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**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:** **Joseph J. Simons, Chairman**
**Noah Joshua Phillips**
**Rohit Chopra**
**Rebecca Kelly Slaughter**
**Christine S. Wilson**

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| **In the Matter of**<br><br>**Altria Group, Inc.**<br>**a corporation;**<br><br>**And**<br><br>**JUUL Labs, Inc.**<br>**a corporation.** | **Docket No. 9393**<br><br>**PUBLIC VERSION** |

# COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Altria Group, Inc. ("Altria"), a corporation, and JUUL Labs, Inc. ("JLI"), a corporation, hereinafter sometimes referred to as "Respondents," have executed agreements in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), and Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), stating its charges as follows:

## I. NATURE OF THE CASE

1. This action concerns a series of agreements between Altria and JLI, whereby Altria ceased to compete in the U.S. market for closed-system electronic cigarettes ("the relevant market") in return for a substantial ownership interest in JLI, by far the dominant player in that market. Electronic cigarettes ("e-cigarettes") are devices that deliver nicotine to a user by vaporizing a liquid nicotine solution; in the case of closed-system e-cigarettes, the liquid is contained in a pre-filled, sealed cartridge. Faced with declining sales of traditional cigarettes and a shift in consumer demand toward alternative nicotine products, for years Altria had viewed participation in the relevant market as a strategic priority essential to its long-term survival. Altria entered the

relevant market through its subsidiary Nu Mark in 2013 and continued to invest heavily in the category. By mid-2017, its MarkTen e-cigarette had achieved the second-highest market share.

2. JLI entered the relevant market in 2015, and experienced modest growth until mid-2017, when it began rapidly overtaking its competitors, including Altria. JLI's meteoric rise stunned Altria and upended the entire e-cigarette market: by the end of 2017, JLI's market share had surpassed those of all other e-cigarette manufacturers, including Altria.

3. JLI's rise presented Altria with a new threat on two fronts: it stood in the way of Altria's goal of leading the e-cigarette category and threatened to disrupt Altria's lucrative traditional cigarette business. Altria reacted to this threat by pursuing a dual-track strategy: on the one hand it would endeavor to compete aggressively against JLI, including through price promotions and product innovation; at the same time, it sought to eliminate the threat by acquiring JLI. Altria made repeated overtures to JLI about a potential acquisition or partnership, but negotiations dragged, and meanwhile Altria continued to compete aggressively. In February 2018, it introduced MarkTen Elite, a pod-based e-cigarette that closely resembled JLI's product in appearance and structure. Although JLI continued to dominate the relevant market, in mid-2018, Altria told the investment community that its own products were driving growth and gaining traction among consumers.

4. Negotiations between Altria and JLI intensified in the summer of 2018, and the future of Altria's e-cigarette business emerged as a key point of contention. During negotiations, JLI insisted, and Altria recognized, that Altria's exit from the e-cigarette market was a non-negotiable condition for any deal. When Altria sought to weaken or remove any obligation to exit that market, JLI conveyed that any such attempt was completely unacceptable. After negotiations had stalled temporarily, Altria reaffirmed its willingness to accede to JLI's demand in early October 2018. With that commitment secured, negotiations resumed. At that time, JLI dominated the relevant market with a market share of approximately 70%, and Altria was anticipating an increasingly negative impact on both its e-cigarette and its traditional cigarette businesses due in part to JLI's growth.

5. In order to meet JLI's demand that Altria cease to compete in the e-cigarette market, Altria began taking steps to withdraw its e-cigarettes from the relevant market, including pulling its MarkTen Elite product from the market in October 2018, and then, after five years of continuous operation, announcing on December 7, 2018, its decision to wind down the remainder of its e-cigarette business. At the same time [redacted] Less than two weeks later, Respondents reached a deal.

