respondents could have "set the Non-Compete to expire upon the completion of JLI's PMTA submission," CC Opening Br. 72, Complaint Counsel ignores that Altria's regulatory services extend well beyond JLI's initial PMTA filing. As Murillo testified, Altria's regulatory support to JLI is ongoing: Altria continues to assist JLI with follow-up from FDA on JLI's pending PMTA, as well as with [redacted] and a Modified Risk Tobacco Product application.[248] Complaint Counsel's proposed line editing of the noncompete flies in the face of the Supreme Court's recent admonition that "[f]irms deserve substantial latitude to fashion agreements that serve legitimate business interests," *Alston*, 141 S. Ct. at 2163, and that "degrees of reasonable necessity" "should not [be] second-guess[ed]," *id.* at 2161.

Third, Complaint Counsel never attempted at trial to establish that an information firewall would have served the parties' objectives just as well. And as Respondents explained in their opening brief, it would not. Resps. Opening Br. 131-32. Most significantly, a firewall would have disincentivized Altria from putting its best people, like Dr. Gardner, on the job, undermining the value of the services to JLI. Complaint Counsel's suggestion in this regard is a textbook example of a plaintiff "just point[ing] to" a hypothetical alternative without demonstrating "equivalent viability." *N. Am. Soccer League, LLC*, 883 F.3d at 45.

* * *

Whether assessing Complaint Counsel's imagined unwritten agreement or the actual agreement struck by the parties, Complaint Counsel did not meet its burden at trial of proving substantial anticompetitive effects—or any anticompetitive effects at all. That is because, for all of Altria's resources and distribution might, its products lacked the nicotine salts they undisputedly needed to be viable and were widely recognized by competitors and retailers to be

[247] RFF ¶¶ 1129, 1178-88.

[248] RFF ¶¶ 1266-67.

inferior. And Altria could not fix the problem in the near- or medium-term (or potentially ever) under FDA's stringent regulatory scheme. In the face of an increasingly competitive marketplace post-transaction, Complaint Counsel can muster only hypothetical harm, which is easily rebutted both on its own terms and by the substantial evidence of procompetitive effects adduced at trial. Like virtually all Section 1 claims evaluated under the rule of reason, Complaint Counsel's Section 1 claim should be dismissed. *Alston*, 141 S. Ct. at 2160-61.

IV. Complaint Counsel Failed to Prove Its Section 7 Claim at Trial.

Because Complaint Counsel failed to prove that Altria would have kept its e-vapor products on the market but for the JLI deal, Complaint Counsel is left with only a potential competition case, the elements of which it cannot satisfy. *See* Section IV.F, *infra*. But even if the Court weighs Altria's existing products in the effects analysis, Complaint Counsel cannot satisfy its burden under Section 7 of showing that the transaction, "at this time and in this remarkably dynamic industry, is likely to *substantially* lessen competition." *United States* v. *AT&T Inc.*, 310 F. Supp. 3d 161, 194 (D.D.C. 2018) (emphasis added); *see also FTC* v. *Arch Coal, Inc.*, 329 F. Supp. 2d 109, 115 (D.D.C. 2004).

For one thing, Complaint Counsel did not meet its burden to prove a relevant product market. *See* Section II, *supra*. In addition, while Complaint Counsel stakes its Section 7 case on its claim to a presumption of harm, its expert's HHI calculations are based on indefensible assumptions that are contradicted by actual market evidence. And even if Complaint Counsel were entitled to a presumption, it would be readily rebutted by the mountain of record evidence demonstrating that Altria's products were not competitive constraints and could not be improved in light of FDA's regulatory scheme. The claim should be dismissed.[249]

[249] The Section 7 claim should be dismissed as against JLI for the independent reason that Section 7 applies only to acquirers. *See* Resps. Opening Br. 132-33. Complaint Counsel effectively concedes the point in its opening brief, limiting its argument on this point to a footnote observing that "equitable relief in the form of divestiture covers both the acquiring and

A. Altria's decisions to withdraw its e-vapor products were not "effects" of the transaction under Section 7 and cannot give rise to a presumption of anticompetitive harm.

As discussed in Respondents' opening brief, *see* Resps. Opening Br. 88, Complaint Counsel's Section 7 case is premised on proving that Altria discontinued Elite and Nu Mark for pretextual reasons—in other words, that those decisions were "effects" of the transaction. Complaint Counsel once again makes that crystal clear in its opening brief. CC Opening Br. 78 ("[I]t is abundantly clear that *but for the Transaction* Altria would not have exited the U.S. closed-system e-cigarette market and would have continued to compete vigorously against JLI and other e-cigarette competitors. . . . Thus, the *effect* of the Transaction was the complete elimination . . . of Altria as a competitive presence in the U.S. closed-system e-cigarette market." (emphasis in original)).

As Respondents explained in their opening brief, *see* Resps. Opening Br. 102-04, there are two problems with that claim:

First, it is factually wrong: Complaint Counsel failed to prove that Altria would have kept its products on the market but for the prospect of a transaction with JLI. *See* Section III.A, *supra*. For that reason, Altria's product withdrawals cannot be deemed "effect[s] of [the] acquisition." 15 U.S.C. § 18.

Second, even if it were the case that Altria would have stayed on the market with its existing products but for the deal, those pre-transaction decisions are not "effects" under Section 7 as a matter of law. *See United States* v. *Aetna Inc.*, 240 F. Supp. 3d 1, 79-80 (D.D.C. 2017). While Complaint Counsel attempts to distinguish *Aetna* by observing that the district court declined to apply the potential competition doctrine in that case, *see* CC Opening Br. 94-95, it misses the point. *Aetna* held that regardless of why an industry participant exits prior to a transaction, courts cannot under Section 7 "ignor[e] the reality" of the exit in assessing effects, even when treating the exiting party as an actual competitor. 240 F. Supp. 3d at 79.

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acquired firms," such that JLI may be a party to the Section 7 claim. CC Opening Br. 99 n.41. Complaint Counsel does not contend in its opening brief that JLI can violate Section 7.

While *Aetna* might have countenanced Complaint Counsel arguing that Altria would have somehow found its way back onto the market in the near term if the deal had fallen through, Complaint Counsel never made that argument (for good reason, given the regulatory overlay and the decisions Altria had already announced).[250] And, regardless, *Aetna* makes clear that under no circumstances may Complaint Counsel "pretend" the product discontinuations did not occur for purposes of its effects analysis. *Id.* Because Complaint Counsel does indulge in that fiction in calculating HHIs, its claim to a presumption fails, and the Section 7 claim falls at the starting gate.

B. Complaint Counsel's claim that it is entitled to a presumption based on HHIs ignores fatal methodological flaws in its expert's analysis.

Even if, contrary to fact and law, the withdrawals are treated as "effects" of the transaction, the Section 7 claim still fails—and again at the start. Complaint Counsel claims that the transaction "presumptively violates Section 7" based on its expert's HHI calculations. *See* CC Opening Br. 75-77. But Complaint Counsel's calculations of pre- and post-transaction market share are not reliable and cannot form the basis of Complaint Counsel's *prima facie* case. They fail to take into account the actual state of the market at the time of the transaction. And they depend on assumptions that are contradicted by the actual market evidence.

1. Complaint Counsel improperly calculates both pre-transaction and post-transaction shares, nullifying its claim to a presumption.

As Complaint Counsel concedes in its opening brief, its expert, Dr. Rothman, "calculated *pre-Transaction* HHIs by using shares of Altria [and other e-vapor manufacturers] in the 12-month period between October 2017 to September 2018." CC Opening Br. 75-76 (emphasis

[250] Moreover, the *Aetna* court declined to apply the potential competition doctrine for reasons that do not obtain here. In particular, the defendant was "continu[ing] to offer very similar products in adjacent markets" and there were "indications that [it would] once again attempt to compete in the challenged markets" as soon as the following year. 240 F. Supp. 3d at 78; *see also id.* at 88.

added). That approach—which Complaint Counsel says yields a pre-transaction market share of 10.1 percent for Altria—ignores that the pod segment took off like a rocket during that period, starting with around a 20 percent share of closed-system cartridge share in October 2017 and gaining roughly *50 percent* in share by the end of Complaint Counsel's 12-month period.[251] As a result, by September 2018, Altria's share of Complaint Counsel's alleged market was well under 10.1 percent: it had fallen to 7.5 percent, as measured by units, almost entirely cig-a-likes, and was continuing to decline, sinking to less than 5 percent by dollars in November.[252] Altria's share was of course even lower in the pod market.[253] And given that Altria lacked a competitive pod product with nicotine salts, it had no near- or medium-term prospects for recovery.

The purpose of calculating market shares is to provide an indication of the competitive significance of suppliers at a given point in time. *See* HMG § 5.3. Where the share of a supplier is dropping precipitously over a year for reasons that are likely to persist—like a declining product as opposed to a one-time disruption—it is invalid to use a one-year average as Complaint Counsel has done here. Complaint Counsel and its expert clearly knew full well that this was a trend as it was featured in a graph during their opening statement. Tr. 53-54. And yet Complaint Counsel proceeded to rely on a one-year average in calculating HHIs. There was no basis for doing so.

With respect to calculating *post*-transaction share, as Complaint Counsel also concedes, its expert's calculation "required an assumption about where Altria's sales [went] as a consequence of its exit." CC Opening Br. 76 (internal quotation marks omitted). In particular, Complaint Counsel's expert "calculated post-Transaction HHIs by proportionally reallocating Altria's shares to the remaining competitors." *Id.* While Complaint Counsel insists that it need

[251] RFF ¶ 1326.

[252] RFF ¶¶ 1439, 1441-43. [redacted]

[253] RFF ¶ 1467.

not present HHI estimates "with the precision of a NASA scientist," CC Opening Br. 76 n.27, it does need to exceed the performance of a random dart-thrower. *See Comprehensive Sec., Inc.* v. *Metro. Gov't of Nashville & Davidson Cnty.*, 2021 WL 2355067, at *5 (M.D. Tenn. June 9, 2021) (rejecting plaintiffs' HHI calculation as "unreliable" because their "method for calculating the HHI value likely overstated the results"). And even according to the case on which it relies, Complaint Counsel should employ the "closest available approximation" of market shares. *FTC* v. *Sysco Corp.*, 113 F. Supp. 3d 1, 54 (D.D.C. 2015) (citation omitted).