6. On December 20, 2018, Respondents announced that they had executed a Purchase Agreement and a number of related agreements (together, "the Transaction"). Under the Purchase Agreement, Altria purchased a 35% non-voting stake in JLI, which Altria could convert to a voting stake upon receiving HSR approval. In addition,

Respondents executed a Relationship Agreement, which contained a non-compete provision ("the Non-Compete") restricting Altria from competing in the relevant market; a Services Agreement, whereby Altria agreed to provide a variety of support services for JLI; an Intellectual Property License Agreement licensing Altria's e-cigarette intellectual property to JLI; and a Voting Agreement providing Altria representation on JLI's board of directors following the conversion of its shares. Pending HSR approval, the Transaction provided Altria the right to appoint one of its executives to a non-voting "observer" position on JLI's board.

7. Altria's investment in JLI and its nearly simultaneous decision to exit the relevant market in order to meet JLI's demands not only eliminated its existing e-cigarette products from the market but also, through the Non-Compete, halted its ongoing innovation efforts toward developing a new and improved portfolio of products. Thus, consumers lost the benefit of current and future head-to-head competition between Altria and JLI, and between Altria and other competitors. As JLI summarized in a set of draft talking points for the announcement of the Transaction: [redacted]

8. By securing Altria's exit from the relevant market, the Transaction eliminated a threat to JLI's market dominance. Respondents further ensured that dominance by agreeing that Altria would throw behind JLI its extensive resources, including its distribution capabilities and its premier shelf space at retailers.

9. After executing the Transaction, Altria appointed its Chief Growth Officer as its observer on the JLI board of directors. Following that executive's departure from Altria to become Chief Executive Officer of JLI, Altria appointed its Chief Financial Officer and Vice Chairman to fill the observer position.

10. Neither the entry of new producers, nor repositioning by existing producers, would be timely, likely, or sufficient to counteract the anticompetitive effects of Altria's agreement to exit the relevant market. Entry or repositioning would require extensive time and capital expenditure related to the development or acquisition of a product, as well as to securing the approval of a product by the U.S. Food & Drug Administration (FDA) through a complex, lengthy, and expensive regulatory process.

11. Respondents cannot show that the Transaction resulted in cognizable efficiencies sufficient to outweigh the competitive harm caused by Altria's agreement to exit the relevant market. Nor can they point to pro-competitive benefits that could not have been achieved through less restrictive means. In fact, much of the collaboration was restructured in January 2020 to eliminate the marketing aspects of the collaboration, further reducing the scope of theoretical benefits from the agreements.

12. Respondents' conduct has illegally restrained competition in the relevant market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and thus constitutes an unfair method of competition in violation of Section 5(a) of the FTC Act, as amended, 15 U.S.C. § 45(a).

13. The Transaction has also substantially lessened competition in the relevant market in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act.

## II. JURISDICTION

14. At all times relevant, Respondents Altria and JLI have each been, and are each now, corporations as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and in Section 1 of the Clayton Act, 15 U.S.C. § 12.

15. At all times relevant, the acts and practices of Respondents Altria and JLI, including the acts and practices alleged in this complaint, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and in Section 1 of the Clayton Act, 15 U.S.C. § 12.

16. The Transaction constitutes an acquisition subject to Section 7 of the Clayton Act, 15 U.S.C. § 18.

## III. RESPONDENTS

17. Respondent Altria Group, Inc. is a holding company incorporated in Virginia and headquartered at 6601 West Broad Street, Richmond, Virginia 23230. Through a number of subsidiaries, Altria is engaged in the manufacture, sale and distribution of cigarettes, cigars, pipe tobacco, and smokeless tobacco products. Prior to the discontinuation of its entire product line in December 2018, Altria's Nu Mark subsidiary was engaged in the manufacture and sale of "innovative tobacco" products, which included e-cigarettes sold under the brand names MarkTen and Green Smoke. In 2018, Altria generated over $25 billion in net revenues.

18. Respondent JUUL Labs, Inc., a Delaware corporation, is headquartered at 560 20th Street, San Francisco, California 94107. JLI is the leading manufacturer of pod-based e-cigarettes, generating over $1 billion in sales in 2018.

## IV. THE TRANSACTION

19. As referenced in Paragraph 6 herein, on December 20, 2018, Respondents initiated a series of transactions granting Altria a 35% non-voting equity interest in JLI in exchange for a $12.8 billion all-cash investment. This investment did not require a notification under the Hart-Scott-Rodino Act. Respondents' Purchase Agreement incorporates various ancillary agreements, including a Services Agreement, a Relationship Agreement, a Voting Agreement, and an Intellectual Property License Agreement.

20. The Transaction valued JLI at roughly $38 billion, more than double JLI's reported value less than seven months earlier, speaking to JLI's commercial success. JLI distributed the vast majority of Altria's cash payment to its shareholders and employees, including its two largest shareholders, [redacted], and its CEO Kevin Burns.

21. On February 4, 2019, Respondents filed for HSR clearance to convert Altria's interest into voting securities (the "Antitrust Conversion") and to grant Altria permission to appoint three (of nine) members of JLI's board of directors as specified in the Voting Agreement.

22. The Relationship Agreement includes the Non-Compete, which states in the relevant part:

> [Altria] shall not . . . directly or indirectly (1) own, manage, operate, control, engage in or assist others in engaging in, the e-Vapor business; (2) take actions with the purpose of preparing to engage in the e-Vapor Business, including through engaging in or sponsoring research and development activities; or (3) Beneficially Own any equity interest in any Person, other than an aggregate of not more than four and nine-tenths percent (4.9%) of the equity interests of any Person which is publicly listed on a national stock exchange, that engages directly or indirectly in the e-Vapor Business (other than (x) as a result of [Altria's] Beneficial Ownership of Shares or (y) engagement in, or sponsorship of, research and development activities not directed toward the e-Vapor Business and not undertaken with the purpose of developing or commercializing technology or products in the e-Vapor Business) . . . . Notwithstanding the foregoing, (x) the [Altria] and its Subsidiaries and controlled Affiliates may engage in the business relating to (I) its Green Smoke, MarkTen (or Solaris, which is the non-U.S. equivalent brand of MarkTen) and MarkTen Elite brands, in each case, as such business is presently conducted, subject to Section 4.1 of the Purchase Agreement, and (II) for a period of sixty (60) days commencing on the date of this Agreement, certain research and development activities pursuant to existing agreements with third parties that are in the process of being discontinued . . . .

At the time the Non-Compete was signed, Altria had, over the preceding two months, removed all of its e-cigarette products from the market. In effect, Altria committed to shut down its own e-vapor business and participate in that business exclusively through JLI.

23. Though it was later amended, under the initial Services Agreement, Altria agreed to provide certain services to JLI, divided between Initial and Extended Services. The Initial Services included leasing convenience store shelf space to JLI, regulatory consulting, and distribution support; the Extended Services included direct marketing support and sales services. Under the terms of the Relationship Agreement, the Non-Compete went into effect early in 2019 when Altria began to perform Extended Services. The Services Agreement had an initial six-year term, subject to early termination by mutual consent or in case of material breach, bankruptcy, or insolvency. If the Services Agreement expired, Altria could discontinue the Non-Compete, at which point it would lose its right to appoint JLI board members and its pre-emptive right to maintain its 35% stake in the company, but would regain its ability to compete in the market against JLI.

24. The Intellectual Property License Agreement grants JLI a broad, non-exclusive, irrevocable license to Altria's e-cigarette intellectual property portfolio.

25. On January 30, 2020, Respondents announced amendments to their agreement, including an Amended Purchase Agreement, an Amended Relationship Agreement, an Amended Services Agreement, and a Revised Voting Agreement.