As Respondents explained in their opening brief, Dr. Rothman's "proportional reallocation" assumption—*i.e.*, assuming no difference in likely substitution as between cig-a-like users and pod users—is not remotely the "closest available approximation." To the contrary, it is counter to the real-world evidence. *See* Resps. Opening Br. 105-06. JLI, [redacted], and third-party retailers all recognized at the time that Nu Mark's cig-a-like customers generally diverted to other cig-a-like products, not pod-based products like JUUL, Vuse Alto, or NJOY Ace.[254] Dr. Rothman's proportional reallocation assumption accounts for *94 percent* of his calculated increase of 652 points in market concentration—meaning that, without that faulty, self-serving assumption, Complaint Counsel does *not* get a presumption.[255] *See* HMG § 5.3 (requiring HHI increase of more than 200 points to trigger presumption). In the real world, market concentration in Complaint Counsel's alleged market fell sharply following the transaction, by nearly 500 points.[256]

Complaint Counsel's two attempts to sidestep this fatal methodological error fail:

First, Complaint Counsel contends that "Dr. Rothman showed in his report that the Transaction increased concentration even if reallocation" were not proportional. CC Opening Br. 76. Not so. What Dr. Rothman did was substitute one unrealistic and outcome-oriented

[254] RFF ¶¶ 1445-47.

[255] RFF ¶ 1450.

[256] RFF ¶ 1452.

assumption for another, purporting to show that "if all of Altria's share goes to Reynolds, the change in HHI would be 460."[257] Dr. Rothman's alternative hypothetical serves only to reinforce Respondents' point that Complaint Counsel ignored the actual state of the market.

Second, Complaint Counsel contends that Respondents do not account for confounding factors, such as negative press surrounding vaping, and confuse correlation with causation in pointing to the real-world data. *See* CC Opening Br. 77.[258] But it is Complaint Counsel's burden to prove its entitlement to the presumption, and Complaint Counsel has not conducted any analysis to demonstrate (1) that its hypothetical confounding factors had any real-world effect (let alone one that would have strengthened Altria's competitive position) or (2) that its "proportional reallocation" assumption is a reliable proxy in light of the clear evidence that cig-a-like users and pod users would, in fact, not reallocate in a proportional manner.

Because Dr. Rothman's HHI calculations are premised on unreliable, disproven assumptions with respect to both pre-transaction and post-transaction share, Complaint Counsel is not entitled to a presumption of competitive harm and has failed to make out its *prima facie* case. *See* Resps. Opening Br. 104-06. As the old saying goes, "garbage in, garbage out."

2. Complaint Counsel's HHI calculations are not a reliable indicator of anticompetitive effects in any event.

As Respondents demonstrated in their opening brief, Complaint Counsel's HHI figures, even if entertained, are not a reliable proxy for ascertaining competitive effects in this case in any event. 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. *See also New York* v. *Deutsche Telekom AG*, 439 F. Supp. 3d 179, 217 (S.D.N.Y. 2020) (noting that "statistical market share evidence [can be] misleading"); *cf. United States* v. *Baker*

[257] CCFF ¶ 1760.

[258] *See also* CCFF ¶ 1831.

Hughes Inc., 908 F.2d 981, 992 (D.C. Cir. 1990) ("To allow the government virtually to rest its case [on the basis of HHI figures], leaving the defendant to prove the core of the dispute, would grossly inflate the role of statistics in actions brought under section 7.").

But Complaint Counsel failed to do that here, disregarding:

- That the cig-a-like category, which made up almost all of Nu Mark's sales, is a narrower sliver of the alleged market, and was rapidly declining over the period Dr. Rothman claims to have analyzed;[259]
- That consumers have shifted not to pods in general, but to pods with nicotine salts in particular, a product category in which Altria did not even have an offering, *see* HMG § 5.2 (recognizing that market share overstates future competitive significance where participants lack "new technology that is important to long-term competitive viability [and] is available to other firms in the market");[260]
- That the flavor ban would have forced all or nearly all of Elite's SKUs off the market had the product not been discontinued in 2018 in response to FDA's letter;[261] and
- That market shares have "fluctuate[d] substantially over short periods of time in response to changes in competitive offerings" over the last several years, undermining the relevance of years-old HHI estimates, HMG § 5.3.[262]

Each of these developments makes plain that Complaint Counsel's HHI analysis cannot serve as the foundation for a presumption of anticompetitive harm. *See* Resps. Opening Br. 107-08. As the Commission itself explained in its 2004 statement closing its investigation into RJ Reynolds' proposed merger with British American Tobacco ("BAT"), BAT's domestic share of "slightly under 10 percent" "substantially overstate[d] its premerger significance" because most of its sales had been "in a sharp decline in recent years" as a result of "increased competition," and that decline was "expected to continue absent the merger." Statement of the Fed. Trade Comm'n, *Proposed Merger Between RJ Reynolds Tobacco Holdings, Inc. and British American Tobacco p.l.c.*, File No. 041 0017, 2004 WL 3185289, at *1, *4 (June 22, 2004).

[259] RFF ¶¶ 1324, 1459-63.

[260] RFF ¶¶ 1464-65.

[261] RFF ¶ 1474.

[262] RFF ¶¶ 1368-76, 1475-79.

Thus, notwithstanding the Commission's finding that the merger would "increase concentration as measured by the Herfindahl-Hirschman Index . . . from 2735 to 3113, resulting in a change of 378," *id.* at *1, the Commission concluded that a careful factual analysis "d[id] not support the conclusion that [BAT] [was] competitively significant." *Id.* at *7. So too here, where Altria's share was not even close to 10 percent at the relevant time.

C. The evidence Complaint Counsel cites as bolstering its claimed "presumption" of anticompetitive harm mischaracterizes the record and ignores FDA's regulatory scheme.

At pages 77 to 83 of its opening brief, Complaint Counsel primarily repeats its conclusory assertions that Altria's investment in JLI harmed head-to-head price, shelf-space, and innovation competition between the companies, noting that "[m]ergers that eliminate head-to-head competition between close competitors often result in a lessening of competition," CC Opening Br. 79 (internal quotation marks omitted). But "[p]artial acquisitions, like mergers, vary greatly in their potential for anticompetitive effects." HMG § 13. And while Complaint Counsel may prefer to focus on generalizations about what may "often" be true, "antitrust theory and speculation cannot trump facts, and . . . cases must be resolved on the basis of the record evidence relating to the market and its probable future." *RAG-Stiftung*, 436 F. Supp. 3d at 291 (quoting *Arch Coal*, 329 F. Supp. 2d at 116-17). Respondents have already explained why these arguments are baseless above in relation to Complaint Counsel's Section 1 claim. *See* III.B.1.c, *supra*.[263] The few additional points Complaint Counsel makes here in pressing its Section 7 claim each mischaracterize the record, and each gloss over the unique regulatory scheme:

First, Complaint Counsel attempts to prop up its argument that Altria withdrew its products because of the prospect of a JLI deal by claiming that "Garnick wrote [in a December 1, 2018 email] that the decision to 'stop making all evapor products' was made in order to 'start preparing for the post [Transaction] Altria.'" CC Opening Br. 78. That is not what Garnick wrote—not even close—and Complaint Counsel's mischaracterization of the document betrays

[263] *See also* RRCoL ¶ 91.

the weakness of its evidentiary case. As the email clearly shows, Garnick was making two separate (and numbered) observations: "Howard/Billy have decided to announce the decision to stop making all e-vapor products" (Point 2 in Garnick's email) and "Billy is going to want the LT to start preparing for the post Tree Altria" (Point 3 in Garnick's email).[264] Garnick plainly did not write, as Complaint Counsel claims, that the decision to discontinue Altria's remaining e-vapor products was made "in order to" prepare for the post-Transaction environment. CC Opening Br. 78.

Complaint Counsel likewise misstates that Garnick "testified that the decision to discontinue commercialization of Nu Mark products was made in anticipation of the Transaction with JLI." CC Opening Br. 78. Rather, Garnick explained, consistent with the evidence and Gifford's testimony, that Altria needed to find cost savings "to pay for the growth teams" or for the "deal," regardless of which path Altria took.[265] What that means is that Altria discontinued its remaining cig-a-like products in December 2018 *regardless* of the transaction, contrary to Complaint Counsel's premise that Altria would not have discontinued them but for the transaction.

Second, Complaint Counsel makes much of Altria's R&D budget, human resources, and its "long-term commitment to the e-cigarette market." CC Opening Br. 81. True enough: that is why Altria was committed to trying to develop leapfrog products with the Growth Teams on a 5 to 10 year time frame, despite the long odds.[266] But Complaint Counsel entirely glosses over the fact that FDA's regulatory scheme *prevented* Altria from bringing any improved or newly developed products to the market in the absence of PMTA approval, which Complaint Counsel elsewhere concedes is highly uncertain and speculative. *See, e.g.,* CC Opening Br. 91. "Section 7 deals in probabilities not ephemeral possibilities." *FTC* v. *Tenet Health Care Corp.,* 186 F.3d

[264] RRFF ¶ 1400.

[265] CCFF ¶ 1397.

[266] RFF ¶¶ 898-916, 962-70.

1045, 1051 (8th Cir. 1999). While Complaint Counsel prefers to "disregard [Altria's] status as a regulated [entity]," that status is a "fact of market life" and the lens through which effects must be assessed. *See Phonetele, Inc.*, 664 F.2d at 737 (internal quotation marks omitted).

Moreover, even if Altria's efforts with the Growth Teams could properly figure in the effects analysis, there is no reason to believe they would have been successful in light of Altria's poor track record at innovation. As Garnick testified, the Growth Teams had no product concept at the time they were disbanded: "It was a bunch of people in a room saying, okay, think of something."[267] And, even if the Growth Teams had developed a new product after years of work, it would concededly take additional years to develop the studies necessary to file for regulatory approval, which would itself take years to obtain.[268] Under these circumstances, Complaint Counsel cannot possibly meet its burden to show that the supposed anticompetitive effects of the transaction are "sufficiently probable and imminent" to warrant relief. *FTC* v. *CCC Holdings Inc.*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009) (quoting *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 623 n.22 (1974)).

Third, Complaint Counsel again misconstrues Altria's relationship with PMI in order to suggest that Altria had a viable near-term path to competitive significance, this time in two separate ways. Complaint Counsel initially claims Altria would have been able to launch VEEV on its own. CC Opening Br. 81-82. That is misleading for all the reasons discussed above, including that [redacted]

[267] RFF ¶ 970.

[268] CCFF ¶¶ 1789-93; RFF ¶¶ 86-93, 122-26.