26. Under the Revised Voting Agreement, after the Antitrust Conversion, Altria will instead have the right to (1) appoint two (of nine) JLI directors; (2) nominate one (of three) JLI independent directors; (3) appoint one (of four) members of a Nominating Committee (who would have the right to veto independent director nominations); (4) appoint two (of five) members and the chair of a new Litigation Oversight Committee (which would have responsibility for managing litigation involving both Altria and JLI, i.e., "Joint Litigation Matters"); and (5) appoint one (of three) members of a Litigation Subcommittee (which would have authority, by unanimous vote, to change JLI's senior outside counsel responsible for Joint Litigation Matters). The Revised Voting Agreement would further grant JLI's CEO (1) a board seat, (2) a seat on the Litigation Oversight Committee, and (3) a seat on the Litigation Subcommittee.

27. The Amended Relationship Agreement gives Altria the option to be released from the Non-Compete if JLI is prohibited by federal law from selling vaping products in the United States for at least a year or if Altria's internal valuation of the carrying value of its investment falls below 10% of its initial value of $12.8 billion.

28. The Amended Services Agreement eliminates all services except for regulatory support services. The amendment was effective at signing except as regards to Altria's provision of retail shelf space to JLI, which service terminates after March 31, 2020.

## V. INDUSTRY BACKGROUND

### A. Altria Recognized the Need to Invest in E-cigarettes

29. In the mid-2010s, there was an increased focus on alternative nicotine products, among which e-cigarettes became the fastest-growing category. Altria and the other major cigarette producers repeatedly acknowledged the need to invest and compete in the relevant market, and start-ups such as JLI and NJOY entered as well.

30. Altria entered the market with its MarkTen e-cigarette in 2013, and over the next several years spent well over $100 million acquiring other existing e-cigarette platforms in order to augment its portfolio. [redacted], Altria [redacted] a pod-based product and began marketing it in February 2018 as MarkTen Elite.

31. Altria management emphasized the importance of the e-vapor category during investor presentations and through internal incentive compensation plans. For example, in February 2018, Altria's then-COO (and current CEO) Howard Willard explained, "Nu Mark's goal is to lead the U.S. e-vapor category with a portfolio of superior, potentially reduced-risk products that . . . generate cigarette-like margins at scale."

32. JLI, then a subsidiary (subsequently spun-off) of PAX Labs, Inc., entered the relevant market in 2015 with a closed-system e-cigarette in a discreet "pod-based" format, roughly the size and shape of a USB drive. JLI's "JUUL" product quickly gained traction among consumers, and by the end of 2017, it had surpassed Altria and secured the largest share of the relevant market.

### B. The PMTA Process for E-cigarettes

33. Under the FDA's regulatory framework, a manufacturer of a new tobacco product, including an e-cigarette, must submit to the FDA a Premarket Tobacco Product Application ("PMTA") and receive the FDA's approval before marketing that product. An e-cigarette that was on the market prior to August 8, 2016 may remain on the market, but the manufacturer of that product must file a PMTA by May 12, 2020 in order to continue marketing it, and must remove the product in the event the PMTA is denied. An e-cigarette that was not on the market prior to August 8, 2016 cannot be marketed until it receives PMTA approval. At the time Respondents executed the Transaction, the deadline for an in-market applicant to file its PMTA was August 8, 2022.

34. Preparing a PMTA requires a significant amount of resources—time, personnel, and money, which can range from several hundreds of thousands to multiple millions of dollars per product.

35. The FDA announced on January 2, 2020 that it had finalized a new enforcement policy prohibiting all non-tobacco/non-menthol flavors for cartridge-based e-cigarettes until a PMTA authorization, which went into effect on February 6, 2020. In a related but separate action, Congress raised the federal minimum age to purchase all tobacco products (including e-cigarettes) from 18 to 21 in December 2019.

## VI. THE RELEVANT MARKET

36. The relevant product market for the purposes of this action is closed-system e-cigarettes. A hypothetical monopolist in this relevant market would find it profitable to impose at least a small but significant and non-transitory increase in price ("SSNIP").

37. E-cigarettes are battery-powered devices that vaporize a liquid solution containing nicotine (an "e-liquid"). There are two broad categories of e-cigarette: closed-system and open-tank. Closed-system e-cigarettes consist of a device housing a battery and a heating mechanism, and sealed cartridges or pods that are pre-filled with e-liquid. Examples of closed-system devices include cigalikes, which are similar to traditional cigarettes in size and shape, and pod-based products, such as JUUL or MarkTen Elite, which look like USB drives. Subsequent to the FDA flavor ban that went into effect February 2020, closed-system pods and cartridges are available only in tobacco and menthol flavors.

38. By contrast, open-tank e-cigarettes incorporate refillable tanks that customers manually fill with e-liquid. Because customers are able to select from (and mix together) a wide assortment of e-liquids, open-tank e-cigarettes allow a more

customizable experience whereby users can experiment with different flavors and nicotine strengths. In addition, unlike with closed systems, users can customize the individual components of an open-tank system, such as the battery, heating coil, and atomizer (which houses the heating coil).

39. Closed-system e-cigarettes are largely sold in different channels than open-tank products, and open-tank customers tend to seek a different experience than closed-system customers. The vast majority of closed-system e-cigarettes are sold through the multi-outlet channel, which consists primarily of convenience stores. Convenience stores offer a limited range of e-cigarette products, focusing on the highest-velocity brands. In contrast, open-tank e-cigarettes are sold almost exclusively at dedicated vape shops, retail outlets that typically carry an extensive selection of e-liquids and parts for open-tank products and offer a high level of customer service.

40. Respondents considered their respective JLI and MarkTen product lines to be direct competitors with each other and with other closed-system e-cigarette products and set prices based on competition with each other and with other closed-system products. Respondents further acknowledged that their closed-system e-cigarette products did not compete as closely with open-tank products.

41. There are no reasonable substitutes for closed-system e-cigarettes. Closed-system e-cigarettes appeal to consumers because they are discreet due to their small size, and convenient due to their self-contained, ready-to-use format. Open-tank e-cigarettes are not an adequate substitute for closed-system e-cigarettes because they are larger, more complex, and require more manual operation by the user. Open-tank e-cigarettes generally appeal to a different customer type, one that appreciates their complexity and customizable nature.

42. The relevant geographic market is no broader than the United States. Because of the FDA's PMTA requirements, foreign firms cannot import e-cigarettes into the United States without prior FDA approval.

## VII. MARKET STRUCTURE

43. At the time of Altria's exit, the relevant market was already highly concentrated. Following Altria's exit, it became even more concentrated.

44. The federal antitrust agencies, consistent with the Merger Guidelines and federal court decisions, measure concentration using the Herfindahl-Hirschman Index ("HHI"). The HHI is calculated by totaling the squares of the market shares of each firm in the relevant market. Under the Merger Guidelines, a merger is presumed likely to create or enhance market power—and is presumably illegal—when the post-merger HHI exceeds 2,500 and the merger increases the HHI by more than 200 points.

45. In the U.S. market for closed-system e-cigarettes, the Transaction resulted in a post-Transaction HHI exceeding 2,500, with an increase in HHI of more than 200. Thus, the Transaction resulted in concentration that establishes a presumption of competitive harm in the relevant market.

## VIII. ANTICOMPETITIVE EFFECTS

### A. Altria Agreed to Withdraw from Current and Future Competition in Exchange for the Opportunity to Share in JLI's Dominant Position

46. During the negotiations between Respondents, JLI's executives made clear their position that Altria could not remain a competitor in the relevant market if there was to be a deal:

- Mr. Danaher, JLI's former CFO, testified: [redacted]
- Mr. Burns, the former CEO of JLI, testified: [redacted]
- Mr. Valani, a JLI Board Director, testified: [redacted]