[redacted][269]

Nor does Complaint Counsel's alternative claim that the transaction [redacted] CC Opening Br. 82. King repeatedly insisted at trial that PMI "intend[s] to move forward and have VEEV commercialized in the U.S. as soon as [it] can," [redacted].[270] Indeed, there is no question that PMI, which sells combustible cigarettes worldwide and holds the number one or number two position in "many of these markets," has [redacted].[271] Moreover, any purported challenges that PMI may face in commercializing VEEV without Altria's assistance are only relevant on a Section 7 analysis if the evidence shows (a) [redacted], (b) [redacted], and (c) that VEEV would make a material difference to the competitive landscape, whatever it may look like years from now. But, as discussed above, that is not what the evidence shows.[272] *See* Section III.B.1.e, *supra*. This attempt to bootstrap Altria's competitive significance by relying on the product and plans of a third party thus gets Complaint Counsel nowhere.

In short, far from bolstering its claims of anticompetitive harm, what the record actually shows is that any such presumption would be readily rebutted by the substantial evidence that, in light of the regulatory scheme and Altria's weak and declining e-vapor products, Altria would not have been a significant competitor on any reasonable timeline in the but-for world. *See*

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[269] [redacted]

[270] RFF ¶ 1632.

[271] RRFF ¶ 1864.

[272] RRFF ¶ 1864.

Resps. Opening Br. 108-20; *see also United States* v. *Gen. Dynamics Corp.*, 415 U.S. 486, 498, 503-04 (1974) ("[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]").

D. Complaint Counsel's arguments with respect to entry, expansion, and repositioning attack straw men and ignore the post-transaction evidence.

In an effort to escape the real-world evidence that competition intensified following the parties' transaction, Complaint Counsel pounds away at straw men, arguing that Respondents have not shown that "*de novo* entry . . . will be timely, likely, or sufficient to counteract the anticompetitive effects of the Transaction," CC Opening Br. 83, or that "[r]epositioning by PMI will be []sufficient to replace the [alleged lost] competition," CC Opening Br. 86. Respondents do not make any of these arguments. In fact, Respondents fully agree that compiling PMTAs for e-vapor products requires millions of dollars, that the process is "very time-consuming," that the requirements are "demanding," and that "applications for new products can take anywhere from 18 months to three years" to put together, putting aside the time for FDA review and potential approval. CC Opening Br. 84.[273] It is exactly for this reason that Altria's judgment to remove its existing inferior products and pivot to the Growth Teams should not be second-guessed. And it is exactly for this reason that Complaint Counsel is speaking out of both sides of its mouth when it contends that somehow, in the face of this regulatory scheme, Altria would have been able to come to market with a new, FDA-approved competitive product in any reasonable time frame.

In terms of the effect on the market from the removal of Altria's products, what Respondents have actually argued, and demonstrated through the real-world evidence, is that (a) there was no anticompetitive effect associated with Altria's departure from this highly

[273] It is "hornbook law" that "ease of entry" is not necessary to "rebut a prima facie case." *Baker Hughes*, 908 F.2d at 985.

regulated market (*see* Section III.B.1, *supra*), and (b) any possible anticompetitive effect has *already* been offset by competitors' entry and expansion.

1. The post-transaction evidence of intensifying competition is properly before the Court.

Complaint Counsel does not contest that the post-transaction evidence of intensifying competition is properly before the Court and relevant to the adjudication of its Section 7 claim. *See* CC Opening Br. 82. Instead, Complaint Counsel observes that "a showing of actual post-transaction harm is not required" for purposes of Section 7 and that "the ultimate issue under Section 7 is whether anticompetitive effects are reasonably probable in the future, not whether such effects have occurred as of the time of trial." CC Opening Br. 82 (quoting *In the Matter of Polypore Int'l, Inc.*, 2010 WL 9549988, at *8 (F.T.C. Nov. 5, 2010)).[274]

That is true as far it goes, but Complaint Counsel never grapples with the fact that where post-transaction evidence cannot be manipulated by the parties, "post-acquisition evidence favorable to a defendant can be an important indicator of the probability of anticompetitive effects" in a Section 7 case. *Lektro-Vend Corp.*, 660 F.2d at 276; *see also* HMG § 2 (government may "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 (capitalization omitted)). Here, Complaint Counsel cannot, and does not, argue that the intensely competitive environment that has prevailed post-transaction—driven by Reynolds and other third parties—was subject to manipulation by Respondents. And such post-transaction "evidence of significant changes in the relevant market" can be "dispositive" in rebutting the government's *prima facie* case. *United States* v. *Bazaarvoice, Inc.*, 2014 WL 203966, at *73 (N.D. Cal. Jan. 8, 2014). That is the case

[274] Notably, Complaint Counsel never explains why, if this is so, it can make any arguments based on Altria's existing products. It is undisputed that Altria could not bring those products back to market without FDA approval now that the deadline to file a PMTA has passed. RFF ¶ 121; CCFF ¶¶ 199, 1256. And it is undisputed that FDA's flavor ban would have forced all or virtually all of Elite's SKUs off the market. RFF ¶ 1474.

here. *That* is Respondents' point, and Complaint Counsel has not addressed it and cannot address it. *See* Resps. Opening Br. 63-67, 90-96; *see* Section III.B.1.d, *supra*.

2. Competitors have already sufficiently expanded to offset any hypothetical anticompetitive effect.

Complaint Counsel argues that "Respondents cannot show that [] repositioning in the market is timely, likely, and sufficient to *replace* the competitive constraints Altria provided on the U.S. e-cigarette market." CC Opening Br. 85. Putting aside that Altria's products did not impose competitive constraints, Respondents have *already* shown that other competitors—Reynolds and NJOY in particular—have expanded sufficiently to offset the loss of Altria.[275] *See In the Matter of Otto Bock Healthcare N. Am., Inc.*, 2019 WL 2118886, at *28 (F.T.C. May 6, 2019) (initial decision) (expansion by existing competitors is "essentially equivalent to new entry" because "[t]he ability and willingness of current competitors to expand their foothold in the market . . . greatly reduces the anticompetitive effects of a merger").

As noted above, a year after Elite's discontinuation, sales of pod-based devices *increased* by more than 20 percent and sales of cartridges had likewise *increased* by more than 30 percent. *See* Section III.B.1.d, *supra*. Put differently, competitors' sales (excluding sales of JUUL) increased by more than three million cartridges a week following the transaction—*31 times* more than would be required to offset the loss of Elite.[276] These competitors have also accomplished what Altria could not, taking significant share from JLI following the transaction with their satisfying, nicotine-salt-based pod products.[277] And while Complaint Counsel insists that "there is no evidence that Altria's exit prompted these firms to compete more effectively or aggressively," CC Opening Br. 86, the evidence shows that when Altria discontinued its

[275] RFF ¶¶ 1356-67.

[276] RFF ¶ 1360.

[277] RFF ¶¶ 1332, 1372, 1374.

struggling products, the average number of e-vapor products in the top 20 retailers *increased* from 3.0 to 3.8.[278]

As Professor Murphy explained, this post-deal increase in competitive products was likely aided by the fact that Altria's products were no longer on the shelves, making room for new brands—a healthy part of the competitive process that is critical to a robust market.[279] As Professor Murphy also testified, "given the robust competition and the way in which [competitors] were able to market their products and expand their sales and cut their prices, there's no reason, in economics, to believe that output would have been higher in some but-for world" in which Altria continued selling its e-vapor products.[280] *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").

Ultimately, Complaint Counsel's theory of harm reduces to its mantra that "[a] but-for world in which Altria continued to sell e-cigarettes would have been more competitive than the world in which Altria exited the market," pointing again to the supposed price and innovation competition Altria brought to bear. CC Opening Br. 86. But the claim does not grow truer with repetition. As shown above, the record is crystal clear that Altria's MarkTen and Elite products *were not* competitive constraints: There is no evidence that Altria was constraining any other e-vapor product's pricing (the most significant of which were *slashed* following the transaction) or that Altria's independent presence prompted any other e-vapor manufacturer to innovate more than it otherwise would have. *See* Section III.B.1.c, *supra*. Rather, as detailed in Respondents' opening brief, the evidence shows that Altria, JLI, other competitors, and retailers all regarded Altria's products as "inferior," unable to convert smokers, and commercial failures—and that the products could not obtain PMTAs in any event. *See* Resps. Opening Br. 108-13, 120-21; *see*

[278] RFF ¶¶ 1364, 1366.

[279] RFF ¶¶ 1366-67.

[280] RFF ¶ 1363.

also Gen. Dynamics Corp., 415 U.S. at 503-04 (government's *prima facie* case rebutted by evidence of merger party's "weakness" as a competitor, "[i]rrespective of the company's size when viewed as a producer"). That is precisely why Altria transitioned to the Growth Teams, after a comprehensive and thorough review of the state of Altria's e-vapor business and at a time when Altria believed a deal with JLI to be highly unlikely. *See* Resps. Opening Br. 44-46.[281]

3. Complaint Counsel's claim that Altria is impeding PMI is improper, overlooks FDA's scheme, and is unsupported by the evidence.

Under the guise of incorrectly suggesting that Respondents are relying on PMI's potential entry to rebut Complaint Counsel's claimed presumption, Complaint Counsel rehashes PMI-based theories, arguing that [redacted]. CC Opening Br. 86. Each theory is wrong, relies on a mischaracterization of the record, and ignores that VEEV cannot be commercialized in the United States unless FDA grants the product PMTA approval:

First, Complaint Counsel argues that Altria has made it more challenging to commercialize VEEV [redacted]

[281] In arguing that other competitors cannot offset Altria's exit, Complaint Counsel summarily invokes its expert's "conclusion" that Altria would not have discontinued Nu Mark absent the transaction and would have "continued to be a significant competitor in the e-cigarette market absent the Transaction." CC Opening Br. 86. Complaint Counsel does not attempt to explain or defend its expert's conclusion and for good reason. As Respondents demonstrated in their opening brief, *see* Resps. Opening Br. 121-23, this opinion was highly improper, not based on any known or replicable methodology, and premised on a "cherry-picked" chronology that did not "adequately account for contrary evidence." *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 174 F. Supp. 3d 911, 930-32 (D.S.C. 2016).