47. On July 30, 2018, in advance of a meeting between Respondents' lead negotiators, Nick Pritzker, a JLI Board member, emailed Howard Willard, the Altria CEO, an opening term sheet for discussions. The term sheet included the following key provision:

[redacted]

48. [redacted] Continued competition from Altria's e-cigarette products was the only option clearly off the table. [redacted]

49. On August 1, 2018, Respondents' negotiators met at the Park Hyatt Hotel in Washington, DC to discuss terms. The attendees of this meeting consisted of the lead negotiators for each side: Nick Pritzker and Riaz Valani, two members of JLI's Board of Directors, Kevin Burns, JLI's CEO, Howard Willard, Altria's CEO, and Billy Gifford, Altria's CFO. No attorneys were present from either side at this meeting.

50. After this meeting, Altria's top executives understood that ceasing to compete in the e-cigarette business might be a condition for reaching a deal with JLI. Altria's draft talking points dated August 5, 2018, for Mr. Willard to use on a call with JLI, noted that [redacted]

51. In another version of its draft talking points, also dated August 5, 2018, Altria stated more broadly that, [redacted]

52. When Altria sought to modify JLI's proposed non-compete term, JLI responded negatively and reiterated its demands. On August 9, 2018, Billy Gifford sent over a markup of the term sheet to Nick Pritzker, Riaz Valani, and Kevin Burns that was [redacted]

53. During the August 9, 2018 meeting of the JLI Board of Directors, the Board [redacted]

54. On August 15, 2018, Riaz Valani of JLI met with Dinny Devitre, one of Altria's Board Members, at Mr. Devitre's office in New York. The purpose of this discussion was [redacted]. In connection with this discussion, JLI delivered a blunt message to Altria: [redacted]

55. After negotiations between Respondents were suspended temporarily, Altria's executives knew that they had to reaffirm their commitment to meeting JLI's demands if they were to restart talks successfully. On October 5, 2018, Altria's Howard Willard sent Nick Pritzker, Riaz Valani, and Kevin Burns a letter assuring them that:

[redacted]

Upon receiving this letter, Kevin Burns forwarded it to JLI's Chief Legal Officer with a simple note: [redacted] The concessions contained in this letter helped to restart the stalled negotiations. Soon after, Altria began to take key steps that would facilitate a possible wind down of the Nu Mark business.

56. On October 25, 2018, Altria announced that it was temporarily halting its MarkTen Elite business, ostensibly out of concern that pod-based systems and non-traditional flavors could be contributing to youth usage. A few days later, Altria and JLI, which was the largest seller of a pod-based system and non-traditional flavors, agreed to basic deal terms, which included Altria not competing in the e-cigarette market.

57. Altria sought to put MarkTen Elite [redacted]

58. On December 7, 2018, after five years of continuous participation in the e-cigarette market, Altria announced its decision to wind down its remaining e-cigarette business, including its MarkTen cig-a-like.

59. On December 9, 2018, Murray Garnick, Altria's General Counsel, emailed Jerry Masoudi, Chief Legal Officer at JLI to discuss the deal. [redacted]

60. On December 20, 2018, less than two weeks after Altria announced its decision to discontinue its e-cigarette operations, Respondents executed the Transaction whereby Altria invested $12.8 billion and in return, JLI issued stock to Altria amounting to a 35% ownership stake in the company.

61. [redacted] The Transaction also closed routes to other potential acquisitions or partnerships through which Altria might have participated in the relevant market. As JLI summarized in a set of draft talking points for the announcement of the Transaction: [redacted]

### B. Respondents' Conduct Caused Harm to Competition

62. Respondents' conduct as alleged herein had the purpose, capacity, tendency, and effect of restraining competition unreasonably, and the Transaction substantially lessened competition, in the U.S. market for closed-system e-cigarettes, in the following ways, among others:

a. Eliminating Altria's MarkTen products from the relevant market, thereby eliminating current and future price competition between Respondents, in particular promotional activity to create awareness and drive sales;

b. Eliminating current and future innovation competition between Respondents; and

c. Eliminating current and future competition between Respondents for shelf space at retailers through rebates and other incentives.