[redacted].[282]

[redacted] The [redacted] claim is both meritless[283] and outside the scope of the antitrust laws. *See Adaptive Power Sols.*, 141 F.3d at 951 ("Antitrust laws are designed to protect competition, not competitors."). But it is also beside the point. As King acknowledged at trial, [redacted].[284] And as discussed above, PMI has not yet submitted a PMTA for VEEV, and [redacted].[285] Given the amount of time the parties agree FDA review of a PMTA requires, it is unlikely that VEEV, even if granted FDA approval, [redacted].[286] In any event, notwithstanding Complaint Counsel's claim [redacted], PMI is committed to "mov[ing] forward and . . . commercializ[ing] [VEEV] in the U.S. as soon as [it] can."[287]

Second, Complaint Counsel claims that Altria [redacted]. CC Opening Br. 87. That is wrong: [redacted][288] But it is

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[282] [redacted]

[283] RRFF ¶¶ 1848-57.

[284] RRFF ¶ 1848.

[285] RRFF ¶ 1848.

[286] RRFF ¶ 1848.

[287] RRF ¶ 1632.

[288] RRFF ¶¶ 1858-63.

also, again, beside the point. As King acknowledged at trial, [redacted].[289] And once again, it is entirely speculative whether PMI will succeed on its PMTA for VEEV should it ever file one.

Third, Complaint Counsel contends that PMI would be better off collaborating with Altria in view of Altria's established sales force. *See* CC Opening Br. 88. As discussed above, PMI, which has an international sales team of [redacted] employees and extensive experience commercializing tobacco products in some 180 countries worldwide,[290] is perfectly capable of independently commercializing VEEV and fully intends to do so. *See* Section III.B.1.e, *supra*.

Moreover, again, none of these theories is remotely relevant unless Complaint Counsel proves (a) [redacted], (b) that, absent the transaction, Altria and PMI would have both renewed the JRDTA and, separately, [redacted], and (c) that VEEV would make a material difference to competition. Complaint Counsel proved none of this at trial, and its theories are rooted solely in speculation.

E. The efficiencies deriving from Altria's provision of regulatory services to JLI are verifiable, transaction-specific, and well-substantiated by the record.

Complaint Counsel's argument, *see* CC Opening Br. 92-94, that the efficiencies deriving from the transaction are nonverifiable and not transaction-specific is only relevant in the event the Court finds that Complaint Counsel is (a) entitled to a presumption of harm via its HHI calculations, and (b) that any such presumption is not rebutted by a trove of contrary evidence. But if the Court does reach the question of efficiencies under Section 7, the record evidence

[289] RRFF ¶¶ 1858-63.

[290] RRFF ¶¶ 1864, 1866.

demonstrates that the efficiencies deriving from the record are both verifiable and merger-specific.[291]

Efficiencies need not be "capable of precise quantification." *Arch Coal*, 329 F. Supp. 2d at 153. Rather, they must be based on "credible evidence" of "a prediction backed by sound business judgment." *FTC* v. *Staples, Inc.*, 970 F. Supp. 1066, 1089-90 (D.D.C. 1997). Here, it is undisputed that obtaining PMTA approval from FDA is "existential" for JLI.[292] And, as Murillo testified, and as is unrebutted by actual evidence, Altria significantly improved the quality of JLI's PMTA, which JLI could not "have made . . . without Altria's assistance."[293]

Altria's assistance was also critical in ensuring JLI met the accelerated PMTA deadline. When the PMTA deadline was moved up to May 2020, JLI was "caught a . . . little bit flat footed."[294] At the time, an internal JLI PMTA workstream tracker showed that the company was at "[r]isk of missing [the] deadline" for half of its PMTA workstreams.[295] But with Altria's dedicated support and guidance from dozens of employees, including during the onset of the pandemic, JLI was able to file a timely PMTA.[296] All told, JLI estimated that Altria's services would "sav[e] 17 to 28 months on [the PMTA] process," and Complaint Counsel has not adduced any evidence to question that estimate.[297]

With respect to transaction-specificity, "[t]he real question is whether the alternatives to merger are practical and more than merely theoretical." *United States* v. *Anthem, Inc.*, 855 F.3d

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[291] Complaint Counsel does not claim efficiencies must be verifiable or transaction-specific in the context of Section 1, where 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.

[292] CCFF ¶ 1920.

[293] RFF ¶¶ 1247-60.

[294] RFF ¶ 1257.

[295] RFF ¶ 1258.

[296] RFF ¶¶ 1247-64.

[297] RFF ¶ 1263.

345, 357 (D.C. Cir. 2017). The transaction-specific nature of Altria's services is detailed above in addressing Complaint Counsel's failure to proffer less restrictive alternatives for the noncompete. *See* Section III.C.3, *supra*. But, in summary, while Complaint Counsel claims JLI could have gone it alone and tries to dismiss Altria as "just one of many third parties who contributed to JLI's PMTA submission process," CC Opening Br. 93, it ignores that Altria directed those third parties, as well as Murillo's trial testimony that it would have been "completely unrealistic" for JLI to replace Altria with third parties.[298]

Complaint Counsel can hardly dispute the point, given its claim in its brief that "[t]he PMTA process . . . requires regulatory expertise that few firms" other than major tobacco companies have. CC Opening Br. 84. Indeed, as Complaint Counsel itself elicited from King, Altria has a "great deal of expertise on what it would take to get [PMTA] authorization for e-cigarettes" and [redacted][299]

At bottom, as demonstrated in Respondents' opening brief, the record could not be clearer that Altria provided critical, transaction-specific services to JLI following the transaction, ensuring that the start-up met its FDA deadline and maximizing its prospects for success on its "existential" PMTA application. *See* Resps. Opening Br. 60-63, 128-32.

F. Complaint Counsel's potential competition claim disregards the regulatory scheme and cannot pass muster under any formulation of the doctrine.

Complaint Counsel concedes that "if . . . Altria discontinued its existing closed-system e-cigarette products independently of the Transaction," the transaction must be assessed under the "actual potential competition doctrine." CC Opening Br. 95. Complaint Counsel then attempts to run away from the Commission's own articulation of the potential competition

[298] RRFF ¶ 1951.

[299] CCFF ¶ 1870.

standard in *B.A.T.*[300] The Commission made clear in *B.A.T.* that a potential competition claim requires showing "future . . . competitive conditions" of the market into which products might enter, including (1) that the market will be "concentrated"; (2) that there is "a substantial likelihood" that independent entry would "produc[e] deconcentration"; and (3) that the entity in question 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, *10 (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 deal. *Id.* at *9 (emphasis added).

Though Complaint Counsel would prefer to write *B.A.T.* off, the decision has never been overruled, and the fact that it involved a "test case" does not make it any less controlling here. *See* CC Opening Br. 96 n.38.[301] For the reasons discussed in Respondents' opening brief, Complaint Counsel plainly cannot meet this standard. *See* Resps. Opening Br. 113-19.

Complaint Counsel fares no better under its preferred "probability" standard, in any event. Complaint Counsel analogizes extensively to *Yamaha Motor Co.* v. *FTC*, a case that predated *B.A.T.* involving products that could have been readily released to the market and which were not subject to a complex regulatory approval process. 657 F.2d 971, 977-78 (8th Cir. 1981). Despite this obvious and material distinction, Complaint Counsel does not even *mention* FDA or the regulatory scheme in applying the potential competition doctrine in its brief. The reason is plain: Complaint Counsel could not possibly prove that Altria's entry is "probable" in

[300] Respondents dispute the legitimacy of the actual potential competition doctrine. *See* Resps. Opening Br. 88 n.600. However, to the extent the doctrine is viable, it governs the analysis of any hypothetical future products in this scenario or otherwise. In addition, 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. Complaint Counsel cannot make that showing in light of the regulatory scheme.

[301] Though the Commission applied a "reasonable probability" standard in *McWane*, it did not discuss *B.A.T.*, and it ultimately found that the "reasonable probability" standard was not met in that case in any event. *In the Matter of McWane, Inc.*, 2014 WL 556261, at *32-35 (F.T.C. Jan. 30, 2014).

light of the highly regulated e-vapor market, where the sale of any newly developed products in the future is "wholly a matter of governmental grace" and "far from easy." *Marine Bancorporation, Inc.*, 418 U.S. at 628; *see also BOC Int'l*, 557 F.2d at 29 ("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. *Atl. Richfield Co.*, 549 F.2d 289, 295 (4th Cir. 1977) (rejecting FTC's potential competition claim where entry was "extremely difficult" and would take years to accomplish); *FTC* v. *Steris Corp.*, 133 F. Supp. 3d 962, 977-78 (N.D. Ohio 2015) (dismissing potential competition claim where FTC failed to show firm would have entered market "within a reasonable period of time").

Nor could Complaint Counsel possibly show that any hypothetical future entry by Altria "offer[s] a substantial likelihood of ultimately producing deconcentration . . . or other significant procompetitive effects," given that no one knows what the e-vapor category will look like following FDA's resolution of the many PMTAs it has received. *Marine Bancorporation, Inc.*, 418 U.S. at 633; *Mercantile Tex. Corp.* v. *Bd. of Governors of Fed. Rsrv. Sys.*, 638 F.2d 1255, 1272 (5th Cir. 1981) ("[A] heavily regulated industry . . . would not seem a likely candidate for the seer; regulatory change can quickly alter the structure of the market.").

Ultimately, Complaint Counsel offered no proof at trial that any hypothetical product Altria developed on its own or with others would "probably" obtain FDA approval, no proof that Altria could enter within a reasonable time frame in light of the lengthy lead time required to develop an e-vapor product and prepare a PMTA, and no proof that Altria would have succeeded in developing a competitive e-vapor product in the first place. And the parties agree that the PMTA process is subject to "great uncertainty," that it is "difficult for anybody to predict whether a PMTA submission[] will be successful," and that the process takes many years. CC Opening Br. 91; *see also id.* at 84. There is simply no basis for a potential competition claim on this record.

* * *

Complaint Counsel's Section 7 claim reduces to its intuition that the e-vapor industry would be more competitive with Altria competing independently within it. But that does not suffice under Section 7, where Complaint Counsel must prove that the transaction is "likely to *substantially* lessen competition in the manner it predicts." *AT&T*, 310 F. Supp. 3d at 194 (emphasis added). And it certainly does not suffice in the face of overwhelming record evidence that competition has intensified since the transaction, that Altria withdrew its e-vapor products for independent business reasons, that Altria's flawed e-vapor products were not competitive constraints in any event, and that FDA's stringent regulatory scheme profoundly constrains the introduction of new or enhanced products. The Section 7 claim should be dismissed.

V. Complaint Counsel's Proposed Order Is Overbroad and Improper.

Complaint Counsel cannot prevail on its claims and therefore no relief is warranted. But even if Complaint Counsel could prevail, the Court should decline to adopt Complaint Counsel's proposed order because it is unjustifiably broad, punitive, and unsupported by the record established by the parties. *See* CC Opening Br., Att. A ("CC Proposed Order").

As Respondents explained in their opening brief, Resps. Opening Br. 138-42, the Commission's authority to order relief is constrained to remedies that have a "reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 612-13 (1946). This means the relief "must be 'effective to redress the violations' and 'to restore competition.'" *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573 (1972). "Absent 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." *Deutsche Telekom AG*, 439 F. Supp. 3d at 230 n.23 (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."). And relief may not be imposed for the sake of "punish[ing] antitrust violators." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

Complaint Counsel's Proposed Order disregards these constraints and goes far beyond the evidence at trial and the potential remedies set out in the Notice of Contemplated Relief (the "Notice") made part of the Complaint, which itself violated the principles set forth above.[302] Because Complaint Counsel has introduced no support for the remedies suggested in the Proposed Order, this Court would be required to hold a separate and additional hearing at which the complexities associated with unwinding the parties' relationship could be fully considered with appropriate evidence.

A. The Proposed Order, if entered, would undermine competition and likely hurt consumers.

As Complaint Counsel acknowledges in its post-trial brief, any proposed remedy must at the very least restore the competition allegedly lost as a result of the transaction. CC Opening Br. 98 ("An effective remedy in this case must restore the level of competition that was lost . . . ."); *see also du Pont*, 366 U.S. at 326 ("The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition."). As explained in Respondents' opening brief, there is no basis to believe ordering divestiture here would promote competition given the regulatory regime. *See* Resps. Opening Br. 138-39. And Complaint Counsel's associated proposed remedial provisions likewise fly in the face of that objective:

[302] In their opening brief, Respondents explained that divestiture and termination of the noncompete would be improper for a number of reasons, including: (1) it would be *impossible* to recreate the pre-transaction competitive environment because the deadline to file for PMTA approval for Altria's products has passed, Resps. Opening Br. 138-39; (2) those remedies would harm the public interest because JLI is dependent on Altria to complete the PMTA process, *id.* at 139-40; (3) forcing a fire sale of Altria's stake in JLI would inequitably rob Altria of any return on its investment and would merely serve to punish, *id.* at 140-41; and (4) divestiture of Altria's minority stake makes no sense in the context of the Clayton Act's passive-investment exemption, *id.* at 141-42. All of those arguments continue to apply to Complaint Counsel's Proposed Order, and Respondents incorporate those arguments by reference.

- The **cease-and-desist provision** imposes an *absolute prohibition* on noncompete agreements between Respondents, on the one hand, and "any Person," on the other, in the "development, manufacturing, distribution or sale of E-Cigarettes." CC Proposed Order, § II.A. Such a restraint would materially affect JLI's and Altria's contractual relationships up and down the manufacturing, distribution, and retail channels, and hinder the very research and development efforts that Complaint Counsel claims Altria *should have* utilized instead of investing in JLI. *See, e.g.*, CC Opening Br. 81-82 (arguing that Altria could compete by entering into agreements with third parties). This provision would disrupt JLI's and Altria's businesses and would injure consumers.

- The **prior-approval provision** covers "*any* agreement or business transaction" with "*any* Person that develops, manufactures, sells, or distributes E-Cigarettes." CC Proposed Order §§ I.G, II.B (emphasis added). This provision thus requires prior approval for *almost any agreement necessary* to operate as an e-vapor manufacturer. This would clearly disrupt JLI's business by requiring pre-approval of all manufacturing and distribution agreements—thus harming consumers. It would also clearly chill or *even preclude* Altria from working with another company to develop or promote a new e-cigarette product, which would implicate the very same types of agreements that Complaint Counsel now argues Altria should have continued to pursue. *See, e.g.*, CC Opening Br. 81-82 (arguing that Altria would have continued its [redacted]). Indeed, the very order which the FTC says is necessary to allow Altria to compete would effectively preclude it from doing so. It would require prior approval from the Commission for even the most basic agreements to sell products to retailers. And the proposed prior-approval provision sets no standards or time period for Commission action, such that it would greatly disincentivize Altria from undertaking the very activities the Commission says it seeks to encourage. The absurdity of such a provision demonstrates the extent to which the Commission's new Proposed Order overreaches.

- The **rescission provision** reaches agreements other than the noncompete provision of the Relationship Agreement, including the Purchase Agreement and the Services Agreement. CC Proposed Order § III. The basis for this proposed provision was not developed in any way at trial, and if entered as Complaint Counsel has suggested, could be financially devastating to JLI depending upon what is meant by "rescission," something Complaint Counsel does not even attempt to explain. And rescission of the Services Agreement, potentially while appellate review is still pending given the Proposed Order's phased approach, would abruptly deprive JLI of its key partner in its continuing pursuit of PMTA authorization, crucial to keeping JLI's innovative products on the market and to introducing new products.[303] No evidence has been developed by Complaint Counsel in these proceedings regarding the need for rescission or the effects it would have; Complaint Counsel's pre-trial briefing discussed only divestiture and

[303] RFF ¶¶ 1215-83.

the termination of the noncompete. But it is plain that the proposed provision would punish Respondents and harm competition.

- The **monitorship provision** and **reporting provision** are unnecessary to effectuate divestiture and termination of the transaction agreements, which Complaint Counsel itself argued would be sufficient to resolve their competitive concerns.[304] CC Proposed Order §§ VII, VIII.B. With Complaint Counsel having extolled the ease of administration of these remedies, its request for ongoing monitoring and compliance reports is redundant and would simply impose significant burdens.

B. The Proposed Order is improper because it is broader than the Notice of Contemplated Relief and Commission precedents.

Complaint Counsel's Proposed Order seeks remedies that far exceed the scope of the Notice. First, the cease-and-desist provision in the Notice encompassed only "future non-compete agreements *between Respondents*," while the Proposed Order reaches *any* noncompete related to the "development, manufacturing, distribution or sale of E-Cigarettes." *Compare* Notice ¶ B (emphasis added), *with* CC Proposed Order § II.A. Second, the Notice included a prior-approval requirement for transactions "*between Altria and JLI* that combine[] their businesses in the relevant market," while the Proposed Order requires prior approval for *any* "agreement or business transaction with each other or any E-Cigarette Business Entity related to the development, manufacture, distribution, or sale of E-Cigarettes." *Compare* Notice ¶ C (emphasis added), *with* CC Proposed Order § II.B. As set forth above, these differences are material and beyond the legitimate scope of the Commission's remedial powers, which Respondents could have demonstrated with extensive evidence had Complaint Counsel included such provisions in the Notice.

Complaint Counsel's effort to expand the relief sought in the Notice in this manner is clearly improper. As this Court has recognized, relief is inappropriate where it reaches matters

[304] *See* CC Opening Br. 98-99 ("The simplest and most effective way to remedy the anticompetitive harm arising from the Transaction is to restore Altria to the position it occupied before agreeing with JLI to halt all competition between the two firms. . . . Altria's full divestiture of its equity stake in JLI coupled with the immediate termination of the Transaction's agreements will achieve these objectives.").

"outside the scope of the violations alleged in the Complaint and outside the scope of the notice of contemplated relief attached to the Complaint." *In the Matter of N.C. Bd. of Dental Examiners* ["*NCBDE*"], 2011 WL 11798452, at *97 (F.T.C. July 14, 2011) (initial decision). Complaint Counsel's after-the-fact attempt to flatly prohibit or impose restrictions on activity having nothing to do with the antitrust violations alleged in this case and outside the scope of the Notice has unfairly deprived Respondents of an opportunity to be heard at trial on the scope of these remedial provisions.[305]

These provisions also exceed both FTC and court precedents,[306] such that Respondents could not even rely on those precedents to forecast what Complaint Counsel would seek, which would have afforded Respondents the opportunity to submit evidence in opposition at trial. *Cf. In the Matter of Chi. Bridge & Iron Co.*, 2004 WL 5662266, at *61 (F.T.C. Dec. 22, 2004) (holding that respondents should be on notice where "provisions appear time and again [in other orders]—and without substantial variation"). And, without proper notice and opportunity to be heard, Respondents will have been deprived of due process if these remedial provisions are entered. *See Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing . . . ." (internal quotation marks omitted)). As in *NCBDE*, even if the

[305] In fact, it seems clear that Complaint Counsel's inclusion of an overbroad prior-approval provision in its Proposed Order was inspired by the Commission's decision *after trial* to rescind the 1995 Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases—a long-standing policy that had limited those provisions' use to more appropriate contexts. *See* 60 Fed. Reg. 39,745, 39,745-46 (Aug. 3, 1995). This makes the change even more improper. The Court should disregard Complaint Counsel's nonsensical contention that it previewed this far-reaching proposed provision in its Notice; it plainly did not. *See* CC Proposed Order § II.B n.43.

[306] *See, e.g., In the Matter of Toys R Us, Inc.*, Docket No. 9278, 1998 WL 34300619, at *145 (F.T.C. Oct. 13, 1998) (final order) (narrow cease-and-desist provision targeting conduct found to be unlawful but permitting otherwise lawful conduct); *In the Matter of Brunswick Corp.*, Docket No. 9028, 1982 WL 608304, at *3 (F.T.C. Apr. 29, 1982) (modifying order to permit vertical arrangements where Commission's findings were limited to respondent's horizontal activities); *Abex Corp.* v. *FTC*, 420 F.2d 928, 933 (6th Cir. 1970) (striking as overbroad portion of order dealing with sale of goods when only manufacture of such goods was at issue).

Court were to find liability, the Court should summarily reject Complaint Counsel's overbroad Proposed Order provisions that exceed the scope of the Notice. 2011 WL 11798452, at *97.

C. The Proposed Order is improperly punitive.

Courts have long held that antitrust remedies must not be punitive. *See du Pont*, 366 U.S. at 326 ("Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive."). Furthermore, "[e]quitable relief in an antitrust case should not embody harsh measures when less severe ones will do," *New York* v. *Microsoft Corp.*, 224 F. Supp. 2d 76, 100 (D.D.C. 2002) (internal quotation marks omitted), and a court may properly consider "economic hardship" when choosing "among two or more effective remedies," *du Pont*, 366 U.S. at 327. Despite this clear law, the Proposed Order is structured in a way that would serve only to punish Respondents:

- The rescission provision would unduly punish Altria by requiring that, "without regard" to the divestiture, "Respondents rescind the Transaction Agreements and the Cooperation Agreement," CC Proposed Order § III. Rescission of governance rights negotiated by Altria that are embedded in the transaction agreements—*prior to divestiture*—would prevent Altria from obtaining *any* value for those rights whatsoever, even though those rights were clearly part of the consideration Altria paid for in its multi-billion dollar investment.[307]
- The transaction agreements also contain various governance rights and protective provisions negotiated by JLI in exchange for selling a 35 percent stake in the company. Rescinding those agreements would deprive JLI of the benefits of those provisions vis-à-vis any potential divestiture buyer, causing significant harm to JLI.
- The Proposed Order also punishes Respondents by calling for divestiture (or in the alternative, rescission) of the Purchase Agreement within 90 days of the order becoming final. CC Proposed Order § IV. Compelling a sale on such an expedited timeline is likely to result in a fire sale and force Altria to incur a substantial loss on its investment—and is particularly punitive in light of the fact

[307] Rescission is not an appropriate remedy when it is punitive and does not result in the restoration of competition. *See, e.g.*, *United States* v. *Coca-Cola Bottling Co.*, 575 F.2d 222, 231 (9th Cir. 1978) (finding "argument against [rescission]" was "compelling" where it was "difficult to conceive of how such a decree might be fashioned without impermissibly injuring [defendants]").

that Altria cannot get to market without a PMTA in any case.[308] And as noted above, depending upon how "rescission" is defined, it could cause irreversible financial harm to JLI.[309] There is no record on which to base this remedy.[310]

D. The Court should hold a hearing if it intends to grant Complaint Counsel relief.

Complaint Counsel is not entitled to any relief in this case. In the interest, however, of further complying with the Court's post-trial order requiring that the parties address "each and every provision of the proposed order (other than definitions, boilerplate, or non-substantive provisions)," Respondents attach a mark-up (Appendix I) that further illustrates the myriad ways in which the Proposed Order is overbroad and inconsistent with both the Notice and precedent.

Given Complaint Counsel's failure to demonstrate its entitlement to any of the relief it seeks, Respondents would be entitled to a hearing before the entry of any remedial order in this case. *See* 16 C.F.R. § 3.51(e)(1) (allowing the Court to reopen the proceeding to receive "further evidence for good cause shown" prior to entry of an Initial Decision). Absent such a hearing, Respondents should not be subject to *any* of the relief sought by Complaint Counsel.

VI. FTC Administrative Proceedings Are Unconstitutional.

For the reasons discussed in Respondents' opening brief, the FTC's structure violates the separation of powers in numerous respects, and its procedures, whereby the Commission serves

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[308] It also contravenes the common practice in Commission orders of allowing for extension of that period through the appointment of a divestiture trustee. *See In the Matter of Otto Bock HealthCare N. Am., Inc.*, Docket No. 9378, 2019 WL 5957364, at *12-13 (F.T.C. Nov. 1, 2019) (final order); *In the Matter of Polypore Int'l, Inc.*, Docket No. 9327, 2010 WL 5132519, at *53-54 (F.T.C. Dec. 13, 2010) (final order).

[309] *See* RFF ¶¶ 1141-50.

[310] Following the filing of the Proposed Order, JLI requested that Complaint Counsel withdraw this aspect of its Proposed Order given that it is irrelevant to restoring competition and that Complaint Counsel had developed no record on it. Complaint Counsel declined, explaining that it had no discretion to do so in light of the inclusion of potential rescissory relief in the Complaint that the FTC Commissioners had voted to issue. That Complaint Counsel lacks any ability to omit or remove this baseless and unsupported provision is emblematic of the constitutional concerns raised in Respondents' opening brief. *See* Resps. Opening Br. 133-38.

as the ultimate jury on each case it votes out, also run afoul of constitutional guarantees. *See* Resps. Opening Br. 133-38. The Complaint should be dismissed for these reasons.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed.

Dated: October 20, 2021

Respectfully submitted,

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APPENDIX I

PUBLIC

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

In the Matter of **Altria Group, Inc.** **a corporation;** **and** **JUUL Labs, Inc.** **a corporation.**	**DOCKET NO. 9393**

[PROPOSED] ORDER[A]

I.

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

A. "Altria" means Altria Group, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Altria Group, Inc., including, Altria Enterprises, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "JLI" means JUUL Labs, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by JUUL Labs, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means Altria and JLI, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "Cooperation Agreement" means the Cooperation Agreement by and among Juul Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on January 28, 2020.

F. "E-Cigarettes" means battery-powered devices that vaporize a liquid solution containing nicotine (an "e-liquid"), including a closed system, which consists of a device housing a battery and a heating mechanism, and sealed cartridges or pods that are pre-filled with e-

[A] For ease of reading, the original footnotes in Complaint Counsel's proposed order appear in gray text and are numbered, and Respondents' explanatory footnotes appear in blue text and are lettered.

liquid, and an open system, which incorporates refillable tanks that customers manually fill with e-liquid.

G. "E-Cigarette Business Entity" means any Person that develops, manufactures, sells, or distributes E-Cigarettes.

H. "JLI Equity Stake" means the 35% interest Altria acquired from JLI pursuant to the Purchase Agreement.

I. "Monitor" means the Person appointed pursuant to Section VII of this Order.

J. "Non-Public Information" means all information not in the public domain, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

K. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

L. "Purchase Agreement"[B] means: ~~the~~

1. Class C-1 Common Stock Purchase Agreement by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on December 20, 2018, and the subsequent Amendment No. 1 to Class C-1 Common Stock Purchase Agreement entered into on January 28, 2020;

2. Relationship Agreement by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on December 20, 2018, and the subsequent Amendment No. 1 to Relationship Agreement entered into on January 28, 2020 (the "Relationship Agreement");

3. Ninth Amended and Restated Investors' Rights Agreement entered into by Respondents and various JLI stockholders on December 20, 2018;

4. Ninth Amended and Restated Right of First Refusal and Co-Sale Agreement entered into by Respondents and various JLI stockholders on December 20, 2018;

5. True-Up Convertible Security Agreement by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on December 20, 2018; and

6. JUUL Labs, Inc. Eighth Amended and Restated Voting Agreement entered into by Respondents and various JLI stockholders on December 20, 2018, the subsequent Ninth Amended and Restated Voting Agreement entered into on January 28, 2020, and any subsequent amendments or related agreements.

~~M. "Transaction Agreements" means:~~

~~1. Intellectual Property License Agreement entered into by Respondents on December 20, 2018;~~

[B] Complaint Counsel arbitrarily defines the Purchase Agreement without regard to the structure of Respondents' actual negotiated transaction. This misguided definition has the effect of punishing Respondents by forcing forfeiture of important economic and governance rights of the JLI Equity Stake prior to its divestiture. As amended, the term "Purchase Agreement" is defined to include all documents memorializing the purchase of JLI stock and associated economic and governance rights. This is consistent with the terms of Respondents' transaction, which did not treat the purchase of the JLI Equity Stake in isolation as Complaint Counsel's approach attempts to do.

~~2. Ninth Amended and Restated Investors' Rights Agreement entered into by Respondents and various JLI stockholders on December 20, 2018;~~

~~3. Relationship Agreement by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on December 20, 2018, and the subsequent Amendment No. 1 to Relationship Agreement entered into on January 28, 2020;~~

~~4. Ninth Amended and Restated Right of First Refusal and Co-Sale Agreement entered into by Respondents and various JLI stockholders on December 20, 2018;~~

~~5. Services Agreement by and between Altria Group, Inc., and JUUL Labs, Inc. entered into on December 20, 2018, and the subsequent Amendment No. 1 to Services Agreement entered into on January 28, 2020;~~

~~6. True-Up Convertible Security Agreement by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on December 20, 2018; and~~

~~7. JUUL Labs, Inc. Eighth Amended and Restated Voting Agreement entered into by Respondents and various JLI stockholders on December 20, 2018, and the subsequent Ninth Amended and Restated Voting Agreement entered into on January 28, 2020.~~

M. "IP Agreement" means the Intellectual Property License Agreement entered into by and between Altria Group, Inc., and JUUL Labs, Inc. on December 20, 2018.

N. "Services Agreement" means the Services Agreement by and between Altria Group, Inc., and JUUL Labs, Inc. entered into on December 20, 2018, and the subsequent Amendment No. 1 to Services Agreement entered into on January 28, 2020.

II.

IT IS FURTHER ORDERED that:

A. Respondents, directly or indirectly, or through any corporate or other device, in connection with the development, manufacturing, distribution, or sale of E-Cigarettes in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from, and are prohibited from, entering into or participating in any agreement or understanding, whether express or implied, with ~~any Person~~ each other to not compete in the development, manufacturing, distribution or sale of E-Cigarettes, except with prior approval by the Commission.[1C]

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

[C] Complaint Counsel's proposed cease-and-desist provision is overbroad, punitive, inconsistent with precedent, and would diminish competition because, among other things, it fails to carve out lawful, procompetitive activities and is therefore not reasonably related to any alleged anticompetitive conduct. The provision also exceeds the scope of the Notice of Contemplated Relief (the "Notice"). As amended, Section II.A mirrors the relief Complaint Counsel sought in the Altria/Juul Part 3 Complaint. *See* Notice of Contemplated Relief, Paragraph B (seeking "a prohibition against any future non-compete agreements *between Respondents*, except with prior approval by the Commission"

B. Respondents shall not, without prior approval of the Commission, enter into any agreement or business transaction with each other ~~or any E-Cigarette Business Entity related to~~ that combines their businesses in the development, manufacture, distribution, or sale of E-Cigarettes in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.[2]

Provided, however, that nothing in this Order shall prohibit the provision of *bona fide*, third-party services on an arm's-length basis.[D]

III.

IT IS FURTHER ORDERED that, within 10 days of this Order becoming final and effective (without regard to the finality of the divestiture requirements herein), Respondents ~~rescind~~

(emphasis added)). The amended provision is modeled after previous FTC Orders, including those cited by Complaint Counsel, that permit lawful conduct that may otherwise fall within the scope of a cease-and-desist order. *See In the Matter of N.C. Bd. of Dental Examiners*, Docket No. 9343, 2011 WL 11798463, at *40-41 (F.T.C. Dec. 2, 2011) (final order) (Section II); *In the Matter of Toys R Us, Inc.*, Docket No. 9278, 1998 WL 34300619, at *145 (F.T.C. Oct. 13, 1998) (final order) (Section II); *In the Matter of Polypore Int'l, Inc.*, Docket No. 9327, 2010 WL 5132519, at *59 (F.T.C. Dec. 13, 2010) (final order) (Section VII.B). The amended provision is also modeled after previous FTC Orders that permit lawful vertical arrangements where the Commission's findings are limited to the respondent's horizontal activities. *See In the Matter of Brunswick Corp.*, Docket No. 9028, 1982 WL 608304, at *3 (F.T.C. Apr. 29, 1982) (modifying order) (Section X); *Yamaha Motor Co.* v. *FTC*, 657 F.2d 971, 984 (8th Cir. 1981).

[2] Prior approval is contemplated in the Altria/Juul Part 3 Complaint – "A prohibition against any transaction between Altria and JLI that combines their businesses in the relevant market, except with prior approval by the Commission." See Notice of Contemplated Relief, Paragraph C.

[D] Section II.B is overbroad, punitive, inconsistent with precedent, and would diminish competition because it requires prior approval of "*any* agreement or business transaction" related to e-vapor activities, exceeding the scope of the Notice in a manner that is not reasonably related to any alleged anticompetitive conduct. Complaint Counsel's request for a far broader prior-approval provision beyond that contained in the Notice appears to be improperly inspired by the Commission's recently announced rescission of the policy statement in effect at the time of the issuance of the Complaint. *See* Press Release, Fed. Trade Comm'n, FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers (July 21, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter (announcing rescission of FTC "policy statement requir[ing] prior approval and prior notice provisions only when there was a 'credible risk' of an unlawful merger"). The Proposed Order would impose a substantial burden that is not warranted by the evidence in the record. *See* Resps. Reply Br. Section V.B. As amended, Section II.B mirrors the relief Complaint Counsel sought in the Altria/Juul Part 3 Complaint. *See* Notice of Contemplated Relief, Paragraph C (seeking "[a] prohibition against any transaction between Altria and JLI that combines their businesses in the relevant market, except with prior approval by the Commission"). It is also consistent with precedents at the time of the filing of the Complaint. The amended provision is also modeled after previous FTC orders that carve out lawful, procompetitive activities. *See In the Matter of Polygram Holding, Inc.*, Docket No. 9298, at 2003 WL 25797195, at *96-97 (F.T.C. July 24, 2003) (final order) (Section III) (permitting written agreements to set prices if reasonably related to a lawful joint venture agreement and reasonably necessary to achieve its procompetitive benefits); *In the Matter of Polypore, Int'l, Inc.*, Docket No. 9327, 2010 WL 5132519, at *59 (F.T.C. Dec. 13, 2010) (final order) (Section VII.B) (permitting joint venture agreements); *In the Matter of Toys R Us, Inc.*, Docket No. 9278, 1998 WL 34300619, at *145 (F.T.C. Oct. 13, 1998) (final order) (Section II) (permitting exclusive arrangements with suppliers).

terminate Article 3 of the ~~Transaction Agreements and the Cooperation Agreement~~ Relationship Agreement.[3E]

IV.

IT IS FURTHER ORDERED that:[4]

A. No later than ~~90 days~~ one year from the date this Order becomes final and effective, Respondent Altria shall divest, absolutely and in good faith, at no minimum price, to one or more buyers approved by the Commission (unless the buyer is Respondent JLI), its JLI Equity Stake, ~~or, in the alternative,~~ and in divesting the JLI Equity Stake, shall seek to preserve the value related to the contractual rights and protections bargained for in the Purchase Agreement.

B. ~~Respondents shall rescind the Purchase Agreement.~~If Respondent Altria has not divested, absolutely and in good faith, its JLI Equity Stake pursuant to the requirements of Section IV.A of this Order, within the time required by Section IV.A of this Order, the Commission may, upon notice to and opportunity to comment by Respondents, appoint one or more Persons (the "Divestiture Trustee") to divest the JLI Equity Stake, including the economic interest and the accompanying rights as reflected in the Purchase Agreement, at no minimum price, and pursuant to the requirements of Section IV.A of this Order, in a manner that satisfies the requirements of this Order.[F]

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[3] The purpose of Section III is to rescind the Agreements between the Respondents, and remedy the likely anticompetitive effects of the transaction. See Otto Bock HealthCare North America, Inc., Docket No. 9378, Order, at Section II.

[E] Complaint Counsel's proposed provision would be punitive and not reasonably related to any allegations of anticompetitive harm in the instant case because it would require rescission of agreements tied to economic and governance rights of the JLI Equity Stake, potentially erasing all value for that stake *prior to* divesting it. Rescission of agreements tied to the economic value of the JLI Equity Stake would not be consistent with precedent and would be improper in light of the divestiture remedy proposed in Section IV. *See* Resps. Reply Br. Section V.C; *In the Matter of Otto Bock HealthCare N. Am., Inc.*, Docket No. 9378, 2019 WL 5957364, at *10 (F.T.C. Nov. 1, 2019) (final order) (Section IV) (requiring maintenance of the marketability and viability of the divestiture business); *In the Matter of ProMedica Health Sys., Inc.*, Docket No. 9346, 2012 WL 2450574, at *7 (F.T.C. June 25, 2012) (final order) (Section II) (prohibiting rescission of the transaction agreement or any term of the transaction agreement required to comply with the order pending divestiture). In addition, rescission of agreements such as the Services Agreement could significantly impair JLI's ongoing competitiveness. *See* Resps. Reply Br. Section V.A. Finally, rescission of the Cooperation Agreement, which governs cooperation in ongoing litigation, would be unnecessary and improper. Complaint Counsel's citation to the order in *Otto Bock* to support a provision requiring rescission is inapposite. In *Otto Bock*, also a challenge to a consummated transaction, the Commission required divestiture, not rescission. *In the Matter of Otto Bock HealthCare N. Am., Inc.*, Docket No. 9378, 2019 WL 5957364, at *5-10 (F.T.C. Nov. 1, 2019) (final order) (Section II). As amended, Section III terminates the noncompete provision that was the focus of this proceeding.

[4] The purpose of Section IV is to undo the acquisition and remedy the likely anticompetitive effects of the transaction. See Otto Bock HealthCare North America, Inc., Docket No. 9378, Order, at Section II.

[F] The length of time Complaint Counsel proposes for effectuating divestiture (90 days) is more limited than previous FTC orders for no valid reason under the antitrust laws, particularly in light of FDA's regulatory scheme preventing the introduction of new products without PMTA approval. And, Complaint Counsel's proposal of requiring

C. The Commission's selection of the Divestiture Trustee shall be subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures.

D. If a Divestiture Trustee is appointed by the Commission pursuant to this Section IV, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effect the divestiture pursuant to the requirements of Section IV.A of this Order and in a manner consistent with the purposes of this Order.

2. Within 10 days after appointment of the Divestiture Trustee, Respondents shall execute an agreement that transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture and perform the requirements of Section IV.A of this Order for which he or she has been appointed.

3. The Divestiture Trustee shall have 12 months from the date the Commission approves the agreement described in Section IV.D.2 of this Order to accomplish the divestiture. If, however, at the end of the 12-month period the Divestiture Trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission. Until the divestiture required by this Order has been accomplished, the Divestiture Trustee shall vote all of the shares of the JLI Equity Stake that are entitled to vote for and/or against applicable matters in the same respective proportions as the other holders of JLI Class C-1 stock.

4. Respondent Altria and Respondent JLI shall, if requested by the Divestiture Trustee, each use their respective best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. Subject to a customary confidentiality agreement adequate to protect Respondents' sensitive, proprietary information, with the Divestiture Trustee and any representatives the Divestiture Trustee retains pursuant to Section IV.D.6 of this Order, Respondent JLI shall provide the

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rescission if the JLI Equity Stake cannot be divested on an expedited timeline would serve only to diminish competition and punish Respondents. *See* Resps. Reply Br. Section V.C. As amended, Section IV mirrors prior FTC orders providing a longer time period for divestiture, particularly important in the context of a minority stake, and appointing a divestiture trustee to effect a divestiture if the Respondent is unable to do so in the time provided by the order. *See In the Matter of Chi. Bridge & Iron Co.*, Docket No. 9300, 2004 WL 3142892, at *5, *9 (F.T.C. Dec. 21, 2004) (final order) (Section VI) (180 days, followed by a 12-month period for the divestiture trustee); *In the Matter of ProMedica Health Sys., Inc.*, Docket No. 9346, 2012 WL 2450574, at *6, *9 (F.T.C. June 25, 2012) (final order) (Section II) (same); *In the Matter of Polypore Int'l Inc.*, Docket No. 9327, 2010 WL 5132519, at *48, *54 (F.T.C. Dec. 13, 2010) (final order) (Section II) (similar); *see also In the Matter of Bos. Sci. Corp.*, No. C-4164, 2006 WL 2330115, at *14-21 (F.T.C. July 21, 2006) (consent order) (30 months for one respondent to divest a minority interest, and 18 months for the other respondent to divest a minority interest, followed by up to 3-year period for the divestiture trustee). Even the example cited by Complaint Counsel, in which there was already "an identified buyer" and a proposed divestiture, provided for a divestiture trustee, rather than requiring rescission if the respondent could not effect the divestiture in the limited time provided. *See In the Matter of Otto Bock HealthCare N. Am., Inc.*, Docket No. 9378, 2019 WL 5957364, at *12-15 (F.T.C. Nov. 1, 2019) (final order) (Section VII); *id.*, 2019 WL 5957363, at *3 (F.T.C. Nov. 1, 2019) (opinion).

Divestiture Trustee with full and complete access to the personnel, books, records, and facilities related to the assets to be divested, or to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may reasonably request and shall cooperate with the Divestiture Trustee. Subject to a customary confidentiality agreement adequate to protect Respondents' sensitive, proprietary information, the Divestiture Trustee shall permit prospective purchasers of part or all of the JLI Equity Stake to have access to any and all JLI financial or operational information to which the Divestiture Trustee has access, as may be relevant to the divestiture required by this Order. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture.

5. The Divestiture Trustee shall use his or her best efforts to negotiate the most favorable price and terms available, but shall divest expeditiously at no minimum price. Upon receipt of any offer to purchase part or all of the JLI Equity Stake, the Divestiture Trustee shall inform Respondents of such offer and its terms, within 3 business days and in any event no later than 10 business days prior to presenting such an offer to the Commission. In divesting the JLI Equity Stake, the Divestiture Trustee shall seek to preserve the contractual rights and protections bargained for in the Purchase Agreement. The Divestiture Trustee shall divest the JLI Equity Stake in its entirety in a single divestiture transaction or in part in one or more divestiture transactions, to one or more purchasers that each receive the prior approval of the Commission.

6. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The Divestiture Trustee's compensation may be based in part on a commission arrangement contingent on the Divestiture Trustee's divesting the assets.

7. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Section IV.D.7, the term "Divestiture

Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Section IV.D.6 of this Order.

8. If the Divestiture Trustee ceases to act or fails to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Section IV for appointment of the initial Divestiture Trustee.

9. The Divestiture Trustee shall have no obligation or authority to operate or maintain the assets to be divested.

10. The Divestiture Trustee shall report in writing to the Commission every 60 days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

E. The Commission may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order, provided that Respondents receive adequate notice and opportunity to respond.

V.

IT IS FURTHER ORDERED that[5]:

A. Respondents shall, within 10 days of this Order becoming final and effective (without regard to the finality of the divestiture requirements herein), remove any director, observer, or other Person associated with a Respondent from the other Respondent's board of directors, including prohibiting any Person associated with a Respondent from attending a board of director meeting convened by the other Respondent;

B. Respondents shall not:

1. Permit any officer or director of either Respondent to serve on the other Respondent's board of directors or attend any of its meetings.

2. Influence or attempt to influence, directly or indirectly, the management or operation of the other Respondent.~~;~~

3. Receive or attempt to receive, directly or indirectly, any Non-Public Information of, from, or relating to, the other Respondent.

VI.

IT IS FURTHER ORDERED THAT, no later than ten (10) days from the date on which this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), Respondents shall provide a copy of this Order to each of Respondents' officers,

[5] The purpose of this Section is to ensure that Respondents do not violate Section 8 of the Clayton Act, 15 U.S.C., § 19.

employees, or agents having managerial responsibilities for any of Respondents' obligations under this Order.[6]

VII.

~~**IT IS FURTHER ORDERED** that~~[7G]~~:~~

~~A. At any time after this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), the Commission may appoint a Person ("Monitor") to monitor Respondents' compliance with their obligations under this Order, consult with Commission staff, and report to the Commission regarding Respondents' compliance with their obligations under this Order.~~

~~B. If a Monitor is appointed pursuant to Paragraph VII.A of this Order, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:~~

~~1. The Monitor shall have the power and authority to monitor Respondents' compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor pursuant to the terms of this Order and in a manner consistent with the purposes of this Order and in consultation with the Commission or its staff.~~

~~2. Within ten 10 days after appointment of the Monitor, Respondents, separately, shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order. If requested by a Respondent, the Monitor shall sign a confidentiality agreement prohibiting the use or disclosure to anyone other than the Commission (or any Person retained by the Monitor pursuant to Paragraph VII.B.5 of this Order), of any competitively-sensitive or proprietary information gained as a result of his or her role as Monitor, for any purpose other than performance of the Monitor's duties under this Order.~~

~~3. The Monitor's power and duties under this Section VII shall terminate three 3 business days after the Monitor has completed his or her final report pursuant to~~

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

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

[G] The compliance monitor provision would be unnecessary to effectuate divestiture and termination of the agreements, which Complaint Counsel stated was sufficient to resolve its competitive concerns. *See* Sections VII and VIII.B. With Complaint Counsel having extolled the ease of administration of these remedies, Complaint Counsel's request for ongoing monitoring and compliance reports is redundant. The absence of a monitoring requirement is consistent with the Commission's practice of not requiring or permitting a monitor in cases of a complete divestiture designed to undo a partial interest or joint venture transaction. *See In the Matter of Brunswick Corp.*, Docket No. 9028, 1982 WL 608304, at *1-3 (F.T.C. Apr. 29, 1982) (modifying order); *In the Matter of Polygram Holding, Inc.*, Docket No. 9298, 2003 WL 25797195, at *95-98 (F.T.C. July 24, 2003) (final order).

Paragraph VII.B.8 of this Order or at such other time as directed by the Commission.

4. Respondents shall cooperate with any Monitor appointed by the Commission in the performance of his or her duties, and shall provide the Monitor with full and complete access to Respondents' books, records, documents, personnel, facilities, and technical information relating to compliance with this Order, or to any other relevant information, as the Monitor may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor. Respondents shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order.

5. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct. For purposes of this Paragraph VII.B.6, the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph VII.B.5 of this Order.

7. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor in the same manner as provided by this Order.

8. The Monitor shall report in writing to the Commission (i) every thirty 30 days from the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), (ii) no later than thirty 30 days from the date Respondents complete their obligations under this Order, and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.

C. Respondents shall submit copies of all compliance reports filed with the Commission to the Monitor no later than twenty 20 days after the date the Monitor is appointed by the Commission pursuant to Paragraph VII.A of this Order.

D. The Commission may, on its own initiative or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

VIII.

IT IS FURTHER ORDERED that[8]:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the dates that the Respondents comply with the obligations under Sections III, IV, and V.A, no later than 5 days after the occurrence of each; and

2. Submit any documentation memorializing such occurrences in ~~Paragraph~~ Section VIII.A.1 to the Commission at bccompliance@ftc.gov no later than 30 days after the date they occur.

B. Respondents shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit:

a. Interim compliance reports 30 days after the Order ~~is issued by this Court~~ becomes final and effective, and every ~~60~~ 90 days thereafter until Respondents have fully complied with the provisions of Sections, III, IV, and V.A;

b. Annual compliance reports one year after the date this Order ~~is issued by this Court~~ becomes final and effective, and annually for the next ~~9~~ 3 years on the anniversary of that date;[H] and

c. Additional compliance reports as the Commission or its staff may request.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order. Conclusory statements that Respondents have complied with their obligations under this Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures

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

[H] Complaint Counsel proposes a provision requiring that Respondents submit annual compliance reports for nine years, a period far longer than would be needed to effectuate the divestiture remedy espoused by Complaint Counsel as "simple[]" and "effective." CC Opening Br. 98-99. Moreover, Section VIII.B is overbroad and inconsistent with precedent because it is triggered before any order becomes final and effective. As amended, this provision is modeled after previous FTC Orders requiring annual compliance reports for a more limited period of time following the initial compliance report. *See In the Matter of N.C. Bd. of Dental Examiners*, Docket No. 9343, 2011 WL 11798463, at *42 (F.T.C. Dec. 2, 2011) (final order) (Section IV) (three years).

Respondents have implemented and plan to implement to comply with each ~~paragraph~~ section of the Orders.

3. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Order~~s~~ and provide copies of these documents to Commission staff upon request.

4. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov*; provided, however*, that Respondents need only file electronic copies of the interim reports required by ~~Paragraph~~ Section VIII.B.1 (a). ~~In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.~~

IX.

IT IS FURTHER ORDERED that each Respondent~~s~~ shall notify the Commission at least 30 days prior to any proposed change in the Respondent identified below to the extent the proposed change may affect compliance obligations arising out of this Order[9][l]:

A. Any proposed dissolution of Altria Group, Inc. or Juul Labs, Inc., respectively;

B. Any proposed acquisition of, or merger or consolidation involving all or substantially all of Altria Group, Inc. or Juul Labs, Inc., respectively; or

[9] Section IX is standard in FTC Part 3 Orders. *See*, Otto Bock HealthCare North America, Inc., Docket No. 9378, Order, at Section IX.

[l] Section IX is overbroad and inconsistent with precedent to the extent it would require each Respondent to provide the Commission with prior notice of all changes in corporate structure, rather than only those changes that may affect compliance obligations arising out of this Order. As amended, Section IX mirrors precedents that do not give rise to such a broad notice obligation. *See In the Matter of N. Tex. Specialty Physicians*, 2006 WL 6679063, at *6 (F.T.C. Jan. 20, 2006) (describing this language as requiring "NTSP to notify the Commission at least thirty days prior to any proposed change in NTSP that may affect compliance obligations arising out of the Final Order, including but not limited to dissolution, assignment or sale"); *In the Matter of Georgia-Pacific Corp.*, 1978 WL 206487, at *2 (F.T.C. May 12, 1978) (modifying order) (Paragraph 10) (similar). The addition of the "all or substantially all" qualifier is intended to exclude any immaterial open market purchases of Altria's stock, which is publicly traded.

C. Any other change in the Respondents including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission[10]:

A. Access, during business office hours of the Respondents and in the presence of counsel for the Respondents, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided at the request of the authorized representative of the Commission and by the Respondents at their expense;[J] and

B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate upon the earlier of finalization of the divestiture or 5 ~~10~~ years from the date this Order ~~it~~ is issued.[K]

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

[10] Section X is standard in FTC Part 3 Orders. *See*, Otto Bock HealthCare North America, Inc., Docket No. 9378, Order, at Section X.

[J] Section X is inconsistent with precedent because, among other things, it fails to specify that the Respondents would be entitled to have counsel present during an inspection by the Commission. As amended, this Section aligns that provision with precedent in those capacities. *See In the Matter of Otto Bock HealthCare N. Am., Inc.*, Docket No. 9378, 2019 WL 5957364, at *16 (F.T.C. Nov. 1, 2019) (final order) (Section X).

[K] The 10-year period urged by Complaint Counsel is unreasonable and not warranted by any evidence in this case, which indisputably showed that the e-vapor market is rapidly changing. Thus, as amended, the duration of the Proposed Order reflects the fact that the stated purpose of the Order, "to undo [and rescind] the acquisition and remedy the likely anticompetitive effects of the transaction," and the findings on which it is based, would no longer be apt beyond five years from the date the Order is issued.

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 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:

April Tabor
Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

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

I also certify that I caused the foregoing document to be served via email to:

Stephen Rodger (srodger@ftc.gov)
Jennifer Milici (jmilici@ftc.gov)
James Abell (jabell@ftc.gov)
Peggy Bayer Femenella (pbayer@ftc.gov)
Erik Herron (eherron@ftc.gov)
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Meredith Levert (mlevert@ftc.gov)
Kristian Rogers (krogers@ftc.gov)
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Michael Lovinger (mlovinger@ftc.gov)
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Steven Wilensky (swilesnky@ftc.gov)
Federal Trade Commission
400 7th Street, SW
Washington, DC 20024

Complaint Counsel

s/ Beth Wilkinson

Beth Wilkinson

Counsel for Altria Group, Inc.

CERTIFICATE OF ELECTRONIC FILING

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: October 20, 2021

s/ Beth Wilkinson

Beth Wilkinson
Counsel for Altria Group, Inc.