63. Altria's agreement to exit the relevant market eliminated one of JLI's most dangerous rivals. As a large, well-established, and well-funded company with long-standing relationships and significant shelf space with retailers nationwide, Altria had the resources and infrastructure to drive sales and compete aggressively. For example, Altria used its extensive distribution network to expand its distribution of MarkTen Elite [redacted]

64. Before the shut-down of Nu Mark, Respondents relied on price promotions to drive trial and grow sales of their respective e-cigarette products. In addition, each monitored the other's pricing in setting its own strategy. Altria's decision to pull its MarkTen products brought this price competition to an end.

65. In addition to price competition, Respondents competed through product innovation, including device features and e-liquid formulations. For example, it was JLI's success that prompted Altria to acquire and further develop various pod-based e-cigarettes (including Elite), and to commit significant resources toward developing e-liquid formulations with nicotine salts and higher nicotine concentrations.

66. In the fall of 2018, as a hedge against the risk that a deal with JLI might fall through, [redacted]

67. Altria leveraged its ownership of leading brands across multiple tobacco categories in order to secure substantial and favorable shelf space at retailers throughout the United States. In 2018, for example, to JLI's alarm, Altria launched a major campaign to secure shelf space for its innovative tobacco products (including e-cigarettes), offering retailers product discounts, slotting fees, and fixture payments. After the Transaction, instead of competing for shelf space, Altria leased its shelf space to JLI, effectively replacing its own MarkTen products with JLI's Juul product.

68. Before committing to the Transaction, Altria had every intention of remaining in the relevant market for the long term. Altria's documents and executive statements repeatedly evince their recognition that e-cigarettes were the future of the tobacco industry and their absolute commitment to participate in that future. For example:

- Mr. Joseph Murillo, Altria's former SVP of Regulatory Affairs, testified: [redacted]

[redacted]

- Mr. Martin Barrington, Altria's former CEO, stated to investors: "So we'll be clear: We aspire to be the U.S. leader in authorized, non-combustible, reduced-risk products."

- Mr. Howard Willard, Altria's current CEO, in an interview with the Wall Street Journal, stated: "At a time when e-vapor is going to grow rapidly and likely cannibalize the consumers we have in our core business, if you don't invest in the new areas you potentially put your ability to deliver that financial result at risk."

69. Instead of continuing to pursue its ambitions in the relevant market through competition, including aggressive price promotions, product development, and incentives for shelf space, Altria sought a short cut to market leadership by investing in its competitor. Altria agreed to abandon its long-standing and significant efforts at current and future competition in exchange for a significant share of JLI's profits resulting from a significantly less competitive marketplace.

## IX. LACK OF COUNTERVAILING FACTORS

70. Respondents cannot demonstrate that entry into the relevant market by new competitors or expansion by existing competitors would be timely, likely, or sufficient to offset the anticompetitive effects of the conduct alleged above.

71. The entry of new competitors into the relevant market is unlikely because the regulatory approval process is exceptionally time-consuming and expensive. Respondents themselves estimate that preparing a PMTA for an e-cigarette would require [redacted] No manufacturer has achieved PMTA approval for an e-cigarette product, but Philip Morris International, a multi-national tobacco manufacturer, submitted a PMTA application for its iQOS heat-not-burn ("HNB") device (which is comparable to an e-cigarette in technical complexity) in May 2017 and received approval two years later in April 2019. Altria estimated [redacted] Respondents' internal documents suggest that these figures may significantly underestimate the costs of the PMTA process.

72. In addition to achieving regulatory approval, a new entrant would need to: (1) develop or acquire a product; (2) manufacture the product at quality and scale; (3) sell the product; (4) develop a distribution system; and (5) develop a marketing plan, including a plan to secure shelf space in retail outlets.

73. Existing closed-system e-cigarette competitors cannot effectively replace the lost competition because: (1) they lack Altria's brand strength to secure favorable shelf space at retailers; (2) they lack the substantial resources Altria had at its disposal to commit to e-cigarette research and development as well as to pursuing regulatory

approval; and/or (3) the FDA's enforcement of restrictions on e-liquid flavors has negatively impacted the competitive presence of closed-system competitors other than JLI, who had voluntarily discontinued its flavors earlier.

74. Nor are open-tank e-cigarette manufacturers likely to replace the lost competition, in part because the impending PMTA deadline will likely cause many of them to shut down, and because they are largely sold in the separate "vape shop" sales channel and would not likely be able to expand rapidly into convenience stores, where closed-system e-cigarettes are typically sold.

75. Respondents cannot demonstrate cognizable efficiencies that would be sufficient to rebut the presumption that the Transaction substantially lessened competition in the relevant market.

76. Nor can Respondents demonstrate pro-competitive benefits of the Transaction that could not have been achieved through alternative means that would have been less restrictive on competition than the conduct alleged above.

## X. VIOLATIONS

### Count I—Illegal Agreement

77. The allegations of Paragraphs 1 through 76 are incorporated by reference as though fully set forth.

78. The conduct alleged herein amounts to an agreement whereby Altria agreed not to compete in the U.S. e-cigarette market now or in the future, in return for a substantial ownership stake in the market leader. This agreement unreasonably restrained trade in the U.S. market for e-cigarettes. The effects of this agreement will continue in the absence of appropriate relief.

79. Respondents' conduct constitutes a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and thus constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, under rule of reason analysis.

### Count II—Illegal Acquisition

80. The allegations of Paragraphs 1 through 76 are incorporated by reference as though fully set forth.

81. The Transaction, in which Altria received a substantial ownership stake in JLI and for the purposes of which Altria withdrew its existing e-cigarettes from the market and halted its innovation on future products, substantially lessened competition in the U.S. market for e-cigarettes. Altria now seeks to convert its non-voting securities into voting securities and place two Board Members of the JLI Board in place of its current Board Observer.

82. The Transaction violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 and thus constitutes an unfair method of competition in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

## NOTICE

Notice is hereby given to Respondents that the 5th day of January, 2021, is hereby fixed as the date, and 10:00am as the time, and the Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of the Federal Trade Commission Rules of Practice.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by Respondents. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving the answer of Respondents, to make certain initial disclosures without awaiting a formal discovery request.

## NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that Respondents have violated or are violating Section 5 of the FTC Act, as amended, Section 1 of the Sherman Act, and/or Section 7 of the Clayton Act, as amended, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including but not limited to:

a. Relief that restores Respondents' incentives to compete in the relevant market, including, as appropriate, divestiture of Altria's equity stake in JLI, rescission of Altria's purchase of that stake, and/or any other relief.

b. The voiding of all agreements related to the Transaction, including the Non-Compete agreement and the Services Agreement between Altria and JLI, as well as a prohibition against any future non-compete agreements between Respondents, except with prior approval by the Commission.

c. A prohibition against any transaction between Altria and JLI that combines their businesses in the relevant market, except with prior approval by the Commission.

d. A prohibition against any officer or director of either Respondent serving on the other Respondent's board of directors or attending its meetings.

e. A requirement that, for a period of time, Altria and JLI provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of their businesses in the relevant market with any other company operating therein.

f. A requirement to file periodic compliance reports with the Commission.

g. Requiring that Respondents' compliance with the order may be monitored at Respondents' expense by an independent monitor, for a term to be determined by the Commission.

h. Any other relief appropriate to correct or remedy the anticompetitive effects of the Transaction or of any or all of the conduct alleged in this complaint.

**IN WITNESS WHEREOF**, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, DC, this 1st day of April, 2020.

By the Commission.

April Tabor
Acting Secretary

SEAL: