PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Lina M. Khan, Chair**
Noah Joshua Phillips
Rebecca Kelly Slaughter
Christine S. Wilson
Alvaro Bedoya

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

RESPONDENTS ALTRIA GROUP, INC. AND JUUL LABS, INC.'S ANSWERING BRIEF IN RESPONSE TO COMPLAINT COUNSEL'S APPEAL

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GLOSSARY OF RECORD REFERENCES

ABBREVIATION	MEANING
ID	Initial Decision
IDF	Judge Chappell's Findings of Fact
Compl.	Complaint
CC	Complaint Counsel
OB	Complaint Counsel's Opening Appeal Brief
CCB	Complaint Counsel's Post-Trial Brief
CCFF	Complaint Counsel's Post-Trial Findings of Fact and Conclusions of Law
RB	Respondents' Post-Trial Brief
RRB	Respondents' Post-Trial Reply Brief
RFF	Respondents' Post-Trial Findings of Fact and Conclusions of Law
RRFF	Respondents' Post-Trial Reply Findings of Fact and Conclusions of Law
PX	Complaint Counsel's Trial Exhibit
RX	Respondents' Trial Exhibit
IH	Investigational Hearing
Tr.	Trial Transcript

PRELIMINARY STATEMENT

In the past 25 years, this Commission has not ruled against a complaint that it voted to authorize. *Axon Enter.* v. *FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021). This has led litigants to "raise[] legitimate questions about whether the FTC has stacked the deck in its favor in its administrative proceedings." *Id.* Complaint Counsel's ("CC") unprecedented winning streak—one "[e]ven the 1972 Miami Dolphins would envy," *id.*—has been challenged in the courts, including in a case pending before the Supreme Court. *See* 142 S. Ct. 895 (2022) (granting certiorari in *Axon*). If ever there were an opportunity for this Commission to demonstrate that it has not "rigged the rules to emerge as the victor every time," 986 F.3d at 1187, this is it.

This appeal comes on a fact-intensive record developed at a three-week trial featuring live testimony by 20 witnesses, 14 called by CC. The parties introduced more than 2,400 exhibits, over 1,800 by CC. And, after extensive post-trial briefing, Chief Judge D. Michael Chappell issued a thorough 114-page opinion, accompanied by 145 pages of fact-finding, ruling definitively that CC had not proven its case.

CC now seeks a do-over, as if the trial never happened. The case that CC brought to the Commission over two years ago, however, was based on cherry-picked snippets from documents that told a misleading—and, at times, downright false—story of Altria Group, Inc.'s ("Altria") minority investment in Juul Labs, Inc. ("JLI"). CC tried the same approach at trial, and Judge Chappell, with the benefit of the full record and witness testimony, saw right through it. This Commission should do the same.

Whatever reasons existed for initially bringing this case—based on, as Judge Chappell noted, "highly circumstantial" evidence (ID63)—there is no basis to maintain it now after the evidence was tested in the crucible of an adversarial trial.

In the suit authorized by the Commission, CC alleged an agreement between Altria and JLI that Altria would remove its e-vapor products from the market before it made an investment in JLI. That theory was baseless, and it collapsed in discovery. As Judge Chappell recognized, CC "seemingly … abandoned" it at trial. ID66 n.20. Instead, CC shifted to the notion that JLI merely wanted Altria "ultimately" to exit the e-vapor market at some point (CCB31), but "did not care" if Altria exited by divesting or contributing its products post-transaction as part of the HSR process (CCB37).

As Judge Chappell correctly recognized, any contemplation during negotiations that Altria would "ultimately divest or contribute its e-vapor assets" *as part of the HSR process* does not constitute an illegal agreement. ID66. It is exactly what this agency has expected—and requested—of companies in the past. CC could not explain—and does not explain on appeal—"how an agreement to submit a transaction for antitrust review and approval, whereby competitive products of one party would be disposed of, to the extent required or allowed by antitrust authorities, could be deemed an antitrust violation." ID67. To adopt CC's theory would cast a pall over virtually all good-faith merger negotiations, significantly chilling legitimate commerce.

Nor does CC offer any reason to disturb Judge Chappell's determination that there were "logical" reasons "supported by substantial, credible evidence" for Altria to withdraw its products independent of any agreement with JLI. ID63. CC mischaracterizes Judge Chappell's findings, contending that he merely accepted uncritically the "self-serving, post-hoc testimony from Respondents' executives" and "failed to consider the evidentiary record as a whole." OB2. To the contrary, Judge Chappell expressly based his findings both on his assessment of

witnesses' credibility *and* "contemporaneous documents" supporting that live testimony (ID63), including numerous documents CC ignores on appeal. For example:

- In contemporaneous documents, Altria scientists not involved in the JLI negotiations advised management that Altria's existing products had so many problems that "no one thinks we can get" FDA authorization. IDF541.

- The leadership of Nu Mark (Altria's e-vapor business) conducted a 100-day review of its existing products in 2018 (IDF533), resulting in the conclusion—expressed in contemporaneous documents—that Nu Mark, which had lost over $700 million since its inception, was failing. IDF576, 624-25, 633-34, 661, 675.

- In the fall of 2018, when contemporaneous documents show negotiations between Respondents had broken off, Altria committed its resources away from Nu Mark to fund so-called "Growth Teams," charged with exploring new options on a five- to ten-year timeframe. IDF600-06, 630-45.

- JLI had no notice that Altria would withdraw most of its products in October 2018 (IDF898-99) or that Altria would withdraw its remaining products in December 2018 (IDF937-38). Contemporaneous documents reflect that, as Altria anticipated, JLI viewed Altria's October withdrawal as unwelcome. IDF900-07.

CC likewise offers no basis to overturn Judge Chappell's determination that CC failed to prove anticompetitive effects. The evidence of no competitive harm, undermining any claim under either Section 1 or Section 7, was overwhelming:

- ***MarkTen***: Altria's cig-a-like product was in an obsolete segment. IDF963-73. And it could not obtain regulatory approval, in part because it emitted carcinogenic formaldehyde at levels far exceeding peer products. IDF396, 399, 539-41.

- ***Elite***: As Judge Chappell found, Altria's pod product was simply not competitive and it is "illogical" to think it ever would have been—the product lacked the key ingredient of "nicotine salts," never exceeding a 1% market share despite heavy discounting. ID26-27, 97; IDF445. And like MarkTen, it could not obtain regulatory approval. ID80-81; IDF541, 590-97.

- ***Hypothetical Products***: CC hypothesizes Altria would have developed new, competitive products on its own or in partnership with Phillip Morris International ("PMI"), which was developing its own product. Putting aside that "Altria was not a competent innovator of e-vapor products" (ID99), FDA's regulatory scheme meant any hypothetical future product was highly uncertain and many years away, even in a best-case scenario. ID109-10.

> As for a partnership with PMI, CC fails to explain why that would be any better than a partnership with JLI or any better than PMI (a multibillion-dollar company with substantial regulatory and technical expertise) going to market on its own or with another partner. It also mischaracterizes the evidence: PMI's product was not "almost market-ready" at the time of the Altria/JLI transaction (OB35); it existed in prototype only and was years away from entering the market. IDF617, 1055, 1059; RFF ¶¶1613-19. In fact, as of trial, [redacted]. IDF1060-61.

Most significantly, as was undisputed at trial, the market is more competitive now than it was before the transaction. Output is up, and prices and market concentration are down. ID101-04. Such post-transaction evidence is highly probative of the lack of competitive effects. CC's expert ignored this evidence, leaving his analysis fundamentally flawed. ID90-91.

Against all this, CC is left arguing that Altria's investment is illegal simply because, but for the transaction, a large tobacco company like Altria would have been incentivized to compete. OB2; ID112. But, as CC knows, its argument cannot stop there. It must rest speculative inference upon speculative inference: (1) that Altria would have developed a new viable product; (2) that FDA would have authorized the new product; (3) that the new product would have made the market more competitive; and (4) that this all would have happened in the near future.

Such speculation is not enough. There is no evidence that Altria would have succeeded. And the need for FDA authorization means it would be years before it could try. Moreover, the actual noncompete in Respondents' agreement is the kind routinely entered into by businesses—allowing Altria to assist JLI in its "existential" objective of "obtaining [FDA] approval." ID76.

If any case cried out for respecting the decision of the trial court, it is this one. The Commission should affirm.

STATEMENT OF FACTS

A. The Parties

Altria owns multiple tobacco companies. IDF4. JLI is a technology startup whose mission is to eliminate cigarettes by converting smokers to e-vapor products. IDF76-79; RFF ¶212. Altria found it lacked the innovation necessary to develop an e-vapor product that could satisfy and convert large numbers of smokers; all of its products were acquired or licensed. IDF50-54. By contrast, JLI developed JUUL, a transformative "pod" product relying on "nicotine salt" technology to replicate the nicotine experience delivered by combustible cigarettes. IDF10-12, 431-34, 473.

B. The FDA Framework

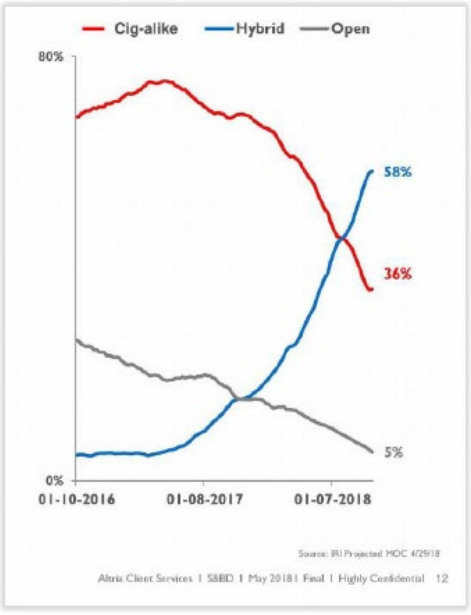
Shortly after JUUL's launch in 2015, FDA issued the "Deeming Rule," requiring manufacturers to obtain authorization to market e-vapor products by succeeding on a Premarket Tobacco Product Application ("PMTA"). IDF193-203. In particular, FDA must find the product at issue "appropriate for the protection of the public health," 21 U.S.C. §387j(c)(2)(A), requiring a demonstration, among other things, that the product can convert smokers. IDF216, 262-70. FDA allowed products introduced before August 8, 2016 to remain on the market pending PMTA review, provided the manufacturer filed a PMTA by August 8, 2018 (a deadline ultimately extended to September 2020). IDF198, 249-56. The Deeming Rule otherwise prohibited manufacturers from introducing new e-vapor products or materially modifying existing ones without obtaining PMTA authorization. IDF199-206. The Rule thus effectively "froze[]" e-vapor products as of August 8, 2016. IDF199.

Obtaining FDA authorization is "rigorous," "expensive," "exceptionally time-consuming," and "uncertain." IDF215, 220; Compl. ¶71. It requires submitting "voluminous" information (PMTAs can be millions of pages), conducting lengthy studies, and expending tens

of millions of dollars—a process that takes years. IDF227-60, 1049. And even once a PMTA is filed, "it takes years for the FDA to review the application." IDF257. Further complicating the process, FDA took years to develop guidelines for applications, and the PMTA deadline moved forwards *and backwards* five times. IDF225, 249-56.

C. Cig-a-likes and Pods

Before JUUL, the prevailing form of closed-system e-vapor product was the "cig-a-like." IDF524. Cig-a-likes look "similar to a traditional cigarette." IDF31. Pod-based products, by contrast, possess a sleek, technology-based aesthetic, rendering them more suitable for converting smokers sensitive to the stigma associated with smoking. IDF34, 125-31. Pods also accommodate larger batteries, enhancing the generation of vapor. IDF118-19. JUUL, with its superior format and formula, ultimately contributed to a "dramatic shift" in demand away from cig-a-likes—which never meaningfully caught on. ID96; IDF24. And by January 2018, as reflected in the below excerpt of an internal Altria slide, IDF293, pods (labeled "Hybrid") had overtaken the category. IDF524. Altria, which had only ever marketed cig-a-likes, knew it needed a pod. IDF293-98. But there was a problem: It didn't have one. IDF295-96.



D. Altria's Unsuccessful E-Vapor Products: MarkTen and Elite

From 2013 to 2017, Altria marketed cig-a-likes under the MarkTen brand name, but the products never resonated. IDF57-63, 291-96. The record evidence of their flaws is overwhelming: Competitors, including JLI, saw them as "extremely low quality," "not viable," "not successful at converting smokers," and "product failure[s]." IDF429, 967-69. MarkTen also generally lacked nicotine salts, which Altria scientists and Nu Mark leadership would later conclude were "required" to deliver nicotine satisfaction. IDF441.[1]

Making matters worse, Altria discovered in late 2017 that MarkTen had a formaldehyde problem. While not presenting an "acute health risk," MarkTen emitted more formaldehyde (a carcinogen) than virtually all other e-vapor products. IDF396, 399-400. Accordingly, as one Altria scientist advised leadership in a June 2018 email, "no one thinks we can get a PMTA on [the] current Mark Ten product." IDF541. CC ignores this issue entirely—the formaldehyde problem and the scientists' views make no appearance in its brief.

Altria's cig-a-likes were not only failing on their own terms. They were in a cratering market segment rapidly being rendered obsolete by pods. IDF293-94. Accordingly, Altria concluded that there was an "urgent need" to market a pod product. IDF310. Unable to develop its own, Altria conducted a global search for acquisition options, ultimately licensing Elite from a Chinese manufacturer in October 2017, for all of $500,000. IDF297-309.

Elite lacked nicotine salts, but Altria did not yet appreciate their signal importance. IDF435-45. Hoping that Elite could spark a turnaround for Nu Mark, Altria pulled out all the

[1] The one version of MarkTen with some salts—MarkTen Bold—lacked the right formula. IDF458-68. As JLI observed in a 2018 document, Bold was a "terrible product—[Altria] didn't get it right." IDF429.

stops when releasing the product in February 2018, offering increasingly rich discounts and incentives, while rapidly expanding distribution to some 25,000 stores. IDF329-43.

It didn't work. As Scott Myers, Altria's current head of distribution, testified, Altria could not terminate its promotions without steep drop-offs in sales. IDF345-48. By June 2018, more than half of 7-Eleven stores carrying Elite had yet to sell a single pod. IDF354. All told, Elite was Altria's "worst" product roll-out in over two decades. IDF362. Elite's share of cartridge sales among all closed-system e-vapor products never exceeded 1%. IDF364.

CC ignores this, but competitors took note. When JLI's co-founder Adam Bowen realized that Elite lacked salts, he observed in contemporaneous documentation that Elite could not "provide [cigarette]-like nicotine satisfaction" and was therefore "not a threat." IDF447. Elite was "an absolute nonstarter" in his view. *Id.* Reynolds likewise regarded Elite as "inferior in quality," and PMI [redacted] because it knew the product could not convert smokers. IDF1014-15. Retailers concurred. According to Sheetz, a convenience-store chain with significant tobacco sales, Elite did not "res[o]nate" with consumers, could not sustain sales, and had not made "any dent in JUUL's share." RFF ¶1021; IDF345-48.

Altria executives and scientists also concluded that Elite, like MarkTen, could not obtain PMTA authorization. ID80; IDF541, 590-97. Elite was not converting smokers and suffered from the same formaldehyde problem plaguing MarkTen, among other defects. IDF379-85, 411-12.

E. Altria's 100-Day Review

When Howard Willard became Altria's CEO in May 2018, he restructured Altria in an attempt to "turn[] around [Altria's] e-vapor business." IDF529. Willard appointed Brian Quigley to lead Nu Mark, tasking him with "coming up with the best plan [he] could to turn

around [Nu Mark]." IDF534. Willard also moved the Regulatory Sciences division under Murray Garnick, Altria's General Counsel and head of Regulatory Affairs. IDF537.

Quigley embarked on a 100-day review of Nu Mark, IDF533, which he described in detail at trial, but which CC declines to mention. Soon after, Quigley and the scientists supporting Nu Mark experienced what they described as a "Eureka" moment: Nicotine salts are required to deliver nicotine satisfaction and convert smokers. IDF438-44, 475. The discovery could not be acted on in the near-term, however, because Altria still needed to develop an effective nicotine-salt formulation and, in any event, salts could not be added absent FDA authorization. IDF478-82. Around the same time, Garnick learned that none of Altria's scientists believed Nu Mark's existing e-vapor products could obtain FDA authorization. IDF539-41.

Later in June 2018, Willard convened a "Level Setting" meeting so that he and leadership could assess where Nu Mark stood. IDF549. Quigley shared his findings regarding nicotine salts and his assessment that Altria was not well-positioned to develop innovative products. IDF552-57. As Quigley summarized in a contemporaneous email, it was "important [to] right size expectations for the current products," given that "a consumer will not repurchase" a product that does not offer "immediate nicotine satisfaction." IDF554. Joe Murillo, then-Senior Vice President of Regulatory Affairs, shared the regulatory consensus: Nu Mark needed to "[c]ompletely re-set [its] product and filing plans," as there was "no confidence in the current set of products and their [PMTA] filing plans." IDF559.

In mid-July 2018, Garnick's regulatory team began preparing a presentation informing Altria's board that neither MarkTen nor Elite could obtain FDA authorization—a presentation Garnick delivered on August 23, 2018. IDF568-74, 590-97. Willard told investors in late July,

as CC repeatedly cites (*e.g.*, OB7), that Elite was gaining "traction"—the result of the deep discounting and rapid distribution described above—but the 100-day review was not even half over, and there were growing concerns that the product would never succeed.

On August 3, Quigley met with leadership. His presentation warned that Nu Mark "[l]ack[ed] quality pod products" and that none of its products "provide[d] immediate nicotine satisfaction." IDF576-81. Given his mandate to "com[e] up with the best plan [he] could," Quigley broached a "risky," "expensive," and "long shot" option: continue to lose money with Nu Mark's current products, while working to develop a new product that might receive FDA authorization by 2025. IDF584-86. After Quigley's presentation, Altria's then-CFO, Billy Gifford, asked whether Altria should cut its losses and discontinue Elite given that the product did not "have the nicotine [it] need[ed]." IDF587. Willard declined to do so then, telling Quigley to continue his review. ID71.

F. The Growth Teams, the FDA Letter, and Altria's Product Withdrawals

By September 2018, Altria had concluded that "all of the existing Nu Mark products … had failed to be successful" and that it needed to "take everything [it] had learned" and "start over again." IDF599-600. Willard decided Altria would "start over" with "Growth Teams," tasking them with considering new options on a five- to ten-year timeframe. IDF602-03. "In order to fund and focus on the Growth Teams," Altria would downsize Nu Mark, terminate or transfer 60 people, and stop work on unpromising projects, including the Elite PMTA. IDF606-10, 636. These determinations were made at a time when discussions with JLI had ceased. ID73. Yet CC does not even *mention* the Growth Teams in its brief.

Amid this transition planning, FDA issued an ultimatum through a letter sent to Altria, JLI, and other e-vapor manufacturers on September 12, 2018, and an associated public statement: Take "prompt," "bold" action to address FDA's mounting concerns regarding youth use of

e-vapor products or "face regulatory consequences," including potential criminal action. IDF275-80. FDA gave Altria 60 days to respond in writing with a "forceful" plan and identified removal of flavored products as a potential responsive measure. IDF279-83. Altria decided to remove its failing Elite product, which relied on flavors for the vast majority (and arguably all) of its modest sales,[2] in response—along with its nontraditional cig-a-like flavors. IDF283-88, 611-14. That decision was announced internally at a September 26, 2018 meeting, as reflected in a slide presented by Quigley. IDF613-23. Again, this took place while negotiations were off. But to read CC's brief, FDA's letter was a nonevent; CC ignores all of September as if it didn't happen.[3]

On October 25, 2018, Altria announced its decision publicly. IDF648, 650. While Altria and JLI had resumed negotiations by this point, Altria had not discussed its discontinuation decision with JLI. IDF896-99. And Altria "anticipated that JLI would be unhappy" with its announcement, which acknowledged that "pod products substantially contributed to the youth epidemic." IDF900. Altria was right: As Nick Pritzker, a JLI board member and one of its principal negotiators, testified, JLI was shocked by Altria's decision, which contradicted JLI's expectation that Altria would market its products pending FTC review. IDF903-06. Altria's letter to FDA was deemed a "hostile action towards JUUL"—an impression fueled by retailers who observed that Altria had "[c]ontinuously fail[ed] to compete in the category." IDF901-02. CC again ignores all of this evidence.

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[2] RFF ¶1474.

[3] JLI also removed products in response to FDA's letter, pulling nontraditional flavored products from retail stores at great cost to its business. IDF927; RFF ¶¶1032-38. Moreover, FDA imposed a ban on flavored e-vapor products in 2020, IDF289-90, and has denied PMTA authorization to such products to date. *See, e.g.*, IDF261; Resps.' Motion for Official Notice ("Resps.' Notice Motion") (concurrently filed).

As fall 2018 progressed, Altria continued to reckon with its financial challenges. During its annual budgeting process, Altria recognized that its alternative potential "pathways" to an e-vapor product—whether through Growth Teams or a potential JLI investment—would require a substantial financial commitment. IDF655.

As Jody Begley, Altria's COO and former President of Nu Mark, testified, Altria was willing to accept losses if there were "a reasonable path to profitability at some point in the future"—as Altria had hoped in February 2018 when launching Elite. IDF315-16, 679. But by December 2018, leadership understood no such path existed. IDF676. Nu Mark had lost over $700 million, repeatedly pushing out the year it hoped to become profitable. IDF661, 669-75, 680. And notwithstanding CC's misleading assertion that MarkTen and Elite were "generating positive margins,"[4] OB4, Nu Mark was forecast to lose another $235 million over the next three years. IDF680. Meanwhile, Nu Mark had been downsized in connection with pivoting to Growth Teams and had only traditional-flavored cig-a-like products left.

Compounding these challenges, Altria's regulatory team was concerned it could not meet the deadline for filing MarkTen's PMTA—forecast to cost roughly $100 million—given that no satisfactory solution to the formaldehyde issue had yet been identified. IDF241, 682-86.

On December 7, 2018, Altria announced it would discontinue Nu Mark's remaining products (including Verve, a chewable disk that is not an e-vapor product (IDF688)), citing their "current and expected financial performance, coupled with regulatory restrictions that burden[ed] [Altria's] ability to quickly improve these products." IDF691. CC ignores the foregoing context

[4] CC relies on documents reflecting each product's "marginal contribution." *See, e.g.*, CCFF ¶1106. This measure is not an indication of profitability, because it "excludes fixed costs and overhead," such as "marketing, sales, and any allocated costs that are used to support the business." IDF368; RRFF ¶1106.

for the decision. And while CC claims that Altria executives not involved in the JLI negotiations were "stunned" by the announcement, OB16, the exact opposite is true. Quigley and other Nu Mark executives agreed with the decision. IDF693. As for JLI, the announcement "barely even registered," to the extent it registered at all. IDF939.

G. Negotiation History

To defend its "side agreement" theory, CC ignores this mountain of evidence and clutches onto a few words ("cease to operate") in an initial, nonbinding term sheet sent months before the deal happened. That effort fails. As explained below, CC takes those few words out of context and ignores that the initial term sheet was superseded several times over.

1. Summer 2018

Altria and JLI engaged in sporadic discussions beginning in 2017, but the first term sheet was not exchanged until JLI shared one on July 30, 2018. IDF720-52, 761. JLI's term sheet included a section addressing "Antitrust Clearance Matters." IDF766. This section proposed that Altria divest its e-vapor products within nine months of the contemplated transaction; or, if divestiture were not "reasonably practicable," contribute its products to JLI; or, if that too were not "reasonably practicable," cease to operate its products. IDF766. This same section proposed that the parties "cooperate with the FTC and agree to the reasonable concessionary requirements of the FTC in connection with changes in [Altria's] non-combustible reduced-risk products business." IDF771.[5] JLI also proposed that Altria agree to "refrain from competing anywhere in the world in the e-vapor business," but included a carve-out permitting Altria to market

[5] This obligation, in sum and substance, appeared in every term sheet exchanged between Respondents. ID65.

"MarkTen and MarkTen Elite prior to their divestiture or contribution as described above." IDF775.[6]

More significantly, JLI's term sheet proposed that Altria purchase a 45% stake in JLI's U.S. business in exchange for just 5% voting power. IDF763. It is undisputed that Altria found these ownership terms "appalling" and that the parties "focused on issues of control and voting power" in an August 1 meeting that ended in a "stand-still" over these issues. IDF764, 784-85.

Altria struck the divest/contribute/cease-to-operate provision in its responsive August 9 Term Sheet, replacing it with a commitment to exclusively license its intellectual property to JLI upon HSR approval. IDF810. Altria also sought to expand the carve-out to the proposed noncompete to cover "under development products," stoking JLI's concern that Altria could exploit JLI's proprietary information obtained through its provision of services to JLI, using such information to develop competitive products. IDF811, 817-19.

By August 22, though, the parties had reached an understanding on the antitrust-clearance and noncompete provisions. Per a proposed term sheet JLI sent on August 19, Altria would "contribute, upon receipt of Antitrust Clearance and at no cost to [JLI], all [its e-vapor assets]," and, if "Antitrust Clearance for … contribution [were] not obtained within nine months after the Purchase, … divest" those assets. IDF831. Gone was the "cease to operate" language from the first term sheet on which CC built its case as if term sheets are static. Altria would also be subject to a noncompete "other than with respect to MarkTen and MarkTen Elite prior to their

[6] CC asserts that "Altria conveyed to JLI" that it was concerned it may not be able to "divest or contribute" "*[b]efore* the exchange of the initial term sheet." OB6 (emphasis added). CC's proposed findings of fact cited for this proposition do not cite evidence to that effect—nor even make the claim—and it is not true. RRFF ¶¶927-31. CC did not explore this question at trial.

contribution or divestiture," at which point Altria would have designees on JLI's board. IDF835; IDF826-27, 837. An August 22 issues list "showed consensus" on these provisions. IDF838-41.

While these particular issues were resolved in principle, disputes persisted over other issues of transaction structure, governance, and control. IDF824, 844-50. An August 27 meeting between the parties ended in impasse. IDF846-48. JLI's September 8, 2018 board minutes reflect that the company resolved to "cease discussions" with Altria. IDF858. And, on September 11, JLI advised Altria it had decided to pursue alternative financing and was "not interested in additional discussions." IDF859-61. Gifford believed the deal "was off." IDF856.

2. Fall 2018

This negotiation breakdown lasted "through September and into October of 2018." IDF865. No terms sheet were exchanged, and no meetings between Respondents took place. IDF855. On October 5, in an effort to restart discussions, Altria sent JLI a letter proposing to accommodate many of JLI's outstanding concerns regarding transaction structure, governance, and control. IDF868-70. Altria also indicated it would agree to a noncompete "in a manner consistent with our previous discussions," which JLI understood to mean the most recent term sheet from August 19, reflecting the parties' consensus. IDF877-78. Issues remained, however.

On December 11, 2018—after Altria had shut down Nu Mark—Altria informed its board that the deal remained "highly uncertain and subject to many factors." IDF941. As contemporaneous documents reflect, one critical factor was valuation, on which the parties reached "an impasse" on December 16. IDF945-47. Altria perceived JLI to be attempting to dilute its position—a "critical" deal point on which Altria could "not give in." IDF945. And many other terms remained disputed. IDF941-43.

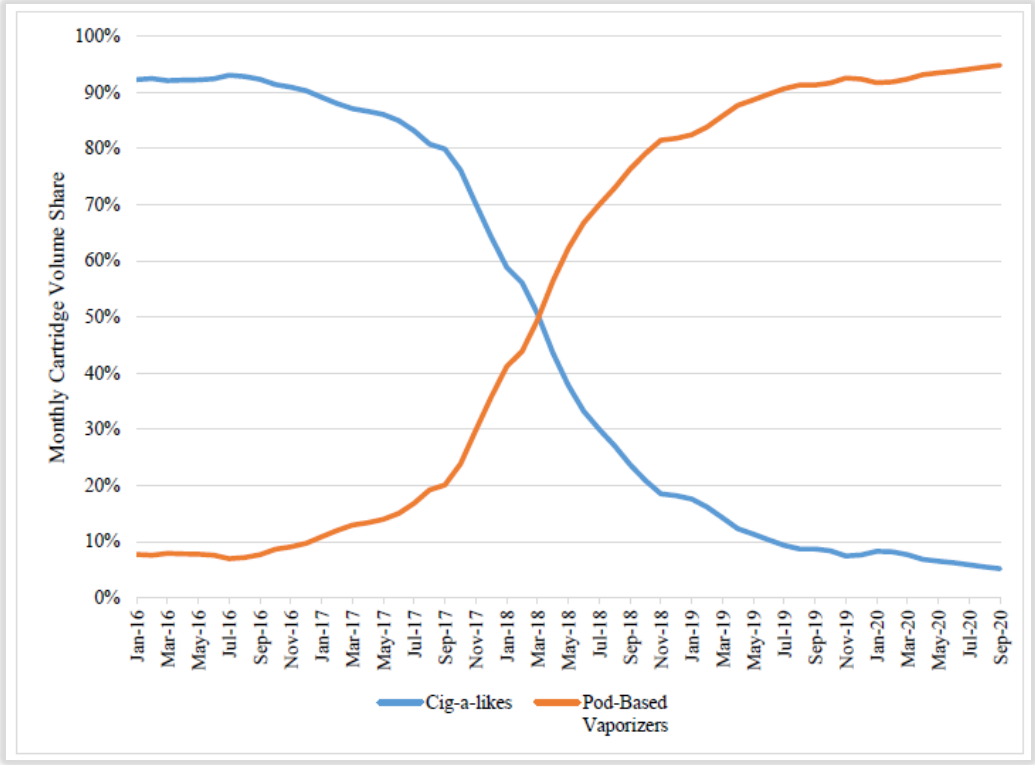
The parties ultimately resolved these issues and executed final transaction documents on December 20, 2018, with Altria investing $12.8 billion in JLI in exchange for a 35% economic

interest. IDF948-49. Altria agreed to divest its e-vapor assets as needed to obtain HSR approval, to provide services to JLI, including regulatory services supporting JLI's PMTA effort, and not to compete with JLI for as long as Altria was providing services. IDF950-53, 957.

H. Intensifying Competition Post-Transaction

Following the investment, competition flourished, with prices falling, output rising, and JLI's share dramatically declining. ID101-04. Two competitors, NJOY and Reynolds American, engaged in a "price war," featuring "aggressive discounting" on newly commercialized devices. IDF1021, 1044. Unlike Elite, these companies' pod products had nicotine salts and thus resonated with consumers. IDF1005-18. Unlike Elite, promotions on these products drove a sustained uptick in cartridge sales, as shown in the below *in camera* chart based on sales at [redacted]. IDF993, 1005-13; [redacted]. And unlike Elite, these products upended JUUL's competitive position: JLI's share plummeted, and "facing an aggressive competitive threat for the first time" (RX1547 at 002), JLI slashed its prices, something it never did in response to Elite. IDF997, 1020, 1038-42; RFF ¶1644.

Cig-a-likes, meanwhile, continued their march toward obsolescence. By September 2020, cig-a-likes had fallen to 5% of total cartridge volume. IDF963-64. And there is no evidence to suggest this years-long trend will ever reverse itself.



STANDARD OF REVIEW

Per its rules, the Commission reviews the Court's decision *de novo*. 16 C.F.R. §3.54(a). As CC recognizes, however, the Court premised its decision on live witness testimony, *e.g.*, OB2, 12, along with the "substantial[,] credible evidence of Altria's independent decision making." ID79; *see also* ID63. These fact determinations are entitled to "some deference." *In re Trans Union Corp.*, 2000 WL 257766, at *4 (F.T.C. Feb. 10, 2000). It is Judge Chappell, "as trier of the facts, who … lived with the case, and who … had the opportunity to closely scrutinize witnesses' overall demeanor and to judge their credibility." *In re Horizon Corp.*, 97 F.T.C. 464, 857 n.77 (1981); *see also id.* ("[A]bsent a clear abuse of discretion, the Commission will not disturb on appeal the ALJ's conclusions as to credibility."); *Schering-Plough Corp.* v. *FTC*, 402 F.3d 1056, 1070-71 (11th Cir. 2005) (emphasizing ALJ's credibility findings in overturning Commission on appeal).

In assessing competitive effects, the Commission must also "careful[ly] account" for "the pervasive federal … regulation characteristic" of the e-vapor industry. *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004). The "presence of [a] regulatory scheme and need for approval" may "convert[] [a potential] antitrust injury in a free market into only a speculative exercise," particularly where "[t]here are no facts … which even permit [a court] to speculate as to the likelihood" of regulatory approval. *City of Pittsburgh* v. *W. Penn Power Co.*, 147 F.3d 256, 267-68 (3d Cir. 1998).

ARGUMENT

I. The Court's dismissal of the Section 1 claim premised on an alleged side agreement should be affirmed.

The essence of a Section 1 violation is an "agreement." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 553 (2007). From the outset, the lynchpin of CC's Section 1 claim was the allegation

that Altria withdrew its products pursuant to an unwritten "side agreement" with JLI, rather than for independent business reasons. ID10. CC's burden at trial was to adduce evidence that "tend[s] to exclude the possibility of independent action." *Twombly*, 550 U.S. at 554. Based on its observation of the trial testimony and its meticulous review of the extensive documentary record, the Court determined CC had failed. ID61-86.

CC now attempts to flip that burden on its head, asking the Commission to credit CC's cherry-picked snippets of documents, assume the truth of far-fetched inferences that the Court rejected, and shift the onus to Respondents to disprove CC's speculation. But CC at all times bears the burden, *Kreuzer* v. *American Academy of Periodontology*, 735 F.2d 1479, 1488 (D.C. Cir. 1984), and in any event the effort fails. Judge Chappell's highly fact-intensive decision, supported by over 1,000 paragraphs of fact-finding, was rigorous and sound. It should be affirmed.

A. The Court rejected Complaint Counsel's theory based on the totality of the evidence.

CC claims that the Court "fail[ed] to consider the totality of the evidence" and held CC to an "insurmountable standard," "all but requiring [CC] to produce explicit confirmation of the entire agreement in either emails or wiretaps." OB2, 12. This is fiction. Judge Chappell gave "full consideration of the entire record," ID2, carefully considered CC's theory, and rejected the inferences CC asked him to draw. He determined that:

- JLI "insisted on disposition [of Altria's e-vapor products] as part of an antitrust review process" and "intended for those products to stay on the market until divestiture or contribution" (ID64-65);
- JLI was not "worried about competition" from Altria's existing e-vapor products, ID40, which JLI "regarded … as uncompetitive and 'terrible'" (ID67);
- JLI's request for a noncompete was animated by JLI's fear that Altria could exploit JLI's trade secrets (ID40);

- In September 2018, at a time when negotiations had broken down, and after Quigley's 100-day review, Altria both pivoted to Growth Teams (ID73) and decided to withdraw Elite and nontraditional cig-a-like flavors for independent business reasons (ID80-83);

- JLI was shocked and frustrated by Altria's withdrawal decision (ID54-55); and

- Altria discontinued Nu Mark for independent business reasons and without notice to JLI (ID83-85).

Indeed, the evidence that there was no unwritten, side agreement is overwhelming. *Every single witness* involved in the negotiations testified as much—testimony corroborated by an extensive documentary record. RFF ¶¶1152-60. And in response to Respondents' "substantial, credible evidence," CC could only muster "highly circumstantial" evidence, "often ambiguous, lacking in context, and unexplained." ID63. CC claims the evidence it cherry-picks "supports an inference" of a side agreement. OB16. But CC is appealing a post-trial decision, not the grant of a motion to dismiss. "The ultimate burden … is on the plaintiff," and CC must do more than ask that strained inferences be drawn in its favor. *Kreuzer*, 735 F.2d at 1488.

B. Complaint Counsel misstates the evidence.

In asking the Commission to reverse, CC repeatedly contorts the negotiation history, misconstruing the evidence, shifting its theory, and ignoring the Court's fact-finding.

1. Complaint Counsel's "exit" theory and the July 30 Term Sheet. In bringing this case, CC alleged that Respondents reached an agreement that Altria would remove Nu Mark's e-vapor products as a precondition to a deal. *See, e.g.*, Compl. ¶¶4-5, 55. That theory collapsed in discovery. As the Court recognized, CC "seemingly … abandoned" it, ID66 n.20, in favor of a theory that JLI cared only that Altria ultimately exit the e-vapor market and that Altria "cho[]se" to withdraw prior to the investment supposedly because it did not want to wait to obtain board seats and to provide certain services that JLI was supposedly eager to obtain. CCB37, 45-46. Putting aside that Altria's unilateral choice to withdraw is not an agreement,

CC's new theory is just as wrong: The Court found no evidence in support of this "common motive" theory because there is none. ID75-76. And it found abundant evidence that JLI "desired and expected that Altria would cooperate with the antitrust review process and that Altria's e-vapor assets would be disposed of in compliance with that process." ID67.

On appeal, unable to prove any iteration of its theory, CC opts instead to obscure the central factual issue by citing testimony and documents to the effect that JLI wanted Altria ultimately not to compete with it. OB14; *see also, e.g.*, OB16 (discussing draft talking points for August 6, 2018 call); OB17 (discussing August 15, 2018 issues list); OB19 (discussing August 19, 2018 Term Sheet); OB24 (discussing October 2018 email). It is *undisputed* that JLI did not want Altria ultimately to compete, because Altria would have access to JLI's trade secrets and designees on its board. ID63-64; IDF774-81. That does not mean JLI did not care *when* or *how* Altria disposed of its products. As the Court found, JLI very much did care.

For example, with respect to the July 30 Term Sheet on which CC places so much weight, its divestiture/contribution/cease-to-operate provision was not "intended to describe … something Altria would do before Altria had a transaction with JLI." IDF773. Rather, JLI wanted Altria's products "to stay in the marketplace until the FTC ruled on what would happen to them," IDF777, as evidenced through, among other things, the Term Sheet's surrounding provisions concerning cooperation with the FTC on Altria's e-vapor business, IDF771-72.[7] Every JLI witness involved in negotiations confirmed this was JLI's intent. IDF768, 778; RFF ¶¶1152-61. And as the Court further observed, the "cease to operate" language was struck by

[7] CC points to a July 27, 2018 email in which a JLI deal advisor said he thought Altria would "shut down Mark 10," OB13 n.10, omitting that advisor's deposition testimony that he had not heard that from anyone, along with Pritzker's response that he thought Altria instead "may need to sell it." ID67-68; IDF759. CC chose not to call the advisor at trial.

Altria in the August 9 Term Sheet, never to reappear again. ID64. CC's insistence that once used in a term sheet, a proposed term reflects the parties' agreement, even if struck, defies logic and practice.

In addition to ignoring this record evidence, CC is asking the Commission to reject Judge Chappell's credibility findings, corroborated by an extensive record of contemporaneous documents. And it is doing so by relying on stray snippets of testimony and documents, withholding the context. To take one particularly egregious example, CC quotes the testimony of Riaz Valani, a JLI negotiator, that the concept of "cease to operate" was intended as a "fail-safe," OB14, while omitting that Valani completed the thought by "reiterat[ing] … that this was all in the context of what the regulator deemed as an appropriate … solution," Tr. 918-19; *see also* IDF768-69.

2. Complaint Counsel's "timeline." CC claims that the "record clearly shows that Altria leadership's approach to Nu Mark in the summer of 2018 was influenced by JLI's non-compete demand." OB14.[8] CC asks the Commission to draw the following daisy chain of inferences: Gifford suggested pulling Elite during Quigley's August 3 presentation because of the July 30 Term Sheet; Quigley persuaded leadership at the same meeting that Nu Mark was competitive; leadership therefore decided to strike JLI's divest/contribute/cease-to-operate term in the August 9 Term Sheet and continue work on MarkTen; and Altria "withdrew [its] products after JLI rejected [Altria's] revised [August 9] term sheet as unacceptable." OB14-15.

As the Court found, "the chronology [CC] lays out fails to take into account important context for Altria's actions and instead merely juxtaposes negotiation events and business events,

[8] CC relies on supposed "plus-factor" evidence in support of its Section 1 theory. CC cites no authority permitting reliance on "plus factors" outside the parallel-conduct setting, and Respondents dispute its application here. RRFF ¶25 (reply to proposed conclusion of law).

… urg[ing] linkages that are not supported by evidence." ID70. For example, CC makes no effort to account for: (1) the findings conveyed at the June 2018 Level-Setting meeting that none of Altria's products could effectively convert smokers or obtain FDA authorization (IDF548-63); (2) that, as part of his 100-day review, Quigley advised leadership on August 3 that Elite was not competitive (IDF575-89); (3) that Altria's proposed August 9 Term Sheet contemplated Altria would exclusively license its e-vapor assets to JLI upon HSR approval (IDF810); (4) that there is "no evidence tying … together" the proposed August 9 Term Sheet and Altria's decisionmaking on August 10 in any event (ID71); (5) that Altria decided to withdraw Elite and nontraditional cig-a-like flavors in response to FDA's September 12 letter, at a time when negotiations were dead (*see* Facts §§F-G, *supra*); (6) that JLI was surprised and upset by Altria's October 25 announcement (ID54-55); and (7) that Altria withdrew its e-vapor products at *two* separate points in time and in response to different business imperatives, which would make no sense were it acting to satisfy a JLI demand (ID84).

3. August 2018 Negotiations. CC contends JLI reacted negatively to Altria's proposed August 9 Term Sheet because Altria had "wavered on its commitment to exit e-cigarettes." OB16. What Altria's term sheet actually did was: (1) convert Altria's post-antitrust clearance divestiture obligation into an exclusive licensing obligation; and (2) expand JLI's proposed noncompete carve-out to cover not only on-market products, but also "under development products." ID41; IDF810-12. As the Court found, that was the context for Valani's objection in his August 15 issues list to Altria's revisions—a far cry from CC's *ipse dixit* claim that Valani was objecting to the removal of "cease to operate." ID42.

If there were any doubt as to the parties' intent, JLI's proposed August 19 Term Sheet dissolves it. There, JLI (1) did not reinsert the "cease to operate" language and instead proposed

contribution upon regulatory approval or, failing that, divestiture; and (2) continued to carve out Altria's existing products from the proposed noncompete, but rejected Altria's effort to expand the carve-out to encompass future products. IDF831-35. As the Court found, the August 22 issues list shows the parties had reached consensus on these points. IDF838-41.

CC's answer to this record evidence is that the parties met on August 18 and must have secretly conspired. OB18. But the "mere fact of meetings or discussions" is insufficient to prove conspiracy. Areeda & Hovenkamp, *Antitrust Law* ("Areeda") ¶1417b n.4. CC's *only* "evidence" is draft talking points for Willard, which stated in part that Altria's August 9 revisions were not driven by "substantive disagreement" but a desire to comply with antitrust law. IDF821. To CC's jaundiced eye, this is evidence the parties must have conspired and lied to their counsel, who were present and prepared the subsequent term sheets. *See* OB18-19; IDF820. But that is the opposite of what the draft talking points, on their face, show. CC is not permitted to "first assum[e] a conspiracy and then explain[] the evidence accordingly." *Blomkest Fertilizer, Inc.* v. *Potash Corp.*, 203 F.3d 1028, 1033 (8th Cir. 2000). The actual evidence is that the meeting focused on voting power and whether Altria's prospective investment would encompass JLI's international business. IDF824.

C. The Court correctly rejected Complaint Counsel's claims of pretext.

CC accuses the Court of making "three key errors" (OB20) in concluding that CC's pretext theory was "unjustified" and "unsupported." ID79, 80, 85. These accusations do not withstand scrutiny.

First, CC argues it was "illogical" for Altria to remove Elite in response to FDA's letter while also negotiating with JLI. OB20. The Court addressed this argument and credited Willard's testimony that, unlike Nu Mark's products, JUUL had demonstrated it could convert

adult smokers in significant numbers, rendering the public-health calculus entirely different. ID82 n.25; IDF623.

Second, CC says the Court "disregarded evidence showing that Altria purposefully did not make any commitment to remove Elite until *after* it had confirmation from JLI that the deal was on track." OB21. In so doing, CC mischaracterizes Garnick's October 4 talking points for a board call, which make clear that Altria was committed to informing FDA of its intention to remove Elite and nontraditional flavors "[r]egardless" of whether JLI negotiations resumed. IDF630. As the Court found, "Altria made the decision to pull Elite at the September 26 Ranch Meeting, when negotiations with JLI had been broken down for a month." ID82-83.[9] That "timing … undermines any claim of pretext." ID82. Nor does CC have any answer to the undisputed fact that, as Altria anticipated, JLI did not welcome the announcement, but rather viewed it as a "hostile" act. IDF899-907. So CC just ignores it.

Third, CC suggests the Court erred in finding that Altria had deemed Elite both a "commercial failure" and "unlikely to get FDA approval." OB22 (citing ID80). This is an astonishing claim: The record at trial was overwhelming and unrebutted on each point. As for Elite's commercial viability, Elite never cracked a 1% market share in cartridges despite massive promotional effort (IDF329-47, 364); Altria's head of distribution viewed Elite as the "worst" product roll-out in his 24 years at the company (IDF362); third parties viewed Elite as inferior (IDF1014-15); and Quigley repeatedly advised management that Elite was not competitive (IDF548-58, 575-88). Nor is there any genuine dispute that scientists with no involvement in the

[9] CC cites an internal analysis that it reads as [redacted] (OB21), omitting that it was prepared by someone not involved in the JLI negotiations or the ultimate decision of how to respond to FDA's letter and who was never deposed. Whatever this individual's view, it had no impact on Altria's decisionmaking. RRFF ¶1245.

negotiations had determined Elite could not obtain FDA authorization and had so advised leadership. IDF541, 568-73, 590-97.

CC also contends that Altria's discontinuation of its remaining cig-a-like products on December 7, 2018 was pretextual and that "it is illogical that Altria would have decided to exit and sit on the sidelines." OB23. But as the Court recognized—and CC continues to ignore—Altria did *not* "exit" e-vapor when it discontinued the remnants of Nu Mark. Rather, it decided to stop investing in a failed operating company and to redirect the freed-up funds to its Growth Teams strategy or, if it came to fruition, financing the potential JLI deal. ID84; IDF654-59; *In re Citric Acid 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").

D. Complaint Counsel's assault on witness credibility is baseless.

As the Commission and myriad courts have recognized, the trial court is best positioned to evaluate witness credibility. *See, e.g.*, *Horizon*, 97 F.T.C. at 857 n.77. Nevertheless, CC concludes its "side agreement" argument with a broadside against the integrity and credibility of Quigley, who is no longer employed by Altria and was represented by independent counsel.

CC accuses the Court of "completely ignor[ing] Quigley's IH testimony," OB25, implying Quigley conceded in his IH that Altria's reasons for withdrawing e-vapor products were pretextual. Both the accusation and implication are demonstrably false. The Court's decision repeatedly relies upon Quigley's IH testimony as well as his trial testimony. *E.g.*, IDF334, 520, 529, 585, 612, 634, 1031. And in his IH, Quigley agreed it was "the right decision to pull … Elite off the market," given that "something needed to be done to fix the youth usage issue." PX7003 (Quigley IH Tr. 179-80).[10]

[10] CC attempts to tar Quigley as "potential[ly] bias[ed]" in light of supposed "potential business entanglements" with Altria that CC implies emerged after Quigley's IH. OB25. CC omits that

The supposed inconsistencies CC highlights relate to ancillary issues and are not inconsistent. For example, CC claims Quigley testified at trial that he "wasn't surprised" by Gifford's suggestion regarding pulling Elite (in supposed contrast to his IH testimony), OB25, omitting that at the very transcript pages it cites, Quigley explained that the suggestion had in fact "caught [him] off guard" given that he had not completed his 100-day review. Tr. 1958-59. CC likewise omits that Quigley testified at his IH that he *did* understand why leadership was considering pulling Elite at this time—and, as noted above, that he ultimately agreed with the determination given the FDA letter. PX7003 (Quigley IH Tr. 134, 179-80).

CC also says Quigley contradicted himself in testifying at trial that MarkTen cig-a-likes were "not meaningful" (as if the proposition were genuinely disputed). OB25. But what Quigley actually said was that cig-a-likes were "not meaningful in terms of what was driving change in the tobacco landscape"—which was entirely consistent with his IH testimony. IDF578.

The Court assessed Quigley's credibility based on hours of live testimony and the extensive documentary record. The Commission should ignore CC's desperate *post hoc* attempt to smear him as a liar.

CC's implication that Altria executives knowingly gave misleading testimony regarding the implementation of a gasket for Elite, OB 25-26, is similarly nonsense. That the gasket was implemented briefly without their knowledge does nothing to impugn those executives' credibility, nor does the gasket have any relevance to this case. ID81 n.22. As soon as the implementation came to light, Altria notified CC. RRFF ¶1224.

Quigley has been on the board of Lexaria Nicotine since *before* his IH testimony, Tr. 1926, and that Quigley did not anticipate any "opportunities for Respira"—his current employer—"to do business with Altria," PX7041 (Quigley Dep. 140-41).

Moreover, at no point does CC introduce any evidence calling into question the credibility of the JLI witnesses involved in the negotiations—Pritzker, Valani, Kevin Burns (JLI's then-CEO), and Gerald Masoudi (JLI's then-General Counsel)—each of whom testified either at trial or through deposition, just like the Altria witnesses, that there was no side agreement. IDF899, 902-04, 938-39; RFF ¶¶1152-61.

* * *

The Court, after a 13-day trial and a comprehensive review of the record, saw CC's "side agreement" theory for what it was: speculation that did not pan out. The dismissal of the Section 1 claim should be affirmed.

II. Complaint Counsel failed to prove anticompetitive effects.

Under the Section 1 rule-of-reason analysis, CC must show that "the challenged restraint has a substantial anticompetitive effect." *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).[11] Similarly, under Section 7, CC must show that the transaction may "substantially … lessen competition," 15 U.S.C. §18—that is, that substantial loss of competition is a "sufficiently probable and imminent" result of the transaction, *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 623 n.22 (1974).

CC did not meet its burden under either statute. As the Court found, "the evidence establishes that Altria was not a significant competitor," and was not positioned to become one within any reasonable timeframe. ID96, 112.

[11] The Commission voted out the Complaint on a rule-of-reason theory, Compl. ¶79, and the case was litigated on that theory throughout. ID15 n.11 ("[CC] confirms … that it does not rely on a *per se* theory"). CC's blithe suggestion in a footnote that *per se* treatment could be appropriate (OB40 n.37) is both waived and telling.

A. Complaint Counsel is not entitled to a presumption of harm.

CC improperly claims the Court erred in denying it a presumption of competitive harm.

1. Pre-transaction HHIs. The Court correctly held that the pre-transaction HHI calculations of CC's expert, Dr. Rothman—premised on Altria's average share from October 2017 through September 2018—were a "poor predictor of what [Altria's] share would have been in a but-for world" because of "the continually declining importance of cig-a-likes" and the corresponding fact that Altria's share was "declin[ing] over the measured 12-month period." ID90 (citing *Horizontal Merger Guidelines* ("HMG") §5.2); IDF176-83.[12]

CC does not dispute that Altria's share was rapidly declining (IDF183, 675), nor contend Altria would have somehow regained share with its failing products. Instead, CC insists that Dr. Rothman's calculation actually "understates Altria's competitive significance" because Altria could have [redacted] or a revised "Elite 2.0." OB29-30. This defies reality. As the Court recognized (ID109-11; IDF386-93), these hypothetical products were years away from PMTA submission, let alone FDA authorization, which is itself speculative. *See also* §II.C, *infra*.

To downplay the significance of consumers' transition to pods, CC also points to FDA's recent authorization of certain cig-a-like products. OB30. But these limited authorizations, discussed further below, do not change the fact that MarkTen cig-a-likes were not competitively significant or render the authorized products competitively significant. *See* Facts §§C-D, H, *supra*. None of the authorized cig-a-like products have material market share. IDF972 (citing Vuse Solo's decline).

[12] In light of these trends, it was error for Dr. Rothman to calculate Altria's share based on a 12-month rolling average. RRB84-85.

2. Post-transaction HHIs. The Court also properly rejected Dr. Rothman's post-transaction HHI calculation, which depended on a counterfactual assumption that Altria's market share diverted to market participants "in proportion to their shares." OB28; ID90-91. That assumption accounted for 94% of Dr. Rothman's claimed HHI increase. IDF186. As the Court found, actual market data disproves Dr. Rothman's assumption: Altria's sales disproportionately "diverted to other cig-a-like products," not JUUL. ID91. CC claims that the Court ignored that HHI would increase under "numerous assumptions." OB28. That misses the point, but it's also misleading. The *only* other assumption Dr. Rothman offered was one in which Altria's sales were all assigned to Reynolds. OB29 (citing CCFF ¶1760). Replacing one fanciful, market-disproven assumption with another gets CC nowhere. The Court assessed HHIs based on the best evidence available: what actually happened. OB27 (courts rely on "closest available approximation" of market shares in calculating HHIs).[13]

B. The Court properly considered post-transaction evidence that is devastating to Complaint Counsel's case.

In a transparent effort to manufacture a legal issue in a highly fact-intensive case, CC accuses the Court of engaging in a "before-and-after" analysis as opposed to a "but-for world" analysis. Not so. Judge Chappell repeatedly made clear that he was carefully considering a "but-for world" in which the transaction did not take place. *See, e.g.*, ID90 ("Altria's historical market share is a poor predictor of what its share would have been in a *but-for world* in which

[13] CC contends in a footnote that favoring real-world data is "misguided" because it "ignore[s] confounding factors." OB29 n.23. But CC does not analyze how any "confounding factors" cut. Nor does it cite any authority for its position. As the Court reasoned, "actual market data" is more compelling than arbitrary "assumptions." ID91; *see also New York* v. *Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 362-63 (S.D.N.Y. 1995) (calculating HHIs with reference to "post-acquisition data"); HMG §5.3 ("When using the HHI, the Agencies consider … the post-merger level of the HHI").

Altria continued to sell e-cigarette products." (emphasis added)); ID94 ("[T]he evidence fails to prove [CC's] contention that Elite would still be on the market, *but for* the Transaction with JLI." (emphasis added)); *see also* ID93, 108 n.35, 110-11, 112 n.37. He examined market evidence because it is probative of the but-for world and the impact of the transaction on competition.

As CC concedes, OB33, it is proper to consider post-transaction evidence. Such evidence goes "directly to the question of whether future lessening of competition [is] probable." *United States* v. *Gen. Dynamics Corp.*, 415 U.S. 486, 506 (1974). And it is most probative when, as is the case here,[14] there is no evidence of manipulation by the transacting parties. ID100-01 (citing cases).

This makes sense. A typical Section 7 case requires forecasting what the post-transaction competitive environment will look like. But here, we know what happened after the investment. Output shot up, with sales of pod-based devices and cartridges increasing 20% and 30%, respectively. IDF1025. Prices plummeted, with the average price of a pod-based device falling by 72% from September 2018 to September 2020, and JLI slashing its prices in response to competitors' deep discounting. ID103; IDF1019-22. And market concentration fell, with JLI's device share tumbling from 69% in October 2018 to 30% by September 2020, as Reynolds and NJOY surged. ID104; IDF1038-40. Though he contested none of it, Dr. Rothman inexplicably ignored this evidence in analyzing the transaction's likely effect on competition. RFF ¶1377; IDF1048.

CC tries to gloss over this evidence by again invoking "confounding factors," *see supra* n.13, this time contending youth use "negatively affected JLI's market performance more than

[14] The post-transaction evidence at issue resulted from competitive activities of third-party competitors. ID101 & n.32. CC makes no argument Respondents manipulated those third parties.

any other e-cigarette company." OB32-33. Again, the effort fails. None of the evidence CC cites even addresses JLI's market performance. *See, e.g.*, CCFF ¶¶1248-53, 1912. Moreover, the presence of external factors—which will always be inherent to years' worth of post-transaction evidence—does not render the overwhelming record evidence here any less probative of competitive effects.[15] And as the Court found, notwithstanding CC's claim that the transaction did not drive Reynolds' and NJOY's competitive activities (OB32), the transaction *did* facilitate the expansion of output and increased access to shelf space for competitors, including Reynolds and NJOY. ID103-04; IDF1025-37.

C. Complaint Counsel otherwise distorts the but-for world.

The post-transaction evidence is devastating to CC's case, so CC muses that the market may have somehow been even more competitive with Altria. But there is no evidence supporting CC's musings. In assessing competitive effects, the Court correctly determined that Altria's on-market offerings were not competitive constraints and that, in light of the regulatory scheme, Altria was unlikely to compete for years, if at all. CC's claims that MarkTen and Elite had competitive potential, and that Altria was well-positioned to compete with alternative products, cannot be reconciled with the evidence or the regulatory scheme.

1. On-Market Products

First, CC says the Court ignored growth in MarkTen cig-a-likes—a product competitors widely viewed as inferior, to the point that PMI pulled it from an international test market due to poor performance. OB34; IDF969; *see* Facts §D, *supra*. MarkTen cig-a-likes exerted zero

[15] CC cites the denial of a *motion to dismiss* in private litigation for the proposition that JLI's withdrawal of flavored pods "meant that Respondents could not prevail on their motion to dismiss simply by citing evidence that absolute prices declined after the deal." OB33. To state the obvious, factual allegations are assumed true on a motion to dismiss, which drove the ruling in that case. *In re Juul Labs, Inc., Antitrust Litig.*, 555 F. Supp. 3d 932, 958-59 (N.D. Cal. 2021).

pricing pressure on JLI. ID21, 98; IDF977-78. And however marginally MarkTen cig-a-like volumes were growing, CC does not dispute that Nu Mark's only path to profitability was a successful pod-based product. ID24, 108 n.35; IDF315, 973.

Second, CC observes that Elite's sales were increasing in 2018. OB34. As a threshold matter, CC fails to grapple with the Court's finding that Elite would not "be on the market" in the but-for world. ID94.[16] In any event, Elite was released in February 2018 with a massive promotional push (*see* Facts §D, *supra*): starting from zero, of course its sales "grew." But "[t]he notion that a product with a market share of less than one percent could be a significant competitive constraint is illogical." ID97. Altria "was not a meaningful competitor with Elite," which lacked nicotine salts and therefore the ability to deliver cigarette-like satisfaction like JUUL and other products. ID94, 96-97. And neither Elite's introduction nor its withdrawal had any impact on JUUL's pricing. ID98; RFF ¶1644.

Third, CC notes that "Elite did not have a youth vaping problem." OB34. True—not many consumers were using Elite period—but irrelevant. CC cites no evidence that Elite was commercially viable.

Fourth, CC points to a single JLI document, prepared very shortly after Elite's release, suggesting that Elite (along with at least one product that had not even been launched, RRFF ¶1129) had "long-term viability." OB35. CC omits that the employee who prepared the document dismissed the competitive significance of Elite a few months later, emailing colleagues that Elite's "US sales [were] absolutely terrible, no traction whatsoever." RFF ¶443. CC also omits that competitors viewed Elite as inferior. IDF1014-15. And it does not contend

[16] Even if CC had proven that Altria's withdrawals would not have occurred but for the transaction, those pre-transaction decisions are not "effects" under Section 7 as a matter of law. *United States* v. *Aetna, Inc.*, 240 F. Supp. 3d 1, 79-80 (D.D.C. 2017).

with the overwhelming record adduced at trial substantiating that Altria independently determined, based on Elite's disastrous roll-out, Quigley's 100-day review, and Altria's scientists' assessment, that Elite was not competitive and could not obtain FDA authorization. *See* Facts §§D-F, *supra*.

Fifth, CC has suggested that FDA's recent PMTA authorization of certain cig-a-like products means that Altria's on-market products could have obtained FDA authorization. And in its May 13, 2022 Order, the Commission stated that whether that authorization is material "depends in part on what that decision implies about PMTA approval prospects for Altria's former cigalike products and its former products lacking nicotine salts." Order, No. 9393 (May 13, 2022). The answer is clear: FDA's authorization of certain cig-a-like products without nicotine salts does not at all imply that Altria's own products would have obtained authorization or that it was pretextual for Altria to conclude they would not. The consensus of Altria's scientists unconnected to the JLI negotiations was that "no one thinks we can get" FDA authorization, not only because Altria's products lacked nicotine salts (or the right formula, in the case of MarkTen Bold) and thus would not have significant conversion potential, but because of numerous technical defects, including higher formaldehyde levels relative to other e-vapor products. IDF376-412, 458-68, 541.

Moreover, after CC filed its brief stressing that no pod product had been granted FDA authorization, OB30, FDA granted PMTA authorization to NJOY ACE, a pod product with salts that successfully competes against JUUL, while denying authorization to Imperial Tobacco Group's myBlu products[17]—decisions demonstrating the fundamentally speculative nature of attempting to predict a future competitive landscape so dependent on the findings of another

[17] *See* Resps.' Notice Motion.

regulator. Exacerbating the problem in this case, CC "failed to proffer evidence or expert opinion as to the likelihood of FDA approval for any hypothetical future e-vapor product." ID108. It would thus be error for the Commission to step into the shoes of FDA and determine that FDA would have been likely to authorize MarkTen or Elite. As Congress found, only FDA—and specifically *not* "the Federal Trade Commission"—"possesses the scientific expertise needed to implement" the statute under which PMTAs are authorized.[18] And in any event, while PMTA authorization is a prerequisite for remaining on the market, it in no way means a product is competitive.

2. "Elite 2.0" and Collaboration with PMI

Unable to demonstrate that Altria's existing products were competitive, CC argues Altria would have been able to come up with *something*—either internally or through collaboration with PMI.

CC claims Altria was "on-track" to submit a PMTA for Elite 2.0—a mere product concept—by January 2022. OB35; IDF387. This reflected the "most optimistic plan," one that almost certainly would have been pushed back in light of past experience, RRFF ¶1299, particularly given Altria's suspension of PMTA work on Elite in connection with the transition to the Growth Teams, IDF606-10. And even in this best-case scenario, Altria would not be submitting a PMTA for Elite 2.0—authorization of which would be required to launch the product—until more than three years after the transaction, following which FDA would review the product for years and potentially deny authorization. IDF257. As explained below, there can be no cognizable competitive harm flowing from future products in the absence of proof that they are likely to ever come to market; nor can CC carry its burden without demonstrating that

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

such products would come to market in the near future and have a substantial impact on the competitiveness of the market. "Section 7 deals in probabilities not ephemeral possibilities." *FTC* v. *Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999).

With respect to PMI, "[t]he antitrust laws are not meant to realign competitors to assist certain competitors over others." *USAirways Grp.* v. *Brit. Airways PLC*, 989 F. Supp. 482, 489 (S.D.N.Y. 1997). Yet CC would have the Commission prohibit Altria from investing in JLI in the hope that it might team up (merge, even) with a *different* (better-resourced) competitor, even though PMI has repeatedly stated that it is committed to and capable of coming to the U.S. market on its own. RFF ¶1632.

In any event, CC's claim that PMI's VEEV product was "almost market-ready" at the time of Altria's investment is an egregious mischaracterization. OB35. The version of VEEV available in December 2018 was a "large," "baton"-shaped device that consumers found "[c]lunky," and which had no nicotine salts. IDF421, 616. The current iteration of VEEV, which is said to incorporate salts, [redacted]. IDF1059; RRFF ¶1654. PMI has [redacted]. ID111; IDF1060-61.[19] Moreover, [redacted]. IDF1057-58; RRFF ¶1646. As the Court

[19] CC's assertion that Altria "believed it could [redacted]" is disingenuous. OB35. [redacted]

summarized, "it would be pure conjecture to conclude that a collaboration between Altria and PMI would bring PMI's VEEV product to the e-vapor market within any reasonable future time period." ID111.

CC criticizes Judge Chappell for supposedly "failing to consider Altria's multi-front efforts to compete on innovation," OB37, but he specifically assessed those efforts and Altria's innovative capabilities. ID99-100. Based on the documentary record and evaluation of the witness testimony, Judge Chappell found "ample evidence … demonstrating that Altria was not a competent innovator of e-vapor products" and determined that "[c]onsidering the FDA's regulatory regime, it was unlikely that Altria could innovate further." ID99. On appeal, CC offers only the summary assertion that Altria was making "multiple bets" in attempting to innovate, without identifying any concrete project with any likelihood of near-term success. OB37. "[V]ague theories" and "generalities" are not sufficient to support an innovation-harm theory. *United States* v. *Sabre Corp.*, 452 F. Supp. 3d 97, 148 (D. Del. 2020) (refusing to find innovation harm), *vacated as moot*. As for the two cases CC cites for the general proposition that the "loss of innovation competition … is a significant form of competitive harm," OB36, neither involved a complex regulatory scheme constraining entry. And taken to its logical conclusion, CC's theory would tar all horizontal mergers as anticompetitive.[20]

[20] CC also makes conclusory claims regarding loss of price and shelf-space competition, OB35, 41, for which it adduced no material evidence, ID97-99. CC's only specific assertion on appeal is that the transaction resulted in the loss of $33.6 million in consumer welfare annually. OB41. That figure was premised on outlandish, disproven assumptions regarding Altria's share, profit margins, and diversion. *See* RB123-27. Moreover, approximately 80% of the alleged harm derives from supposed loss of consumer choice. Even assuming such loss is cognizable, courts "demand demonstrative, empirical evidence of a substantial effect on consumers and an impact on the market" before accounting for it. *Procaps S.A.* v. *Patheon Inc.*, 141 F. Supp. 3d 1246, 1276 (S.D. Fla. 2015). None is present here.

D. Complaint Counsel's claim that Altria was an "actual competitor" is wrong and misses the point.

The final error with which CC charges the Court is treating Altria as a "potential competitor" rather than an "actual competitor" for purposes of analyzing Altria's ability to compete in the future. OB37. Ironically, this is precisely what CC asked the Court to do if the Court concluded, as it did, that Altria's justifications for exiting the market were not pretextual. CCB95. Altria was not an actual competitor at the time of the transaction—it had removed its products for independent business reasons. That should be the end of the matter, as the potential-competition doctrine has never been endorsed by the Supreme Court and is too speculative to give rise to cognizable competitive harm.

To the extent the potential-competition doctrine is viable, the Court was correct to apply it to hypothetical products and to determine the standard could not be met.

But "[r]egardless of whether Altria is considered an actual competitor or an actual potential competitor, proving a reasonable likelihood of substantial harm to future competition nonetheless requires proving that such competition, more likely than not, would have existed in the 'near future.'" ID106 (citing *Aetna*, 240 F. Supp. 3d at 93). CC does not dispute that holding, instead claiming "near future" means "within five years." OB38-39. But case law indicates "near future" typically means a few years, particularly in the context of a heavily regulated industry. ID106-08 (citing cases); *cf.* HMG §§5.1, 9.1 (entry must be "rapid" to bear on effects analysis).

CC purports to rely on *Aetna* for its "five years" position, but quotes the case misleadingly. In *Aetna*, whether Aetna had withdrawn from certain markets for independent business reasons or to improve its litigation position was disputed. 240 F. Supp. 3d at 79-80. Against that backdrop, the court observed that Aetna had consciously withdrawn from certain

markets in a manner designed to allow it to compete in those markets "within the next five years"—a significant fact because, in the insurance industry at issue, "[i]f an insurer withdraws from a state entirely … then it cannot once again offer plans in that state *for another five years* under state laws." *Id.* at 88 (emphasis added). When assessing Aetna's likelihood of competing in the future, the court repeatedly focused on the few years immediately ahead—consistent with the great weight of authority. *See, e.g.*, *id.* at 9, 78, 79, 80, 93.

Nor could CC possibly demonstrate that Altria would enter the e-vapor market (whether within a few years, five years, or otherwise) given that the sale of any new e-vapor product is "wholly a matter of governmental grace." *Marine Bancorporation*, 418 U.S. at 628; *W. Penn Power*, 147 F.3d at 267-68. Just ask Imperial, a major manufacturer whose product—which Altria pursued as an acquisition option before it lost out to Imperial—was recently denied FDA authorization. *See* Resps.' Notice Motion; IDF299-302. Respondents have identified no case finding a Section 1 or Section 7 violation based on a hypothetical product that was at least five years away, let alone a hypothetical product in a regulated industry where regulatory authorization is highly uncertain.

E. Any anticompetitive effects are offset by the transaction's efficiencies.

The Commission may also affirm on the alternative basis that any anticompetitive effects are readily offset by verifiable, transaction-specific efficiencies. RRB99-101. Efficiencies 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, obtaining FDA authorization is "existential" for JLI. ID76; IDF925. CC does not dispute Altria's regulatory expertise and even trumpeted it in post-trial briefing. CCB62. With Altria's dedicated support and guidance from

dozens of employees, including during the pandemic's onset, JLI was able to file a timely, high-quality PMTA. RFF ¶¶1247-64.[21]

F. Section 7 does not apply to JLI.

The Section 7 claim also fails as against JLI because Section 7 applies only to acquirers. 15 U.S.C. §18 (prohibiting anticompetitive "acqui[sition]" of stock or assets of another person); *United States* v. *Coca-Cola Bottling Co.*, 575 F.2d 222, 227 (9th Cir. 1978) ("By its express terms § 7 proscribes only the act of acquiring, not selling, when the forbidden effects may occur."); *Dailey* v. *Quality Sch. Plan, Inc.*, 380 F.2d 484, 488 (5th Cir. 1967). Because JLI was the seller in the transaction—not the acquirer—it cannot be found to have violated Section 7.

* * *

CC contends that Altria was "greater than the mere sum of its parts" and that the Court "failed to analyze … the loss of Altria as *a competitive whole*." OB34. As demonstrated above, Altria's "competitive whole" in e-vapor was a disaster—costing the company over $700 million through Nu Mark's brief existence. More importantly, the claim reveals what this case is really about: CC's hunch that the transaction must be anticompetitive because Altria is … Altria. As the Court perceived, that is, "[i]n essence," CC's theory. ID112. But it is not the law, nor should it be. *See, e.g.*, *FTC* v. *Atl. Richfield Co.*, 549 F.2d 289, 299 (4th Cir. 1977) (that Arco "possess[ed] the financial resources to enter the … market" and "demonstrated a past presence in th[e] market" held insufficient to sustain Section 7 claim); Areeda ¶1128d2 ("There is no reason to believe that 'large' firms with 'large' shares of a market generally achieve importance in newly entered markets."). It was CC's burden to prove the existence or likelihood of substantial anticompetitive effects at trial. It failed.

[21] Procompetitive benefits under Section 1 are addressed in Part III below.

III. The actual noncompete does not violate Section 1.

As discussed above, CC's Section 1 case was premised on an unwritten, side agreement that never happened. But there is an *actual* noncompete here that is perfectly ordinary and has a plain procompetitive rationale. And to the extent CC continues to challenge it as a standalone violation of Section 1, the claim fails.[22]

First, as the Court held, the claim fails at the outset of the rule-of-reason analysis because CC did not "me[e]t its initial burden of demonstrating anticompetitive effects from the non-compete provision." ID113.

Second, even were the rule-of-reason analysis to progress to Step 2, the noncompete facilitated the provision of critical regulatory services to JLI, providing a "procompetitive rationale for the restraint." *Am. Express*, 138 S. Ct. at 2284. JLI could not obtain these services unless it was assured that its "technology, trade secrets, [and] data"—to which Altria would necessarily have access—could not be exploited by Altria to develop competitive products. IDF776, 780-81, 819, 841. So to achieve their procompetitive objectives, the parties negotiated a narrowly tailored noncompete in effect only so long as Altria provides services. IDF951-53.[23] CC's claim that services could technically be provided before the noncompete commenced is misleading. OB42. CC omits that (1) *JLI* controlled when it requested the services (PX1275 at

[22] In its post-trial brief, CC argued that "standing alone, the written non-compete … violates Section 1." CCB68-72. The claim has now been relegated to a suggestion in a footnote. OB39 n.36. And CC has abandoned its argument that the noncompete is not ancillary to a legitimate business integration.

[23] Notwithstanding that CC itself touted Altria's regulatory expertise (*see* §II.E, *supra*), CC suggests that Respondents' procompetitive rationale must be "pretextual" because Altria's own products were inferior and unlikely to obtain FDA authorization. OB42-43. There is no inconsistency: Altria's regulatory expertise got it nowhere without a viable product.

007-08); and (2) the noncompete would commence no later than December 20, 2019, in any event (PX1276 at 025).

Third, CC makes virtually no effort to satisfy its burden at Step 3 to proffer an alternative to the noncompete that is "substantially less restrictive" and "virtually as effective in serving the legitimate objective without significantly increased cost." *Cnty. of Tuolumne* v. *Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001) (internal quotation marks and emphasis omitted).[24] CC suggests JLI could "simply have hired employees or consultants with the requisite knowledge from Altria or other companies," OB43, while disregarding the testimony that the value of Altria's support was in Altria's methodologies and institutional "know-how" derived from more than a decade of regulatory experience. RFF ¶¶1228, 1276-78. CC likewise suggests the parties could have employed a firewall instead of a noncompete, OB43, notwithstanding that doing so would have disincentivized Altria from putting its best people on the job. CC's uninformed musings, unsubstantiated by evidence, are textbook examples of "just point[ing] to" hypothetical alternatives without demonstrating "equivalent viability." *N. Am. Soccer League* v. *U.S. Soccer Fed'n*, 883 F.3d 32, 45 (2d Cir. 2018); *Alston*, 141 S. Ct. at 2163 ("Firms deserve substantial latitude to fashion agreements that serve legitimate business interests ….").[25]

IV. Complaint Counsel failed to define a relevant market.

CC's claims fail for the independent reason that it did not meet its burden to define a relevant product market, an alternative basis for affirmance. In failing to "analyze whether pods

[24] Contrary to CC's contention, Respondents need only "show a procompetitive rationale for the restraint" in order to shift the burden "back to [CC]." *NCAA* v. *Alston*, 141 S. Ct. 2141, 2160 (2021). But even if CC were correct that Respondents must demonstrate actual procompetitive effects, OB43, the record is replete with such evidence. *See* §II.E, *supra*; RB60-63, 128-31.

[25] CC's claim that rule-of-reason analysis requires a *fourth* balancing step is wrong: The rule of reason operationalizes the balancing. But even were CC correct, the same result would obtain for the reasons described above.

and cig-a-likes could constitute distinct markets," ID17, CC ran afoul of the "narrowest market" principle. *See FTC* v. *RAG-Stiftung*, 436 F. Supp. 3d 278, 292 (D.D.C. 2020). Because CC never undertook this analysis, the inquiry should end there.

In any event, application of the *Brown Shoe* factors shows that pods and cig-a-likes exist in separate markets. The products have peculiar characteristics, cater to distinct customers, and are not priced in relation to one another. IDF123-31, 151, 162-66. At bottom, cig-a-likes were "not close substitutes for pods at the time of the Transaction." IDF976.

V. FTC administrative proceedings are unconstitutional.

The FTC's enforcement regime violates due process and the separation of powers, as well as other constitutional safeguards applicable to administrative adjudications.[26]

A. FTC Commissioners are unconstitutionally shielded from removal.

FTC Commissioners are heads of an Executive Branch department, yet removable only "for inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. §41. That restriction violates Article II, which vests all "executive Power" in the President and charges him with executing the laws. U.S. Const. Art. II, §1, cl. 1; *id.* Art. II, §3. If "an agency does important work," its leaders must be removable by the President—no matter the agency's "size or role." *Collins* v. *Yellen*, 141 S. Ct. 1761, 1784 (2021).

Applying those principles, the Supreme Court held unconstitutional the structure of the Consumer Financial Protection Bureau, whose lone director was removable only for cause. *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2192 (2020); *Collins*, 141 S. Ct. at 1784 (same for FHFA).

The Supreme Court has recognized only one narrow and inapplicable "exception[] to the President's unrestricted removal power" over principal officers. *Seila*, 140 S. Ct. at 2198. Under

[26] Respondents reserve the right to seek pre-enforcement, judicial relief against these proceedings. *See Axon*, 142 S. Ct. 895 (granting *certiorari* on this issue).

Humphrey's Executor v. *United States*, 295 U.S. 602 (1935), Congress may grant for-cause removal protection to multi-member agency heads if the agency mirrors the FTC "as it existed in 1935," when the FTC "was said not to exercise any executive power." *Seila*, 140 S. Ct. at 2198-99. Since then, the Court has recognized that the "conclusion that the FTC did not exercise executive power has not withstood the test of time." *Id.* at 2198 n.2. For good reason: Commissioners exercise vast enforcement, investigative, and prosecutorial authority. Thus, to the extent *Humphrey's Executor* remains good law, it does not support modern-day FTC Commissioners' insulation from removal.

B. The FTC's enforcement regime and judicial-review regime are unconstitutional.

The FTC's enforcement and judicial-review schemes are unconstitutional.

First, the government employs an impermissibly arbitrary approach to deciding whether the FTC or DOJ will lead a given investigation, despite the consequences that decision carries for regulated parties. DOJ-led proceedings occur in federal court. By contrast, the FTC may pursue proceedings before itself, where an ALJ presides over a hearing lacking the stringent evidentiary and procedural rules of federal court, *see* 16 C.F.R. §§3.21-.43. Further, federal courts apply different standards of review depending on where the case originated. *Compare* Fed. R. Civ. P. 52(a)(6), *with* 15 U.S.C. §§21(c), 45(c).

If the lesser protections in FTC proceedings are justifiable at all, they must at least reflect reasoned, non-arbitrary decisionmaking. FTC and DOJ's standardless, black-box process—involving "resort[] to a coin toss" in at least one instance[27]—fails this due-process safeguard. *See Beckles* v. *United States*, 137 S. Ct. 886, 892 (2017) (government cannot deprive property

[27] Bryan Koenig, *For DOJ and FTC, Clearing Deals Remains a Gray Area* (Mar. 20, 2020), https://tinyurl.com/29yrr57z.

under law "so standardless that it invites arbitrary enforcement"); *Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972). The arbitrary manner in which FTC and DOJ determine parties' procedural rights also violates equal protection. *Cf. Williams* v. *Vermont*, 472 U.S. 14, 22-23 (1985) ("arbitrary distinction" among taxpayers violates equal protection).

Second, the Commission serves as the prosecutor, judge, and jury of any FTC case. Commissioners make the "critical decision" whether to initiate a case, *Williams* v. *Pennsylvania*, 579 U.S. 1, 8-9 (2016), then determine how the same case should be resolved, 15 U.S.C. §45(b); 16 C.F.R. §§3.51-.54(a). At minimum, that dual role creates a "risk of actual bias—based on objective and reasonable perceptions"—that due process does not tolerate. *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 884-85 (2009). And that dual role raises particularly acute concerns of prejudgment of the merits here.[28]

The Commission's decisionmaking process compounds constitutional problems to the extent the Commission is not required to defer to the factual findings of the judge who observed the trial and testimony. *See* 16 C.F.R. §3.54(a). The Commission's undefeated record on appeal in adjudicating complaints it voted out speaks for itself. Joshua D. Wright, *Section 5 Revisited* at 6 (Feb. 26, 2015), https://tinyurl.com/y2v2m449. And subjecting respondents to a stacked process, then imposing a deferential review standard on federal appeal, denies a "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion).

Third, these procedures are even more problematic because the FTC should not be resolving private rights at all. Resolution of "private rights"—including "any matter which, from

[28] *Cf.* FTC, *Statement of Comm'r Rohit Chopra Joined by Comm'r Rebecca Kelly Slaughter* (Apr. 2, 2020), https://tinyurl.com/2mjwx5j5 (asserting evidence "strongly suggests" illegal activity).

its nature, is the subject of a suit at the common law"—belongs to Article III. *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011) (citation omitted). Antitrust law's governing provisions emerged out of "common-law prohibitions of combinations[,] contracts, and conspiracies in restraint of trade." Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 759 (1955). FTC's antitrust and unfair-competition actions thus implicate private rights that must be resolved in federal court by "Article III judges." *Stern*, 564 U.S. at 484. Further, by mandating deferential federal-court standards of review, the current scheme also violates Article III courts' obligation to exercise independent judgment in resolving "all cases" properly before them. U.S. Const. Art. III, §2, cl. 1.

REMEDY

Even had CC proven its case (it did not), its Proposed Order—briefed extensively below—would fail to restore competition, is improperly punitive, and violates basic notions of fairness.

A. The Proposed Order would undermine competition and is improperly punitive.

Remedial provisions must be "effective to restore competition" and cannot be "punitive" in nature. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961). The key remedial provisions proposed by CC violate these principles:

First, the proposed divestiture provision (Proposed Order, §IV) would not "restore competition" given the FDA scheme (which prohibits Altria from launching a product now without going through years of PMTA review) and the flourishing of competition post-transaction; would harm the public interest by robbing JLI of Altria's regulatory services; and would cause Altria pointless economic hardship by ordering a fire sale on unfair terms.

Second, the proposed cease-and-desist provision (Proposed Order, §II.A) would affect Respondents' vertical relationships having nothing to do with this case, disrupting Respondents' businesses and harming consumers.

Third, the proposed prior-approval provision would cover "*any* agreement or business transaction" with "*any* Person that develops, manufactures, sells, or distributes E-Cigarettes." Proposed Order, §§I.G, II.B (emphases added). This provision would cripple JLI's ability to compete and chill Altria's incentives to do the same.

Fourth, the proposed rescission provision would punish Respondents by requiring them to rescind, prior to divestiture, agreements containing valuable rights and protections they bargained for. Proposed Order, §III. Moreover, CC fails to explain the scope of the proposed "rescission" remedy. To the extent it seeks to reverse the investment transaction—purporting to require Altria to return shares and JLI to return money—the record is devoid of any evidence that this is necessary to protect competition, and CC cites no applicable precedent for its position. At most, the appropriate remedy would be an orderly divestiture allowing Respondents to retain their rights and protections prior to divestiture. To order otherwise would be unlawfully punitive and harm competition in the relevant market.

More generally, CC did not adduce *any* evidence concerning its proposed remedy at trial, and the record thus contains no evidence concerning the impact of these provisions on Respondents or competition.

B. The Proposed Order improperly exceeds the Notice of Contemplated Relief in scope.

The Proposed Order is independently improper because it seeks relief far exceeding that sought in the Complaint's Notice of Contemplated Relief (the "Notice"). Whereas the Notice's cease-and-desist provision sought to prohibit "future non-compete agreements *between*

Respondents," the Proposed Order reaches *any* noncompete related to the "development, manufacturing, distribution or sale of E-Cigarettes." *Compare* Notice ¶b (emphasis added), *with* Proposed Order, §II.A. Similarly, whereas the Notice's prior-approval requirement encompassed transactions "between Altria and JLI that combine[] their businesses in the relevant market," the Proposed Order would require prior approval for virtually any agreement with any e-vapor participant. *Compare* Notice ¶c, *with* Proposed Order, §II.B.

The unfairness of CC's approach is compounded by the fact that the radically broadened prior-approval provision was plainly inspired by the Commission's decision *after trial* to disavow the 1995 Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases.

CONCLUSION

The Commission should affirm.

Dated: May 18, 2022

Respectfully submitted,

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Appendix A

PUBLIC

Rule 3.45(e) and 5.52(f) Notice

Pursuant to Rules 3.45(e) and 3.52(f) of the Commission's Rules of Practice, attached is (1) a copy of the pages from Respondents' Answering Brief containing *in camera* material and (2) the relevant *in camera* orders issued by Judge Chappell.

Notice of the Commission's intent to disclose the *in camera* material on pages 4, 8, 29, and 36 of Respondent's Answering Brief relating to [redacted] should be made to counsel for [redacted] in this proceeding: [redacted]

Notice of the Commission's intent to disclose the *in camera* material on page 16 of Respondent's Answering Brief relating to [redacted] should be made to counsel for [redacted] in this proceeding: [redacted]

Notice of the Commission's intent to disclose the *in camera* material on page 25 of Respondent's Answering Brief relating to Altria Group, Inc. should be made to counsel for Altria Group, Inc. in this proceeding: Beth Wilkinson, Wilkinson Stekloff LLP, 2001 M Street NW, 10th Floor, Washington, DC 20036, and Jonathan M. Moses, Wachtell, Lipton, Rosen & Katz, 51 West 52nd Street, New York, NY 10019.

> As for a partnership with PMI, CC fails to explain why that would be any better than a partnership with JLI or any better than PMI (a multibillion-dollar company with substantial regulatory and technical expertise) going to market on its own or with another partner. It also mischaracterizes the evidence: PMI's product was not "almost market-ready" at the time of the Altria/JLI transaction (OB35); it existed in prototype only and was years away from entering the market. IDF617, 1055, 1059; RFF ¶¶1613-19. In fact, as of trial, [redacted]. IDF1060-61.

Most significantly, as was undisputed at trial, the market is more competitive now than it was before the transaction. Output is up, and prices and market concentration are down. ID101-04. Such post-transaction evidence is highly probative of the lack of competitive effects. CC's expert ignored this evidence, leaving his analysis fundamentally flawed. ID90-91.

Against all this, CC is left arguing that Altria's investment is illegal simply because, but for the transaction, a large tobacco company like Altria would have been incentivized to compete. OB2; ID112. But, as CC knows, its argument cannot stop there. It must rest speculative inference upon speculative inference: (1) that Altria would have developed a new viable product; (2) that FDA would have authorized the new product; (3) that the new product would have made the market more competitive; and (4) that this all would have happened in the near future.

Such speculation is not enough. There is no evidence that Altria would have succeeded. And the need for FDA authorization means it would be years before it could try. Moreover, the actual noncompete in Respondents' agreement is the kind routinely entered into by businesses—allowing Altria to assist JLI in its "existential" objective of "obtaining [FDA] approval." ID76.

If any case cried out for respecting the decision of the trial court, it is this one. The Commission should affirm.

stops when releasing the product in February 2018, offering increasingly rich discounts and incentives, while rapidly expanding distribution to some 25,000 stores. IDF329-43.

It didn't work. As Scott Myers, Altria's current head of distribution, testified, Altria could not terminate its promotions without steep drop-offs in sales. IDF345-48. By June 2018, more than half of 7-Eleven stores carrying Elite had yet to sell a single pod. IDF354. All told, Elite was Altria's "worst" product roll-out in over two decades. IDF362. Elite's share of cartridge sales among all closed-system e-vapor products never exceeded 1%. IDF364.

CC ignores this, but competitors took note. When JLI's co-founder Adam Bowen realized that Elite lacked salts, he observed in contemporaneous documentation that Elite could not "provide [cigarette]-like nicotine satisfaction" and was therefore "not a threat." IDF447. Elite was "an absolute nonstarter" in his view. *Id.* Reynolds likewise regarded Elite as "inferior in quality," and PMI [redacted] because it knew the product could not convert smokers. IDF1014-15. Retailers concurred. According to Sheetz, a convenience-store chain with significant tobacco sales, Elite did not "res[o]nate" with consumers, could not sustain sales, and had not made "any dent in JUUL's share." RFF ¶1021; IDF345-48.

Altria executives and scientists also concluded that Elite, like MarkTen, could not obtain PMTA authorization. ID80; IDF541, 590-97. Elite was not converting smokers and suffered from the same formaldehyde problem plaguing MarkTen, among other defects. IDF379-85, 411-12.

E. Altria's 100-Day Review

When Howard Willard became Altria's CEO in May 2018, he restructured Altria in an attempt to "turn[] around [Altria's] e-vapor business." IDF529. Willard appointed Brian Quigley to lead Nu Mark, tasking him with "coming up with the best plan [he] could to turn

interest. IDF948-49. Altria agreed to divest its e-vapor assets as needed to obtain HSR approval, to provide services to JLI, including regulatory services supporting JLI's PMTA effort, and not to compete with JLI for as long as Altria was providing services. IDF950-53, 957.

H. Intensifying Competition Post-Transaction

Following the investment, competition flourished, with prices falling, output rising, and JLI's share dramatically declining. ID101-04. Two competitors, NJOY and Reynolds American, engaged in a "price war," featuring "aggressive discounting" on newly commercialized devices. IDF1021, 1044. Unlike Elite, these companies' pod products had nicotine salts and thus resonated with consumers. IDF1005-18. Unlike Elite, promotions on these products drove a sustained uptick in cartridge sales, as shown in the below *in camera* chart based on sales at [redacted]. IDF993, 1005-13; [redacted]. And unlike Elite, these products upended JUUL's competitive position: JLI's share plummeted, and "facing an aggressive competitive threat for the first time" (RX1547 at 002), JLI slashed its prices, something it never did in response to Elite. IDF997, 1020, 1038-42; RFF ¶1644.

adult smokers in significant numbers, rendering the public-health calculus entirely different. ID82 n.25; IDF623.

Second, CC says the Court "disregarded evidence showing that Altria purposefully did not make any commitment to remove Elite until *after* it had confirmation from JLI that the deal was on track." OB21. In so doing, CC mischaracterizes Garnick's October 4 talking points for a board call, which make clear that Altria was committed to informing FDA of its intention to remove Elite and nontraditional flavors "[r]egardless" of whether JLI negotiations resumed. IDF630. As the Court found, "Altria made the decision to pull Elite at the September 26 Ranch Meeting, when negotiations with JLI had been broken down for a month." ID82-83.[9] That "timing … undermines any claim of pretext." ID82. Nor does CC have any answer to the undisputed fact that, as Altria anticipated, JLI did not welcome the announcement, but rather viewed it as a "hostile" act. IDF899-907. So CC just ignores it.

Third, CC suggests the Court erred in finding that Altria had deemed Elite both a "commercial failure" and "unlikely to get FDA approval." OB22 (citing ID80). This is an astonishing claim: The record at trial was overwhelming and unrebutted on each point. As for Elite's commercial viability, Elite never cracked a 1% market share in cartridges despite massive promotional effort (IDF329-47, 364); Altria's head of distribution viewed Elite as the "worst" product roll-out in his 24 years at the company (IDF362); third parties viewed Elite as inferior (IDF1014-15); and Quigley repeatedly advised management that Elite was not competitive (IDF548-58, 575-88). Nor is there any genuine dispute that scientists with no involvement in the

[9] CC cites an internal analysis that it reads as [redacted] (OB21), omitting that it was prepared by someone not involved in the JLI negotiations or the ultimate decision of how to respond to FDA's letter and who was never deposed. Whatever this individual's view, it had no impact on Altria's decisionmaking. RRFF ¶1245.

A. Complaint Counsel is not entitled to a presumption of harm.

CC improperly claims the Court erred in denying it a presumption of competitive harm.

1. Pre-transaction HHIs. The Court correctly held that the pre-transaction HHI calculations of CC's expert, Dr. Rothman—premised on Altria's average share from October 2017 through September 2018—were a "poor predictor of what [Altria's] share would have been in a but-for world" because of "the continually declining importance of cig-a-likes" and the corresponding fact that Altria's share was "declin[ing] over the measured 12-month period." ID90 (citing *Horizontal Merger Guidelines* ("HMG") §5.2); IDF176-83.[12]

CC does not dispute that Altria's share was rapidly declining (IDF183, 675), nor contend Altria would have somehow regained share with its failing products. Instead, CC insists that Dr. Rothman's calculation actually "understates Altria's competitive significance" because Altria could have [redacted] or a revised "Elite 2.0." OB29-30. This defies reality. As the Court recognized (ID109-11; IDF386-93), these hypothetical products were years away from PMTA submission, let alone FDA authorization, which is itself speculative. *See also* §II.C, *infra*.

To downplay the significance of consumers' transition to pods, CC also points to FDA's recent authorization of certain cig-a-like products. OB30. But these limited authorizations, discussed further below, do not change the fact that MarkTen cig-a-likes were not competitively significant or render the authorized products competitively significant. *See* Facts §§C-D, H, *supra*. None of the authorized cig-a-like products have material market share. IDF972 (citing Vuse Solo's decline).

[12] In light of these trends, it was error for Dr. Rothman to calculate Altria's share based on a 12-month rolling average. RRB84-85.

such products would come to market in the near future and have a substantial impact on the competitiveness of the market. "Section 7 deals in probabilities not ephemeral possibilities." *FTC* v. *Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999).

With respect to PMI, "[t]he antitrust laws are not meant to realign competitors to assist certain competitors over others." *USAirways Grp.* v. *Brit. Airways PLC*, 989 F. Supp. 482, 489 (S.D.N.Y. 1997). Yet CC would have the Commission prohibit Altria from investing in JLI in the hope that it might team up (merge, even) with a *different* (better-resourced) competitor, even though PMI has repeatedly stated that it is committed to and capable of coming to the U.S. market on its own. RFF ¶1632.

In any event, CC's claim that PMI's VEEV product was "almost market-ready" at the time of Altria's investment is an egregious mischaracterization. OB35. The version of VEEV available in December 2018 was a "large," "baton"-shaped device that consumers found "[c]lunky," and which had no nicotine salts. IDF421, 616. The current iteration of VEEV, which is said to incorporate salts, [redacted]. IDF1059; RRFF ¶1654. PMI has [redacted]. ID111; IDF1060-61.[19] Moreover, [redacted]. IDF1057-58; RRFF ¶1646. As the Court

[19] CC's assertion that Altria "believed it could [redacted]" is disingenuous. OB35. [redacted]

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

In the Matter of	)	
Altria Group, Inc., a corporation,	)	Docket No. 9393
and	)	
JUUL Labs, Inc. a corporation,	)	
Respondents.	)	

ORDER ON RESPONDENT ALTRIA GROUP, INC.'S MOTION FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Commission's Rules of Practice and the Scheduling Order entered in this matter, Respondent Altria Group Inc. ("Altria") filed a motion for *in camera* treatment for materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter. Federal Trade Commission ("FTC" or "Commission") Complaint Counsel filed an opposition. For the reasons set forth below, Altria's motion is GRANTED in part and DENIED WITHOUT PREJUDICE in part.

II.

Under Rule 3.45(b), the Administrative Law Judge may order that material offered into evidence "be placed *in camera* only [a] after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment or [b] after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45(b).

A. Clearly defined, serious competitive injury

"[R]equests for *in camera* treatment must show 'that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.'" *In re Kaiser Aluminum & Chem. Corp.*, 103

F.T.C. 500, 500 (1984), quoting *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368 (Mar. 14, 1961). Applicants must "make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury." *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of FTC decisions is "the principal countervailing consideration weighing in favor of disclosure." *Id.*

The Federal Trade Commission recognizes the "substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons." *Hood*, 1961 FTC LEXIS 368, at *5-6. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co*., 90 F.T.C. 455, 458 (1977). A full and open record also provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces. *Hood*, 58 F.T.C. at 1186. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id*. at 1188. Moreover, there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *15 (June 26, 1996) (citing *General Foods*, 95 F.T.C. at 353; *Crown Cork*, 71 F.T.C. at 1715).

In order to sustain the burden for withholding documents from the public record, a sworn statement is always required, demonstrating that a document is sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *2-3 (Apr. 23, 2004). To overcome the presumption that *in camera* treatment will not be granted for information that is more than three years old, applicants seeking *in camera* treatment for such documents must also demonstrate, by a sworn statement, that such material remains competitively sensitive. In addition, to properly evaluate requests for *in camera* treatment, applicants must provide a copy of the documents at issue to the Administrative Law Judge for review. Where *in camera* treatment is sought for transcripts of investigational hearings or depositions, the requests shall be made only for those specific pages and line numbers of transcripts that contain information that meets the *in camera* standard. *In re Unocal*, 2004 FTC LEXIS 197, *4-5 (Oct. 7, 2004).

Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only "in unusual circumstances," including circumstances in which "the need for confidentiality of the material . . . is not likely to decrease over time. . . ." 16 C.F.R. § 3.45(b)(3). "Applicants seeking indefinite *in camera* treatment must further demonstrate 'at the outset that the need for confidentiality of the material is not likely to decrease over time' 54 Fed. Reg. 49,279 (1989) . . . [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration." *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (Apr. 25, 1990). In

DuPont, the Commission rejected the respondent's request for indefinite *in camera* treatment. However, based on "the highly unusual level of detailed cost data contained in these specific trial exhibit pages, the existence of extrapolation techniques of known precision in an environment of relative economic stability, and the limited amount of technological innovation occurring in the . . . industry," the Commission extended the duration of the *in camera* treatment for a period of ten years. *Id.* at *5-6.

In determining the length of time for which *in camera* treatment is appropriate, the distinction between trade secrets and ordinary business records is important because ordinary business records are granted less protection than trade secrets. *Hood*, 58 F.T.C. at 1189. Examples of trade secrets meriting indefinite *in camera* treatment include secret formulas, processes, other secret technical information, or information that is privileged. *Hood*, 58 F.T.C. at 1189; *General Foods*, 95 F.T.C. at 352; *In re Textron, Inc.*, 1991 FTC LEXIS 135, at *1 (Apr. 26, 1991).

In contrast to trade secrets, ordinary business records include information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents. *See Hood*, 1961 FTC LEXIS 368, at *13; *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012); *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14. When *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. *E.g.*, *McWane, Inc.*, 2012 FTC LEXIS 143; *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101 (May 25, 2011).

B. Sensitive personal information

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes "sensitive personal information," ("SPI") the Administrative Law Judge shall order that such material be placed *in camera*. 16 C.F.R. § 3.45(b). "Sensitive personal information" is defined as including, but not limited to, "an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records." 16 C.F.R. § 3.45(b). In addition to these listed categories of information, in some circumstances, individuals' names and addresses, and witness telephone numbers have been found to be "sensitive personal information" and accorded *in camera* treatment. *In re LabMD, Inc.*, 2014 FTC LEXIS 127 (May 6, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 156 (Sept. 17, 2012). *See also In re Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting the redaction of information concerning particular consumers' names or other personal data when it was not relevant). "[S]ensitive personal information . . . shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law." 16 C.F.R. § 3.45(b)(3).

III.

On December 20, 2018, Respondents Altria and JUUL Labs, Inc. ("JLI") announced that they had executed a purchase agreement and a number of related agreements (together, "the Transaction"). Complaint ¶ 6; Altria Answer ¶ 6. Through this proceeding, the FTC is seeking to unwind the Transaction.

Altria's motion seeks *in camera* treatment for 515 potential trial exhibits that it states fall into at least one of the following categories: (1) highly detailed and sensitive financial and volume data, projections, and strategy; (2) sensitive information and analysis concerning potential mergers, acquisitions and/or investments; (3) sensitive information concerning ongoing contractual or other relationships; (4) sensitive information and analysis concerning regulatory compliance and communications; and (5) sensitive personal information. Altria supports its motion with a declaration from a senior director of strategy and business development. The declaration provides a general description of the documents in each category and asserts that disclosure of the documents in each category would cause serious competitive injury.

A. Documents that are over three years old

Nearly 100 of the documents for which Altria seeks *in camera* treatment are over three years old.[1] There is a presumption that *in camera* treatment will not be accorded to information that is more than three years old unless the movant's supporting declaration shows that such material remains competitively sensitive. Altria's supporting declaration fails to provide the necessary justification for granting *in camera* treatment to these documents. Instead, it makes a blanket, conclusory statement that the confidential information in the documents has remained highly sensitive despite the passage of time. The declaration does not identify which documents are sufficiently detailed as to Altria's strategy that they remain competitively sensitive. Further, the declaration has not demonstrated how projections that were made three years ago remain competitively sensitive. From a review of some of these documents, it is not apparent that they contain information that remains competitively sensitive. For example, PX1216 is a February 2018 email that appears to relate to Altria's consideration of potential transactions with JLI. Since the transaction with JLI was completed in December 2018, it is not readily apparent that such information remains competitively sensitive.

Unless otherwise granted in another section of this Order, Altria's request for *in camera* treatment for documents that are over three years old and fall under Categories 1, 2, and 3, is DENIED WITHOUT PREJUDICE.

[1] Altria seeks *in camera* treatment for several undated documents. Without knowing when these documents were created, it cannot be determined whether they are competitively sensitive. Accordingly, the motion is DENIED WITHOUT PREJUDICE as to these documents.

B. Categories 1, 2, and 3

Altria states that documents in Category 1 include analysis of all of Altria's businesses, not just those e-vapor products at issue in this proceeding. Altria further states that documents in Category 1 describe financial and volume data and forecasts as well as strategy.

Altria states that documents in Category 2 include information on and analysis of potential transactions contemplated by Altria, other than the one it ultimately entered into with JLI. Altria further states that documents in Category 2 may reflect discussions among or presentations to Altria's board of directors or top executives about what opportunities to pursue and how such decisions are made.

Altria states that documents in Category 3 include not only information relating to the ongoing relationship between Altria and JLI, but also Altria's relationships with retailers and wholesalers. Altria further states that documents in Category 3 include information about the ways in which Altria markets and prices products as part of those relationships.

Complaint Counsel asserts that many of the documents for which Altria seeks *in camera* treatment relate to the consideration of a transaction with JLI and argues that Altria has failed to show why public disclosure of information relating to its consummated acquisition remains competitively sensitive. Complaint Counsel notes that Altria has not explained how documents dated before the Transaction that discuss then potential transactions that are now precluded because of the Transaction are still competitively sensitive.

Complaint Counsel also asserts that Altria seeks *in camera* treatment for documents related to discontinued e-cigarette products and future products that Altria stopped developing after the Transaction. Complaint Counsel argues that because Altria is no longer competing in the closed system e-cigarette market, Altria has not shown that it would suffer serious competitive injury if such documents were disclosed.

For documents in Categories 1, 2, and 3, Altria's request for *in camera* treatment is GRANTED for the documents to which Complaint Counsel has no objection and for those documents that Altria attests include in-depth analyses of Altria's businesses other than the e-vapor products at issue in this proceeding. *In camera* treatment, for a period of five years, to expire June 1, 2026 is GRANTED for these documents.

For all other documents in Categories 1, 2, and 3, Altria's request for *in camera* treatment is DENIED WITHOUT PREJUDICE. Altria is instructed to review its requests in compliance with the directives of this Order. If Altria determines that any of these documents do in fact meet the strict standards for *in camera* treatment, Altria must sustain its burden of demonstrating that the documents sought to be withheld from the public record are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury.

C. Category 4

Altria states that before and after the Transaction and up to today Altria and its operating companies were manufacturing and marketing highly regulated products, and its compliance with regulation and relations with regulators is crucial. Altria further states that following the Transaction with JLI, Altria provided substantial regulatory services and advice to JLI, which Altria argues should be protected from public disclosure.

Altria states that documents in Category 4 reflect Altria's regulatory analyses and strategy and may reflect Altria's communications with its regulator or include information from the development of regulatory strategy. Altria asserts that public disclosure of such discussions could undermine Altria's relations with regulators and also give its competitors a strategic advantage by providing them insight in Altria's regulatory strategy. Altria argues that disclosure of documents in this category would cause serious competitive injury.

Complaint Counsel argues that many of the documents discussing regulatory issues are several years old and may no longer contain competitively sensitive information.

Altria's justifications for documents in Category 4 are sufficient to sustain its burden. *In camera* treatment, for a period of five years, to expire June 1, 2026 is GRANTED for the documents in Category 4.

D. Category 5

Altria states that documents in Category 5 provide details regarding named individuals' personal phone numbers, personal email addresses, and/or home addresses. To the extent that documents contain sensitive personal information such as telephone numbers or personal addresses, that information can be redacted without requiring *in camera* treatment and shall not serve as a basis for withholding documents from the public record. *Basic Research*, 2006 FTC LEXIS 14, at *5-6 (permitting redaction of customer names without requiring *in camera* request for such documents).

Permanent *in camera* treatment is GRANTED for the sensitive personal information contained in the documents in Category 5. However, the documents need not be withheld from the public record since that information can be redacted. Altria is instructed to redact the sensitive personal information from documents in Category 5.

E. Deposition and Investigational Hearing Transcripts

With respect to transcripts of investigational hearings and deposition testimony, requests for *in camera* treatment shall be made only for those specific pages and line numbers of transcripts that contain information that meets the *in camera* standard. *In re Unocal*, 2004 FTC LEXIS 197, *4-5 (Oct. 7, 2004). Altria has properly tailored its

request to cover only those portions of the transcripts that it asserts contain competitively sensitive information, the disclosure of which would cause it serious competitive injury.

In camera treatment, for a period of five years, to expire June 1, 2026 is GRANTED for the portions of depositions and investigational hearing transcripts listed in Exhibit 1 to Altria's motion.

IV.

The burden rests on the movant to demonstrate that the evidence sought to be withheld from the public record is sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury.

As to those portions of Altria's motion that have been denied without prejudice, Altria may, by May 25, 2021, refile its motion for *in camera* treatment, supported with a sworn statement. Prior to filing such motion, Altria shall carefully and thoroughly review all documents for which it seeks *in camera* treatment, and strictly narrow its requests to only those documents that comply with the Commission's strict standards for *in camera* treatment. Furthermore, Altria's refiled motion shall include a sworn statement containing sufficient detail regarding the documents to identify the bases for the request for *in camera* treatment and demonstrate that such documents are entitled to *in camera* treatment. Complaint Counsel may file an opposition to any such motion no later than noon on May 27, 2021.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: May 19, 2021

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

In the Matter of	)	
Altria Group, Inc., a corporation,	)	Docket No. 9393
and	)	
JUUL Labs, Inc. a corporation,	)	
Respondents.	)	

ORDER ON NON-PARTIES' MOTIONS FOR *IN CAMERA* TREATMENT

I.

Pursuant to Rule 3.45(b) of the Rules of Practice of the Federal Trade Commission ("FTC" or "Commission") and the Scheduling Order entered in this matter, certain non-parties, identified below, filed motions for *in camera* treatment for designated materials that FTC Complaint Counsel and/or Respondents Altria Group, Inc., and JUUL Labs, Inc. ("Respondents") have listed on their exhibit lists as materials that might be introduced at trial. Neither Complaint Counsel nor Respondents opposed the substance of the motions filed by the non-parties.

In addition, on May 18, 2021, Respondents filed a Motion for Leave to File an Omnibus Response to the non-parties' motions for *in camera* treatment, together with a proposed response, as to which Complaint Counsel sought leave to submitan opposition. Non-parties ITG Brands, LLC, NJOY, LLC, Reynolds American, Inc., and Turning Point Brands, Inc. also sought leave to file oppositions to Respondents' motion for leave and proposed response. Based on a review of Respondents' motion and proposed response, Respondents' motion for leave to file the response is DENIED as both procedurally and substantively improper. First, the response does not, in fact, respond to the assertions or arguments on the merits of the non-parties' motions. Second, Respondents use the purported response to request an order modifying the standard Protective Order entered in this case on April 2, 2020 to allow in-house counsel access to the information contained in non-party, confidential documents, instead of filing a motion in accordance with Rule 3.22. Third, requests for such access by in-house counsel, such as Respondents', are typically denied as contrary to the mandatory provisions of the Protective Order. *See In re Axon Enterprise, Inc*., 2020 FTC LEXIS 31 (Jan. 31, 2020); *In re Benco Dental*

Supply Co., 2018 FTC LEXIS 109 (June 15, 2018). The respective motions of Complaint Counsel and the above-listed non-parties for leave to file oppositions to Respondents' motion for leave are DENIED AS MOOT.[1]

II.

Under Rule 3.45(b), the Administrative Law Judge may order that material offered into evidence "be placed *in camera* only [a] after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment or [b] after finding that the material constitutes sensitive personal information." 16 C.F.R. § 3.45(b).

A. Clearly defined, serious injury

"[R]equests for *in camera* treatment must show 'that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.'" *In re Kaiser Aluminum & Chem. Corp.*, 1984 FTC LEXIS 60, at *1 n.1 (May 25, 1984), quoting *In re H. P. Hood & Sons, Inc.*, 1961 FTC LEXIS 368 (Mar. 14, 1961). Applicants must "make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury." *In re General Foods Corp.*, 1980 FTC LEXIS 99, at *10 (Mar. 10, 1980). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of FTC decisions is "the principal countervailing consideration weighing in favor of disclosure." *Id.*

The FTC recognizes the "substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons." *Hood*, 1961 FTC LEXIS 368, at *5-6. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co*., 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). A full and open record also provides guidance to persons affected by the Commission's actions and helps to deter potential violators of the laws that the Commission enforces. *Hood*, 1961 FTC LEXIS 368, at *6-7. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be given *in camera* treatment. *Id*. at *10-11. Moreover, there is a presumption that *in camera* treatment will not be accorded to information that is more than three years old. *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *15 (June 26, 1996) (citing *General Foods*, 1980 FTC LEXIS 99, at *4-5; *In re Crown Cork & Seal Co.*, 1967 FTC LEXIS 128, at *2-3 (June 26, 1967).

[1] Respondents represent that they have obtained consent to allow in-house counsel access to the *in camera* materials of Sheetz, Inc. and Wawa, Inc. Accordingly, notwithstanding this denial of Respondents' motion, in instances where a non-party has explicitly consented to Respondents' in-house counsel attending portions of the evidentiary hearing related to that non-party's *in camera* documents or reviewing briefs, orders, or other litigation documents incorporating such information, Respondents' in-house counsel may have such access.

In order to sustain the burden for withholding documents from the public record, an affidavit or declaration is always required, demonstrating that a document is sufficiently secret and sufficiently material to the applicant's business that disclosure would result in serious competitive injury. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at *3-4 (Apr. 23, 2004). To overcome the presumption that *in camera* treatment will not be granted for information that is more than three years old, applicants seeking *in camera* treatment for such documents must also demonstrate, by affidavit or declaration, that such material remains competitively sensitive. In addition, to properly evaluate requests for *in camera* treatment, applicants for *in camera* treatment must provide a copy of the documents for which they seek *in camera* treatment to the Administrative Law Judge for review. Where *in camera* treatment is sought for transcripts of investigational hearings or depositions, the requests shall be made only for those specific pages and line numbers of transcripts which contain information that meets the *in camera* standard. *In re Unocal*, 2004 FTC LEXIS 197, *4-5 (Oct. 7, 2004).

Under Commission Rule 3.45(b)(3), indefinite *in camera* treatment is warranted only "in unusual circumstances," including circumstances in which "the need for confidentiality of the material . . . is not likely to decrease over time . . . ." 16 C.F.R. § 3.45(b)(3). "Applicants seeking indefinite *in camera* treatment must further demonstrate 'at the outset that the need for confidentiality of the material is not likely to decrease over time' 54 Fed. Reg. 49,279 (1989) . . . [and] that the circumstances which presently give rise to this injury are likely to be forever present so as to warrant the issuance of an indefinite *in camera* order rather than one of more limited duration." *In re E. I. DuPont de Nemours & Co.*, 1990 FTC LEXIS 134, at *2-3 (Apr. 25, 1990). In *DuPont*, the Commission rejected the respondent's request for indefinite *in camera* treatment. However, based on "the highly unusual level of detailed cost data contained in these specific trial exhibit pages, the existence of extrapolation techniques of known precision in an environment of relative economic stability, and the limited amount of technological innovation occurring in the . . . industry, . . ." the Commission extended the duration of the *in camera* treatment for a period of ten years. *Id.* at *5-6.

In determining the length of time for which *in camera* treatment is appropriate, the distinction between trade secrets and ordinary business records is important because ordinary business records are granted less protection than trade secrets. *Hood*, 1961 FTC LEXIS 368, at *12. Examples of trade secrets meriting indefinite *in camera* treatment include secret formulas, processes, other secret technical information, or information that is privileged. *Hood*, 1961 FTC LEXIS 368, at *12; *General Foods*, 1980 FTC LEXIS 99, at *2; *In re Textron, Inc.*, 1991 FTC LEXIS 135, at *1 (Apr. 26, 1991).

In contrast to trade secrets, ordinary business records include information such as customer names, pricing to customers, business costs and profits, as well as business plans, marketing plans, or sales documents. *See Hood*, 1961 FTC LEXIS 368, at *13; *In re McWane, Inc.*, 2012 FTC LEXIS 143 (Aug. 17, 2012); *In re Int'l Ass'n of Conference Interpreters*, 1996 FTC LEXIS 298, at *13-14. When *in camera* treatment is granted for ordinary business records, it is typically provided for two to five years. *E.g.*, *McWane*, 2012 FTC LEXIS 143; *In re ProMedica Health Sys.*, 2011 FTC LEXIS 101 (May 25, 2011).

B. Sensitive personal information

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes "sensitive personal information," ("SIP") the Administrative Law Judge shall order that such material be given *in camera* treatment. 16 C.F.R. § 3.45(b). "Sensitive personal information" is defined as including, but not limited to, "an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records." 16 C.F.R. § 3.45(b). In addition to these listed categories of information, in some circumstances, individuals' names and addresses, and witness telephone numbers have been found to be "sensitive personal information" and accorded *in camera* treatment. *In re LabMD, Inc.*, 2014 FTC LEXIS 127 (May 6, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 156 (Sept. 17, 2012). *See also In re Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting the redaction of information concerning particular consumers' names or other personal data when it was not relevant). "[S]ensitive personal information . . . shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law." 16 C.F.R. § 3.45(b)(3).

III.

The non-parties listed below filed separate motions for *in camera* treatment. Each motion included the documents for which *in camera* treatment is sought and was properly supported by a declaration of an individual within the company who had reviewed the documents at issue. These declarations supported the applicants' claims that the documents are sufficiently secret and sufficiently material to their businesses that disclosure would result in serious competitive injury. That showing was then balanced against the importance of the information in explaining the rationale of FTC decisions. *See Kaiser Aluminum*, 1984 FTC LEXIS 60, at *2 ("A public understanding of this proceeding does not depend on access to these data submitted by these third party firms."). Moreover, in evaluating the specific motions of each of the non-parties under the standards set forth above, requests for *in camera* treatment by non-parties warrant "special solicitude." *Crown Cork*, 1967 FTC LEXIS 128, at *2; *ProMedica*, 2011 FTC LEXIS 101, at *3-4. *See also Kaiser Aluminum*, 1984 FTC LEXIS 60, at *2-3 ("As a policy matter, extensions of confidential or *in camera* treatment in appropriate cases involving third party bystanders encourages cooperation with future adjudicative discovery requests.").

7-Eleven, Inc. ("7-Eleven")

7-Eleven seeks indefinite *in camera* treatment for six documents and *in camera* treatment for a period of five years for twenty-nine documents that it asserts constitute competitively sensitive confidential business documents. 7-Eleven supports its motion with a declaration from its senior category manager. The declaration asserts that the documents contain confidential information concerning sales, marketing, negotiations and proprietary store information, and its methodology for setting fees, and that such information is competitively sensitive. With respect

to the documents for which 7-Eleven seeks indefinite *in camera* treatment, the declaration states that the documents contain process and secret technical information. The declaration also describes in detail the significant steps 7-Eleven takes to protect the documents from disclosure and maintain their confidentiality.

Except as described below, 7-Eleven has met its burden of demonstrating that some of its documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as RX1205, RX1700, RX1701, RX1702, RX1703, and RX1704.

There is a presumption that *in camera* treatment will not be accorded to information that is more than three years old unless the movant's supporting declaration shows that such material remains competitively sensitive. 7-Eleven's supporting declaration fails to provide the necessary justification for granting *in camera* treatment to the following documents that are over three years old: PX3204, Attachment to PX3204 at 13384, Attachments to PX3205 at 5441-43, 5438-39, RX1212, RX1193, RX1195, RX1215, RX1706, Attachments to RX1706 at 13874-884, and Attachments to RX1708 at 18194-95. With respect to these documents, 7-Eleven's motion is DENIED WITHOUT PREJUDICE.

With respect to the documents for which 7-Eleven seeks indefinite *in camera* treatment, 7-Eleven has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. However, these documents consist of ordinary business records, and not trade secrets. Moreover, 7-Eleven has failed to demonstrate that the need for confidentiality of the material is unlikely to decrease over time. Accordingly, the documents are not entitled to indefinite *in camera* treatment. *In camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for documents identified as Attachment to PX3204 at 13385, Attachment to PX3204 at 13386, RX119/Attachment to PX3205 at 5440, RX1193, RX1194 and RX1195.

With respect to 7-Eleven's request for *in camera* treatment of portions of the deposition of Jack Stout (PX7044), 7-Eleven has designated page and line numbers it seeks to shield. However, 7-Eleven's designations are overbroad. As to many of the designations, 7-Eleven asserts that the testimony discusses documents that are confidential. A review of some of the designated testimony shows that the testimony does not reveal confidential information. For example, testimony that JUUL is occupying shelf space or that some shelf space is no longer specifically allocated to Altria, are general statements that do not meet the standard for *in camera* treatment. Testimony that merely references or contains general statements derived from confidential documents will not be accorded *in camera* treatment. Accordingly, with respect to PX7044, 7-Eleven's motion is DENIED WITHOUT PREJUDICE.

With respect to 7-Eleven's request for *in camera* treatment for the declaration of Jack Stout (PX8001/RX1190), upon review, information contained in the declaration fails to meet the standards for *in camera* treatment. General statements such as, open vape systems are typically sold at vape stores rather than convenience stores, Altria made an announcement that it was terminating its services agreement with JUUL, and rough estimates of the percentages of sales of

combustible cigarettes, are not sufficiently secret to merit *in camera* treatment. Accordingly, with respect to PX8001/RX1190, 7-Eleven's motion is DENIED WITHOUT PREJUDICE.

Goldman Sachs Group, Inc. ("Goldman Sachs")

Goldman Sachs seeks permanent *in camera* treatment for portions of documents containing sensitive personal information, including email addresses, telephone numbers, unique device identifiers of a device of an employee of an affiliate of Goldman Sachs and names of individuals associated with an employee that are unrelated to this case. Goldman Sachs does not seek to withhold entire documents from the record; rather, Goldman Sachs asks only that the sensitive personal information be redacted.

The information Goldman Sachs seeks to protect appears to be work or business email addresses or telephone numbers. This information does not constitute sensitive personal information. However, home or private email addresses and telephone numbers do constitute sensitive personal information. Therefore, the motion is DENIED WITHOUT PREJUDICE. If Goldman Sachs can demonstrate that any of the information for which it seeks *in camera* treatment constitutes sensitive personal information, permanent *in camera* treatment shall be granted.

ITG Brands, LLC ("ITG")

ITG seeks *in camera* treatment for a period of five years for nineteen documents and portions of two declarations and one deposition transcript, and indefinite *in camera* treatment for two documents, which ITG asserts constitute competitively sensitive confidential business documents. ITG supports its motion with a declaration from its general counsel and corporate secretary. The declaration asserts that the documents contain proprietary information including ITG's financial data, methodology for setting the fees, marketing strategies, product formulations and detailed scope of business operations and that such information is competitively sensitive. The declaration also describes in detail the significant steps ITG takes to protect the documents from disclosure and maintain their confidentiality.

ITG has met its burden of demonstrating that its documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as PX3004/RX1735/RX1227, PX3005/RX1736, PX3014, PX3018/RX1734, RX1737/RX1230, PX3059, RX1738, RX1740/RX1231, RX1741, PX3063, PX3065, PX3066/RX1742/RX1233, RX1743/RX1225, PX3071, RX1744, RX1745, RX1746, RX1747/RX1237 and PX3105.

With respect to the documents for which ITG seeks indefinite *in camera* treatment, these documents consist of ordinary business records, and not trade secrets, and are not entitled to indefinite *in camera* treatment. ITG has failed to demonstrate that the need for confidentiality of the material is unlikely to decrease over time. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for documents identified as PX3026 and PX3069.

With respect to ITG's request for *in camera* treatment of portions of the deposition transcript of Jeff Eldridge (PX7012/RX0091), ITG has designated page and line numbers it seeks to shield. However, ITG's designations are overbroad. General testimony, such as the witness' opinion that one product category has more growth potential than certain others, or a rough estimate of sales made through one channel as opposed to another, or that the company ran a particular promotion in 2018, is not sufficiently secret to merit *in camera* treatment. Testimony that merely references or contains general statements derived from confidential documents will not be accorded *in camera* treatment. Accordingly, with respect to PX7012/RX0091, ITG's motion is DENIED WITHOUT PREJUDICE.

With respect to ITG's request for *in camera* treatment for declaration paragraph 7 of PX8010/RX0096 and for declaration paragraphs 11, 15, 16, 17, 20, 21, 29, 30, 33, 34 and 35 of PX8011/RX0090, ITG's request is narrowly tailored and is GRANTED for a period of five years, to expire on June 1, 2026.

Logic Technology Development LLC ("Logic")

Logic seeks *in camera* treatment for a period of five years for four documents and for portions of three documents that it asserts constitute competitively sensitive confidential business documents. Logic supports its motion with a declaration from its in-house legal counsel. The declaration asserts that the documents contain information regarding Logic's business development and marketing strategies, performance reviews, financial data, methodology for setting the fees, and detailed geographic scope of operations and that such information is competitively sensitive. The declaration also describes in detail the significant steps it takes to protect the documents from disclosure and maintain their confidentiality.

Logic has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as PX3123, PX3201, PX3206, PX3209 and for the portions of PX3124 and PX3199 designated in Exhibit E to Logic's motion.[2]

In addition, Logic seeks *in camera* treatment for telephone numbers and email addresses in documents identified as PX3124, PX3125, PX3126, PX3127, PX3128, PX3129, PX3130, PX3131, PX3132, PX3199 and PX3200. The information Logic seeks to protect appears to be work or business email addresses or telephone numbers. This information does not constitute sensitive personal information. However, home or private email addresses and telephone numbers do constitute sensitive personal information. Therefore, the motion is DENIED WITHOUT PREJUDICE. If Logic can demonstrate that any of the information for which it

[2] With respect to the documents for which Logic seeks partial *in camera* treatment, the parties are instructed to determine whether specific portions or pages of these documents are public or *in camera* before use at trial or in post-trial briefs.

seeks *in camera* treatment constitutes sensitive personal information, permanent *in camera* treatment shall be granted.[3]

NJOY, LLC ("NJOY")

NJOY seeks *in camera* treatment for a period of five years for twenty-two documents, in part or in full, that it asserts constitute competitively sensitive confidential business information. NJOY supports its motion with a declaration from its chief engagement officer and deputy general counsel. The declaration asserts that the documents contain proprietary information, including information regarding NJOY's marketing and distribution strategies, customer relationships, financial and sales data including pricing plans/sales projections and detailed geographic scope of operations, and that such information is competitively sensitive. The declaration also describes in detail the significant steps it takes to protect the documents from disclosure and maintain their confidentiality.

Except as described below, NJOY has met its burden of demonstrating that these documents or designated portions therein are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as PX3149, PX3150 and PX3151 and for the identified portions of the documents identified as PX3008, PX3147, PX3148, PX3152, PX3190, PX3191, PX3192, PX3193, PX3194, PX3195, PX3216, PX3217, RX1758 and RX1761.[4]

There is a presumption that *in camera* treatment will not be accorded to information that is more than three years old unless the movant's supporting declaration shows that such material remains competitively sensitive. NJOY's supporting declaration fails to provide the necessary justification for granting *in camera* treatment to the following documents that are over three years old: PX3002 and PX3003. With respect to these documents, NJOY's motion is DENIED WITHOUT PREJUDICE.

With respect to NJOY's request for *in camera* treatment for portions of the deposition transcript of Andrew Farrell (PX7029), NJOY has designated the text it seeks to shield through yellow highlight. For transcripts, citation to specific page and line numbers is required. Furthermore, NJOY's designation of testimony is overbroad. For example, testimony that NJOY has told retailers that NJOY had made PMTA filings is not sufficiently secret or material.

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[3] Logic's motion includes a request for *in camera* treatment of certain paragraphs of a declaration identified as PX8007. On May 5, 2021, an Order was issued precluding admission of PX8007. Order Granting Respondents' Motion *in Limine* to Exclude Declaration and Witness ("May 5 Order").The May 5 Order further allowed Complaint Counsel to seek relief from the preclusion Order, if the declarant is made available for deposition by Respondents by June 15, 2021. Based on the foregoing, Logic's request as to the declaration is DENIED as presently moot; however, this denial is WITHOUT PREJUDICE to Logic's right to refile a motion for *in camera* treatment as to PX8007, should the conditions of the May 5 Order be met and the issue of the declaration become ripe.

[4] With respect to the documents for which NJOY seeks partial *in camera* treatment, NJOY has indicated the specific pages or portions for which it seeks *in camera* in yellow highlighting without identifying the pages or portions by specific bates numbers. The parties are instructed to determine whether specific portions or pages of these documents are public or *in camera* before use at trial or in post-trial briefs.

General testimony stating, for example, the names of the companies with which NJOY competes, or NJOY's beliefs about youth usage of its product, is not sufficiently secret to merit *in camera* treatment. Testimony that merely references or contains general statements derived from confidential documents will not be accorded *in camera* treatment. Accordingly, with respect to PX7029, NJOY's motion is DENIED WITHOUT PREJUDICE.

With respect to NJOY's request for *in camera* treatment of portions of the declaration of Andrew Farrell (PX8004), upon review, information contained therein fails to meet the standards for *in camera* treatment. General testimony, such as, the witness' opinion that obtaining agreements to sell products in retail stores or a manufacturer's ability to verify a customer's age are important aspects of competition, is not sufficiently secret to merit *in camera* treatment. Accordingly, with respect to PX8004, NJOY's motion is DENIED WITHOUT PREJUDICE.

With respect to NJOY's request for *in camera* treatment of portions of the declaration of David Graham (PX8005), upon review, information contained therein fails to meet the standards for *in camera* treatment. General statements such as NJOY was one of the first United States companies to sell e-cigarettes or that NJOY has long-standing relationships with certain (unidentified) labs or that product testing takes a significant amount of time, are not sufficiently secret or material. Accordingly, with respect to PX8005, NJOY's motion is DENIED WITHOUT PREJUDICE.

Phillip Morris International Inc. ("PMI")

PMI seeks *in camera* treatment for a period of five years for fifty-eight documents and portions of one deposition transcript that it asserts constitute competitively sensitive confidential business documents. PMI also seeks permanent *in camera* treatment for telephone numbers and email addresses contained in the documents. PMI supports its motion with a declaration from its assistant general counsel. The declaration asserts that the documents contain proprietary information including information regarding PMI's contemplated merger between PMI and Respondent Altria, PMI's business relationship with Altria, PMI's business strategies, and the development, commercialization, and marketing of its products, and that such information is competitively sensitive. The declaration also describes in detail the significant steps it takes to protect the documents from disclosure and maintain their confidentiality.

PMI has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as PX3009, PX3011, PX3012, PX3013, PX3027, PX3030, PX3034, PX3036, PX3039, PX3041, PX3042, PX3043, PX3044, PX3045, PX3046, PX3047, PX3048, PX3049, PX3050, PX3052, PX3053, PX3054, PX3055, PX3073, PX3074, PX3078, PX3079 (as partially redacted), PX3081, PX3084, PX3085, PX3086, PX3087, PX3088, PX3089, PX3090/RX1020, PX3091, PX3092, PX3093, PX3094, PX3098/RX1057, PX3099, PX3100, PX3101, PX3102 (as partially redacted), PX3106, PX3107, PX3108, PX3109,

PX3111/RX1036, PX3112/RX1049, PX3210, PX3221, RX1016, RX1021, RX1029, RX1035 (as partially redacted), RX1762 and RX1764.[5]

With respect to PMI's request for *in camera* treatment of portions of the deposition transcript of Martin King (PX7020/RX0111), PMI has designated page and line numbers it seeks to shield. However, PMI's designation of testimony is overbroad. For example, designated testimony that a reference in a document to new e-liquids refers to continuing to improve taste or liquid, is not sufficiently secret or material. Testimony that in most international e-cigarette markets, the level of nicotine is capped, is publicly available knowledge. General testimony, for example, that PMI has made changes to its operating model to allow people to work in a more agile, collaborative, project-based way, is not sufficiently secret to merit *in camera* treatment. Testimony that merely references or contains general statements derived from confidential documents will not be accorded *in camera* treatment. Accordingly, with respect to PX7020/RX011, PMI's motion is DENIED WITHOUT PREJUDICE.

In addition, PMI seeks permanent *in camera* treatment for telephone numbers and email addresses contained in 36 documents. It is not clear whether PMI is seeking to protect work or business email addresses or telephone numbers, as opposed to home or private email addresses and telephone numbers. The first category does not constitute sensitive personal information; the second category does. Therefore, the motion is DENIED WITHOUT PREJUDICE. If PMI can demonstrate that any of the information for which it seeks *in camera* treatment constitutes sensitive personal information, permanent *in camera* treatment shall be granted.

Reynolds American, Inc. ("RAI")

RAI seeks *in camera* treatment for a period of five years for twenty-four documents that it asserts constitute competitively sensitive confidential business documents. RAI supports its motion with a declaration from its assistant secretary. The declaration asserts that the documents contain proprietary information including information regarding RAI's future marketing plans and pricing, financial information, decision-making processes, internal business strategies, and internal consumer surveys and that such information is competitively sensitive. The declaration also describes in detail the significant steps it takes to protect the documents from disclosure and maintain their confidentiality.

Except as described below, RAI has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as PX3006, PX3207, PX3208, PX3211/RX1710, PX3212, PX3213, PX3218, PX3223, PX3224, PX3225,

[5] With respect to the documents for which PMI seeks partial *in camera* treatment, the parties are instructed to determine whether specific portions or pages of these documents are public or *in camera* before use at trial or in post-trial briefs.

PX3226/RX1709, PX3227, PX3228, PX3229, RX1711, RX1713, and for the identified portions of the documents identified as RX1716, RX1717, RX1718, RX1719 and RX1720.[6]

There is a presumption that *in camera* treatment will not be accorded to information that is more than three years old unless the movant's supporting declaration shows that such material remains competitively sensitive. RAI's supporting declaration fails to provide the necessary justification for granting *in camera* treatment to the following documents that are over three years old: PX3218 and PX3223. With respect to these documents, RAI's motion is DENIED WITHOUT PREJUDICE.

With respect to RAI's request for *in camera* treatment of portions of the deposition transcript of Lamar Huckabee (PX7037/RX0109), RAI has designated page and line numbers it seeks to shield. However, RAI's designation of testimony is overbroad. For example, testimony that RAI monitors what other products are being sold, or that new competition limits share growth or that a particular company sells e-vapor products, is not sufficiently secret or material. Testimony that merely references or contains general statements derived from confidential documents will not be accorded *in camera* treatment. Accordingly, with respect to PX7037/RX0109, RAI's motion is DENIED WITHOUT PREJUDICE.

With respect to RAI's request for *in camera* treatment of portions of the declaration of Lamar Huckabee (PX8008/RX1981), upon review, information contained therein fails to meet the standards for *in camera* treatment. General statements such as, statements explaining the corporate structure of RAI and stating that the company sells e-cigarette products in the United States partly through a subsidiary, or that the company sells combustible cigarettes through a variety of retail channels, or a description of who RAI views as its competitors, or that a company acquired a product and introduced it to market in 2016, or that the adult consumer demand for cigarettes has declined slowly but steadily, are not sufficiently secret to merit *in camera* treatment. Accordingly, with respect to (PX8008/RX1981), RAI's motion is DENIED WITHOUT PREJUDICE.

With respect to RAI's request for *in camera* treatment of portions of the declaration of Charles Garner (PX8009/RX0098), RAI's motion is narrowly tailored. *In camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the following portions of PX8009/RX0098: ¶ 43 third sentence only, ¶¶ 50-59.

Sheetz, Inc. ("Sheetz")

Sheetz seeks *in camera* treatment indefinitely, or in the alternative, for a period of five years, for twelve documents that it asserts constitute competitively sensitive confidential business documents. Sheetz supports its motion with a declaration from its category manager for cigarettes and tobacco. The declaration asserts that the documents contain proprietary information including information regarding Sheetz's pricing, sales and margin information, development and competition marketing strategies, Sheetz's relationships and negotiations with

[6] With respect to the documents for which RAI seeks partial *in camera* treatment, the parties are instructed to determine whether specific portions or pages of these documents are public or *in camera* before use at trial or in post-trial briefs.

its manufacturers, and detailed geographic scope of operations and that such information is competitively sensitive. The declaration also describes in detail the significant steps it takes to protect the documents from disclosure and maintain their confidentiality.

Sheetz has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. However, these documents consist of ordinary business records, and not trade secrets, and Sheetz has failed to demonstrate that the need for confidentiality of the material is unlikely to decrease over time. Accordingly, the documents are not entitled to indefinite *in camera* treatment. *In camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents identified as PX3113/RX1126, PX3115, PX3116/RX1134, PX3117, PX3119, RX1135, RX1136, RX1145, RX1146 and DX1127.

With respect to Sheetz's request for *in camera* treatment of portions of the deposition transcript of Paul Crozier (PX7019/RX0083), Sheetz has designated the page and line numbers it seeks to shield. However, Sheetz's designation of testimony is overbroad. For example, testimony about why pod products may be more attractive to some consumers, or that, in 2018, Sheetz planned to fill its top three shelves with Altria's MarkTen, or that Sheetz sells vapor products only from companies that have committed to submit a PTMA application prior to the FDA deadline, or that Altria sent a letter to all of its retail partners announcing that it had terminated a services agreement with JUUL, is not sufficiently secret to merit *in camera* treatment. Testimony that merely references or contains general statements derived from confidential documents or that discusses information that is generally known will not be accorded *in camera* treatment. Accordingly, with respect to PX7019/RX0083, Sheetz's motion is DENIED WITHOUT PREJUDICE.

With respect to Sheetz's request for *in camera* treatment of portions of the declaration of Paul Crozier (PX8000/RX0082), upon review, information contained therein fails to meet the standards for *in camera* treatment. General statements such as statements that Sheetz sets prices at a level that will be competitive with other convenience stores in the region, or that when cigarette companies implement price increases, Sheetz will typically pass higher costs on to end customers, or that prices at vape stores are not a factor when Sheetz considers when deciding how to price vapor products, or that Sheetz does not sell open systems, are not sufficiently secret to merit *in camera* treatment. Accordingly, with respect to (PX8000/RX0082), Sheetz's motion is DENIED WITHOUT PREJUDICE.

Turning Point Brands, Inc. ("Turning Point")

Turning Point seeks *in camera* treatment for a period of five years for five documents that it asserts constitute competitively sensitive confidential business documents. Turning Point supports its motion with a declaration from its vice president of sales. The declaration asserts that the documents contain proprietary information including information regarding Turning Point's marketing and sales strategies, product performance and distribution information relating to Turning Point's retailers, financial and sales data including pricing plans/sales projections and detailed geographic scope of operations, and that such information is competitively sensitive.

The declaration also describes in detail the significant steps it takes to protect the documents from disclosure and maintain their confidentiality.

Turning Point has met its burden of demonstrating that these documents are sufficiently secret and sufficiently material to its business that disclosure would result in serious competitive injury. Accordingly, *in camera* treatment for a period of five years, to expire on June 1, 2026, is GRANTED for the documents or designated portions thereof identified as PX3133/RX1790 (0130-35, 0138-41), PX3134/RX1791 (0228, 0231, 0233, 0235, 0238, 0241, 0244-45, 0248-49, 0252-53, 0256-57, 0259, 0261-63, 0265-72), PX3135, PX3145 (0041-42) and PX7030/RX0133 (25:10 to 26:15; 152:21 to 153:11).

Wawa, Inc. ("Wawa")

Wawa seeks indefinite *in camera* treatment for one document that it asserts constitutes a competitively sensitive confidential business document. Wawa supports its motion with a declaration from its category manager for tobacco and alcohol. The declaration asserts that the document contains proprietary information including information regarding Wawa's business contracts relating to prices, discounts and rebates, marketing and sales strategies, product distribution, financial and sales data including pricing plans/sales projections, and detailed geographic scope of operations, and that such information is competitively sensitive. The declaration also describes the steps it takes to protect the information contained therein from disclosure and maintain its confidentiality.

The document for which Wawa seeks *in camera* treatment is a declaration from William Kloss. Wawa seeks *in camera* treatment for the entire declaration. Upon review, information contained therein fails to meet the standards for *in camera* treatment. General statements such as statements that Wawa is a privately held chain of over 850 convenience stores, or that Wawa sells a variety of tobacco products, or that from 2014 to 2018 there was a steady decline in the volume of combustible cigarettes, or that promotions for combustible cigarettes are complex, or that Altria announced it would discontinue the MarkTen Elite, are not sufficiently secret to merit *in camera* treatment. Accordingly, Wawa's motion is DENIED WITHOUT PREJUDICE.

IV.

All of the documents for which *in camera* treatment has been granted shall also be treated as confidential under the Protective Order and may only be disclosed to those entities covered by the Protective Order. Each non-party whose documents or information has been granted *in camera* treatment by this Order shall inform its testifying current or former employees that *in camera* treatment has been provided for the material described in this Order.

The parties are permitted to elicit testimony that includes references to, or general statements derived from, the content of information that has been granted *in camera* treatment. 16 C.F.R. § 3.45. However, any testimony revealing the confidential information from documents that have been granted *in camera* treatment shall only be provided in an *in camera* session. Counsel shall segregate their questions of witnesses in such a manner that all questions on *in camera* materials will, to the extent practicable, be grouped together and elicited in one *in camera* session during the examination of a witness.

For those non-parties whose motion was denied without prejudice in part or in full, each non-party may refile a motion for *in camera* treatment by June 4, 2021. Each non-party is directed to carefully and thoroughly review all documents for which it seeks *in camera* treatment, and strictly narrow its requests to only those documents that comply with the Commission's strict standards for *in camera* treatment. Any refiled motion shall include a sworn statement containing sufficient detail regarding the documents to identify the bases for the request for *in camera* treatment and demonstrate that such documents are entitled to *in camera* treatment.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: May 26, 2021

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

In the Matter of Altria Group, Inc., a corporation, and JUUL Labs, Inc. a corporation, Respondents.	)	Docket No. 9393

ORDER GRANTING RESPONDENT ALTRIA GROUP, INC.'S SECOND MOTION FOR *IN CAMERA* TREATMENT

I.

By Order issued May 19, 2021, the first motion for *in camera* treatment filed by Respondent Altria Group Inc. ("Altria") was granted in part and denied without prejudice in part ("May 19 Order"). Pursuant to that Order, Altria filed a second motion for *in camera* treatment for materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter. Federal Trade Commission ("FTC" or "Commission") Complaint Counsel filed an opposition. For the reasons set forth below, Altria's motion is GRANTED.

II.

The standards by which Altria's motion is evaluated are set forth in the May 19 Order. Altria has significantly narrowed the number of documents for which it seeks *in camera* treatment. Altria's motion seeks *in camera* treatment for 76 of the exhibits as to which Altria's first request was denied without prejudice. For 16 of these exhibits, Altria seeks *in camera* treatment for only designated pages. Altria asserts that the public disclosure of the information in the 76 exhibits will likely result in a clearly defined, serious competitive injury to Altria. To support this assertion, Altria relies on a declaration from a senior director of strategy and business development.

Altria states that the information in the exhibits falls into one of the following categories: (1) highly detailed and sensitive financial and volume projections and strategy; and (2) sensitive information and analysis concerning contractual relationships, mergers, or other transactions. The declaration provides details regarding each of the documents for which Altria seeks *in*

camera treatment and the significant steps Altria takes to protect the documents from disclosure and maintain their confidentiality.

Complaint Counsel objects to *in camera* treatment for the following documents: RX0886, RX0887, RX0888, RX0889, RX0871, RX0872, RX0873, PX1618, PX4073, PX4527, and PX4528 on the grounds that these relate to e-cigarette products that Altria pulled from the market in 2018 and/or to future innovative products that Altria stopped developing after Altria and JUUL Labs, Inc. ("JLI") announced that they had executed a purchase agreement and a number of related agreements.

Complaint Counsel objects to *in camera* treatment for the following documents: PX1701, PX1470, PX1065, PX1179, PX1229, PX1685, PX3166, PX3221, PX4020, PX4073, PX4188, PX4500, RX0713, RX0871, RX0872, and RX0873 on the grounds that these documents are over three years old. Complaint Counsel objects to *in camera* treatment for PX1421 on the ground that the document is undated and thus its competitive sensitivity cannot be determined.[1]

Upon review of the motion, declaration, opposition, and exhibits, Altria has met the strict standards required for *in camera* treatment. Therefore, Altria's second motion for *in camera* treatment is GRANTED, and it is further ORDERED:

For documents where Altria has sought partial *in camera* treatment, *in camera* treatment is extended only to the designated pages of exhibits listed on Exhibit 1 to Altria's second motion, for a period of five years, to expire on June 1, 2026.

For the exhibits listed on Exhibit 1 to Altria's second motion for which Altria sought *in camera* treatment for full documents, the period of *in camera* treatment will be five years, to expire on June 1, 2026.

III.

By June 4, 2021, Altria shall prepare a proposed order listing, by exhibit number, the documents that have been granted *in camera* treatment by the May 19 Order and this Order. The proposed order shall list only the exhibit numbers and those portions of exhibits that have been granted *in camera* treatment and the length of time for which *in camera* treatment has been granted. The proposed order need not include a description of the documents or the document category.

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: May 28, 2021

[1] Although PX1421 is undated, it appears from the content that it is a 2019 document with competitively sensitive information.

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

In the Matter of	)	
Altria Group, Inc., a corporation,	)	Docket No. 9393
and	)	
JUUL Labs, Inc. a corporation,	)	
Respondents.	)	

ORDER GRANTING RESPONDENT ALTRIA GROUP, INC.'S THIRD MOTION FOR *IN CAMERA* TREATMENT

On June 1, 2021, Respondent Altria Group, Inc. ("Altria") filed a third motion for *in camera* treatment. Complaint Counsel does not oppose the motion. The standards by which Altria's motion is evaluated are set forth in the May 19 Order on Alrtia's first motion for *in camera* treatment.

Altria seeks *in camera* treatment for only certain pages of three newly added trial exhibits. Altria asserts that the public disclosure of the information in the three exhibits will likely result in a clearly defined, serious competitive injury to Altria. To support this assertion, Altria relies on a declaration from a director of litigation support. Altria states that selected pages contain in-depth financial and strategic information and analyses about Altria's businesses other than the e-vapor products at issue in this proceeding. The declaration provides details regarding each of the documents for which Altria seeks *in camera* treatment and the significant steps Altria takes to protect the documents from disclosure and maintain their confidentiality.

Altria has met the strict standards required for *in camera* treatment. Therefore, Altria's third motion for *in camera* treatment is GRANTED, and it is further ORDERED that *in camera* treatment is extended to the designated pages of the exhibits listed on Exhibit 1 to Altria's third motion, for a period of five years, to expire on June 1, 2026.

Altria was previously ordered to prepare a proposed order listing, by exhibit number, the documents that have been granted *in camera* treatment by previous orders. Altria shall include the exhibits granted *in* camera treatment by this Order in that proposed order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: June 3, 2021

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

In the Matter of	)	
Altria Group, Inc., a corporation,	)	Docket No. 9393
and	)	
JUUL Labs, Inc. a corporation,	)	
Respondents.	)	

ORDER GRANTING NON-PARTY SHEETZ, INC.'S SECOND MOTION FOR *IN CAMERA* TREATMENT

By Order issued May 26, 2021, the first motion for *in camera* treatment filed by non-party Sheetz, Inc. ("Sheetz") was granted in part and denied without prejudice in part ("May 26 Order"). Pursuant to that Order, Sheetz filed a second motion for *in camera* treatment for materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter. No party opposes the motion. For the reasons set forth below, Sheetz's motion is GRANTED.

The standards by which Sheetz's motion is evaluated are set forth in the May 26 Order. Sheetz seeks *in camera* treatment for portions of two documents for a period of five years, PX7019/RX0083 and PX8000/RX0082. Sheetz supports its motion with a declaration from its category manager for cigarettes and tobacco. The declaration provides additional details about the documents for which Sheetz is seeking *in camera* treatment and asserts that the documents contain proprietary information including information regarding Sheetz's pricing, sales and margin, development and competition marketing strategies, Sheetz's relationships and negotiations with its manufacturers, and detailed geographic scope of operations, and asserts that such information is competitively sensitive. The declaration also describes in detail the significant steps Sheetz takes to protect the documents from disclosure and maintain their confidentiality.

With respect to Sheetz's request for *in camera* treatment of portions of the deposition transcript of Paul Crozier, Sheetz has narrowed the designated page and line numbers it seeks to shield. Accordingly, with respect to PX7019/RX0083, Sheetz's motion is GRANTED. *In camera*

treatment, for a period of five years, to expire June 1, 2026, is GRANTED for the following portions of PX7019/RX0083:16:4; 30:6; 30:11; 31:1; 31:12-13; 32:4; 32:10; 32:20; 36:19; 36:23; 38:13-14; 45:21-22; 54:5; 54:12; 54:14; 55:6-9; 60:7-61:16; 64:1-17; 73:4-5; 74:8-22; 79:19-22; 79:24-80:3; 80:9-11; 82:20; 82:25; 83:2; 83:6; 84:9-10; 92:10; 103:22-24; 141:24; 142:8; 142:14; 142:23; 145:15-16; 148:14; 152:9; 167:7-8; 167:25; 168:2-3; 168:6-25; and 171:7.

With respect to Sheetz's request for *in camera* treatment of portions of the declaration of Paul Crozier, Sheetz has narrowed the portions it seeks to shield. Accordingly, with respect to PX8000/RX0082, Sheetz's motion is GRANTED. *In camera* treatment, for a period of five years, to expire June 1, 2026, is GRANTED for the redactions shown in the following paragraphs of PX8000/RX0082: 4, 5, 7, 9, 12, 14, and 22.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: June 3, 2021

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

In the Matter of	)	
Altria Group, Inc., a corporation,	)	Docket No. 9393
and	)	
JUUL Labs, Inc. a corporation,	)	
Respondents.	)	

ORDER GRANTING NON-PARTY PHILLIP MORRIS INTERNATIONAL INC.'S SECOND MOTION FOR *IN CAMERA* TREATMENT

By Order issued May 26, 2021, the first motion for *in camera* treatment filed by non-party Phillip Morris International Inc. ("PMI") was granted in part and denied without prejudice in part ("May 26 Order"). Pursuant to that Order, PMI filed a second motion for *in camera* treatment for materials that the parties have listed on their exhibit lists as materials that might be introduced at trial in this matter. No party opposes the motion. For the reasons set forth below, PMI's motion is GRANTED.

The standards by which PMI's motion is evaluated are set forth in the May 26 Order. PMI seeks *in camera* treatment for portions of the deposition transcript of Martin King (PX7020/RX0111). PMI supports its motion with a declaration from an assistant general counsel. The declaration provides additional details about the information PMI seeks to protect and explains how the information meets the *in camera* treatment standards. PMI has narrowed the designated page and line numbers it seeks to shield. Accordingly, *in camera* treatment, for a period of five years, to expire June 1, 2026, is GRANTED for the following portions of PX7020/RX0111: 20:19-21; 25:9-12; 33:14-25; 34:2-3; 34:6-17; 34:24-25; 35:2-3; 35:5-6; 35:9-15; 35:22-23; 36:2-5; 36:9-12; 37:24-25; 38:2-5; 38:14-17; 45:9-15; 47:4-11; 51:21-25; 52:2-4; 52:10-24; 53:12-20; 56:19-25; 57:2-6; 57:8-25; 58:4-10; 58:13-15; 58:17-25; 59:2-6; 59:8-11; 59:19-25; 60:2-25; 61:2-9; 61:11-24; 62:4-7; 62:10-16; 63:3-5; 63:10-17; 63:20-21; 65:18-20; 65:22-25; 66:2-8; 66:13-16; 66:18-25; 67:2-8; 67:12-16; 67:18-19; 67:21-23; 68:2-8; 68:24-25; 69:2-10; 70:12-15; 70:23-25; 71:2-7; 72:3-13; 76:22-25; 77:2; 79:21-23; 80:6-9; 80:17-18; 81:6-22; 82:3-25; 83:2-25; 84:2-4; 84:8-17; 84:19-24; 85:3-11; 85:14-16; 89:20-25; 90:11-12; 91:13; 91:20; 92:24-25; 93:2-10; 93:24-25; 94:2-3; 97:9-12; 100:8-20; 105:6-10;

106:3-5; 106:23-24; 107:10-11; 109:19-21; 110:3-5; 110:9-19; 110:22-25; 111:2-6; 112:5-25; 113:2-5; 116:6-20; 117:3-10; 117:18-20; 118:4-24; 120:25; 121:2-8; 121:11-16; 122:7-13; 123:2; 123:15-25; 124:2-5; 124:10-11; 124:19-25; 125:2-8; 125:13-23; 126:2-13; 126:15-22; 130:10-15; 130:17-25; 131:2-11; 131:13-21; 132:6-9; 132:16-19; 132:21-25; 133:4-5; 133:12-25; 134:2-9; 134:11-25; 135:2; 137:22-25; 166:11-15; 172:25; 173:2-20; 174:14-16; 179:10-14; 180:20-25; 181:2-18; 183:14; 186:12-15; 186:18-21; 186:23-25; 189:9-13; 189:24-25; 190:2-5; 190:10-17; 197:23-25; 198:2-4; 201:11-17; 201:19-23; 202:5-7; 202:18-25; 203:2-3; 203:6-19; 210:17-20; 210:23-25; 216: 25; 217:2-7; 220:16-22; 223:2-8; 229:3-5; 231:8-25; 232:2-19; 232:21-22; 232:24-25; 233:2-3; 233:6-12; 233:14-25; 234:2-22; 235:19-20; 235:22-25; 236:2-5; 236:8-25; 237:2-3; 237:10-17; 237:19-25; 238:2-18; 238:20-25; 239:2-3; 239:5-25; 240:2-12; 240:17-25; 241:2-3; 242:8-12; 243:17-24; 248:23-25; 249:2-9; 249:11-25; 250:2; and 251:10-16.

In addition, permanent *in camera* treatment is GRANTED for the sensitive personal information (five personal email addresses) contained in two PMI documents. The sensitive personal information shall be redacted by the parties from PX3028 (at PMI-FTC-000000517) and PX3029 (at PMI-FTC-000000523).

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: June 7, 2021

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

In the Matter of	)	
Altria Group, Inc., a corporation,	)	Docket No. 9393
and	)	
JUUL Labs, Inc. a corporation,	)	
Respondents.	)	

ORDER ON RESPONDENTS' MOTIONS FOR *IN CAMERA* TREATMENT

By Orders issued on May 19, May 26, and June 3, 2021, (collectively, "Orders") certain trial exhibits of Respondent Altria Group, Inc. ("Altria") or Respondent JUUL Labs, Inc. ("JLI") were granted *in camera* treatment. The standards by which Altria's and JLI's motions were evaluated are set forth in the May 19, 2021 Orders. Pursuant to the Orders and Rule 3.45(b) of the Federal Trade Commission Rules of Practice, the trial exhibits or portions thereof identified in Attachment 1 to this Order shall be subject to *in camera* treatment for the period of time indicated in Attachment 1 and will be kept confidential and not placed on the public record of this proceeding.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: June 8, 2021

Ex No.	Pages	Duration
PX0001	006-019	Five years
PX0003	033 to -039, 015, 030	Five years
PX0007	002 to -005	Five years
PX0009	Pages 7-25	Indefinite
PX0015	All	Five years
PX0018	All	Five years
PX0026	All	Five years
PX0031 RX0012	Pages 009-014; 022-23; 026-030	Five years
PX1000	025 to -034, -035 to -063	Five years
PX1001	001 to -198, -257 to end	Five years
PX1010	002 to end	Five years
PX1062	All	Five years
PX1065	007 to -010, -014 to -015, -019, -021 to -024, -028 to -029	Five years
PX1067,RX0289	All	Five years
PX1074	013 to -014, -020 to -026	Five years
PX1075	027 to -047, -068 to -082	Five years
PX1104	All	Five years
PX1118	All	Five years
PX1122	002 to end	Five years
PX1124	slides 9-10, 18-23	Five years
PX1144	17	Five years
PX1152	slides 9-10, 15-23	Five years
PX1160	17	Five years
PX1164	Slides 26-39	Five years
PX1166	061 to -076, 002 to -052	Five years
PX1167	637, -644 to -654	Five years
PX1179	13	Five years
PX1181	068 to -076, 002 to -052	Five years
PX1195	16	Five years

Ex No.	Pages	Duration
PX1221	276 to -289	Five years
PX1229	003, -007 to -010, -025, -030 to -044	Five years
PX1251	001 to -047, -056 to end	Five years
PX1268	002 to end	Five years
PX1270	037 to -047	Five years
PX1273	001 to -005, -008 to -013, -015	Five years
PX1278	005 to -011, -015 to -016, -022 to -024	Five years
PX1279	003 to -026	Five years
PX1284	019, -024 to -031, -032 to -038	Five years
PX1285	All	Five years
PX1286,RX0196	012 to -013, -035 to -036	Five years
PX1289,RX0204	005, -007 to -011, -013 to -015, -019, -021 to -025, -027 to -029	Five years
PX1292	003 to -007, -009 to -014, -026, -028 to -029, -034	Five years
PX1298	53	Five years
PX1316,RX0396	025, -068 to -070, -054 to -062	Five years
PX1344,RX0972	All except a passage on -003 to -004 (starting "Mr. Willard" on -003 to "potential transaction in the e-vapor space" on -004)	Five years
PX1345	All except third full paragraph on -002 starting "Mr. Gifford commented…" and #4 "Strategy Update" on -015	Five years
PX1346	All starting with the fourth full paragraph on -002 ("Mr. Crosthwaite …")	Five years
PX1347	All starting with the exit of KC, Wappler, and Nussbaum on -004	Five years

Ex No.	Pages	Duration
PX1348	All starting with Mr. Crosthwaite in the 4th full para on -002 as sensitive board materials	Five years
PX1369	6	Five years
PX1387	006, -008, -024, -009, -066 to -092, -025 to -065, -093 to -106	Five years
PX1393	All	Five years
PX1396	All	Five years
PX1412,RX0934	All	Five years
PX1418	003 to end	Five years
PX1419	003 to -010	Five years
PX1420	002, -006 to -014	Five years
PX1421	All	Five years
PX1422	All	Five years
PX1425	26	Five years
PX1427	All	Five years
PX1428	All	Five years
PX1429	All	Five years
PX1433	003 to -004, -006, -052, -057, -065, -093, -099, -103, -015	Five years
PX1438	013 to -034	Five years
PX1439	All	Five years
PX1440	All	Five years
PX1443	003 to end	Five years
PX1448	003 to end	Five years
PX1450	All	Five years
PX1451	All	Five years
PX1459	002 to end	Five years
PX1470	All	Five years
PX1471	002 to end	Five years
PX1474	003 to end	Five years

Ex No.	Pages	Duration
PX1475	003 to end	Five years
PX1480	002 to end	Five years
PX1489	005 to -014, -026, -028 to -029, -034	Five years
PX1491	003 to -009	Five years
PX1492	003 to -008	Five years
PX1511	All	Five years
PX1512	011 to -014, -017 to -024	Five years
PX1550	All	Five years
PX1554,RX0664	All	Five years
PX1598	004 to end	Five years
PX1605	541 to -548, -534 to -540	Five years
PX1606	All except -014 to -016	Five years
PX1615	002 to end	Five years
PX1618	9	Five years
PX1624	9	Five years
PX1646	4	Five years
PX1666	All	Five years
PX1668	All	Five years
PX1678	003 to -004	Five years
PX1680	003 to end	Five years
PX1685	All	Five years
PX1692	All	Five years
PX1695	All	Five years
PX1696	002 to -003	Five years
PX1697	All	Five years
PX1701	2	Five years
PX1702	All	Five years
PX1706	All	Five years
PX1715	All	Five years
PX1747	All	Five years
PX1748	All	Five years

Ex No.	Pages	Duration
PX1749	All	Five years
PX1751	All	Five years
PX1768	All	Five years
PX1769	All	Five years
PX1833	3	Five years
PX1876	All	Five years
PX1877	021 to -028	Five years
PX1911	All	Five years
PX1921	All	Five years
PX1929	All	Five years
PX1937	All	Five years
PX1968	All	Five years
PX1978	027, -028 to -033, -037 to -042, -046 to -047, and -050 to -060	Five years
PX1979	All	Five years
PX1999	All	Five years
PX2051	Pages 6-10, 16-23, 26-28	Five years
PX2127 RX1543	Page 5 Pages 6-7 (all sections except those described below): Strategic Initiatives Pages 6-7 (Product Roadmap and New Programs sections): Trade Secrets and Product Development Pages 22-27, 48-50	Five years (Strategic Initiatives on Pages 5-7) Ten years (Trade Secrets and Product Development on Pages 6-7, 22-27, 48-50)
PX2160 RX2001	Pages 58-60	Five years
PX2193	All pages	Five years

Ex No.	Pages	Duration
PX2235	Pages 5, 21 Page 7 (all sections except those described below): Strategic Initiatives Page 7 (Product Roadmap and New Programs sections): Trade Secrets and Product Development Pages 46-50 Pages 56-61, 74	Five years (Strategic Initiatives on Pages 5, 7, 21) Five years (Regulatory Strategy on Pages 46-50) Ten years (Trade Secrets and Product Development on Pages 7, 56-61, 74)
PX2238	Pages 7-8 (all sections except those described below): Strategic Initiatives Page 7 (Product Roadmap and New Programs sections): Trade Secrets and Product Development Page 8 (Develop Technology & Product Engine section): Trade Secrets and Product Development	Five years (Strategic Initiatives on Pages 7-8) Ten years (Trade Secrets and Product Development on Pages 7-8)
PX2252	All pages	Five years
PX2276	Page 1	Five years
PX2278	All pages	Five years
PX2281	All pages	Five years
PX2374	All pages	Five years
PX2378	All pages	Ten years
PX2486	All pages	Five years
PX2526	Pages 6, 10-12	Five years

Ex No.	Pages	Duration
PX2534 RX1502	Pages 20-21, 26, 28-31 Page 15	Five years (Pages 20-21, 26, 28-31) Ten years (Page 15)
PX2599	Pages 42-44	Ten years
PX2615	All pages	Ten years
PX3053	All	Five years
PX3116,RX1134	All	Five years
PX3155	022 to -025, -040 to -052, -113 to -117, -130 to -144, -054 to -092, -146 to -184	Five years
PX3156	025 to -093	Five years
PX3157	020 to -055	Five years
PX3158	All	Five years
PX3159	All	Five years
PX3166	All	Five years
PX3173	001 to -002 ("Project Eagle (PMI)" on -001 to "IT CERTAINLY ISN'T NOW." on -002)	Five years
PX3188	All	Five years
PX3221	All	Five years
PX4009	All	Five years
PX4019	003, -008 to -011, -017 to -019, -021 to -023, -026 to -029, -036 to -047, -050	Five years
PX4020	003, -007 to -010, -030 to -033, -035 to -037, -040 to -042	Five years
PX4042	All	Five years
PX4061,RX0987	All	Five years
PX4073	All	Five years
PX4081	All	Five years
PX4122	9	Five years

Ex No.	Pages	Duration
PX4175	008 to -011, -014, -017 to -024, -030 to -039, -025 to -027, -054 to -061, -044 to -053	Five years
PX4179	004 to -041, -043 to -073, -083 to -089	Five years
PX4188	015 to -017	Five years
PX4203	2	Five years
PX4204	All	Five years
PX4226	006 to -010	Five years
PX4227	All	Five years
PX4232,RX0411	004 - 012, 014 - 020	Five years
PX4233,RX0911	All	Five years
PX4234	009 to -014, -052 to -056, -018 to -037, -042 to -051	Five years
PX4235	008 to -026, -050 to -068, -028 to -033, -036 to -043, -069 to -074	Five years
PX4236	002 to end	Five years
PX4237	002 to end	Five years
PX4238	002 to end	Five years
PX4254	All	Five years
PX4258	012 to -013, -020	Five years
PX4261	004, -008 to -016	Five years
PX4263	All	Five years
PX4274	003 to -007	Five years
PX4327	012, -020, -038, -085 to -218, -219 to -232, -233 to -259, -260 to -283	Five years
PX4351	011, -018	Five years
PX4358	002 to end	Five years
PX4366	All	Five years
PX4408	All	Five years
PX4416,RX0333	005 to -006	Five years
PX4420	005 to -006	Five years

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Ex No.	Pages	Duration
PX4431	All	Five years
PX4432	002 to -007	Five years
PX4433	004 to -009	Five years
PX4434	003 to -008	Five years
PX4435	006 to -009	Five years
PX4447	003 to -008	Five years
PX4450	001 to -002 (everything before the 9:50am 9/12 email)	Five years
PX4480	All	Five years
PX4485	All	Five years
PX4495	013 to -017, -026	Five years
PX4500	All	Five years
PX4505	17	Five years
PX4511	All	Five years
PX4527	436 to -438	Five years
PX4528	499 to -502	Five years
PX4529	All	Five years
PX4531	All	Five years
PX4532	All	Five years
PX4534	002 to end	Five years
PX4536	011 to -033, -034 to -038	Five years
PX4543	All	Five years
PX4568	All	Five years
PX5000	008; 023; 078; 087; 089; 090; 091; 092; 093; 094; 096; 099	Five years

Ex No.	Pages	Duration
PX5000	009 [PX7006], [PX7005] 010 [PX7005], [PX1229], [PX0018], [PX7003] 011 [PX7003], [PX1344], [PX7006] 012 [PX7036], [PX1491], [PX1010], [PX7001] 015 [PX7001], [PX7004] 016 [PX7001], [PX7003], [PX7004], [PX7022], [PX7024], [PX7026] 017 [PX7001], [PX7026] 018 [PX7001], [PX7016], [PX7026] 019 [PX7016], [PX7025] 020 [PX0018] 021 [PX0018], [PX7026] 022 [PX7004], [PX7005], [PX7022], [PX7025] 023 [PX0015], [PX7003], [PX7005], [PX7025] 024 [PX0007], [PX7003] 025 [PX1104], [PX7004], [PX7005], [PX7032] 026 [PX1229], [PX7004], [PX7011] 027 [PX0003], [PX1104], [PX1229] 028 [PX1229] 029 [PX0018], [PX7026] 033 [PX7004], [PX7016], [PX7022], [PX7025] 034 [PX7016], [PX7022], [PX7025]	Five years
PX5001	013; 014; 022; 023; 025	Five years

Ex No.	Pages	Duration
PX5001	4 [PX1393] 4 [PX4012] 4 [PX1277] 5 [PX1000] 6 [PX7024] 7 [PX1280] 13 [PX0015] 19 [PX1166] 25, 39 [PX4012]	Five years
PX6000	All	Five years
PX7000	Garnick IH Dep. 71:2-79:16 [PX1251] Garnick IH Dep. 40:21-166:6] [PX1122]	Five years
PX7001	Devitre IH Dep. 72:23-77:7 [PX1347]	Five years
PX7003	Quigley IH Dep. 183:2-188:4 [PX1067]	Five years
PX7004	Willard IH Dep. 196:24-214:6 [PX1393]	Five years
PX7005 RX0088	159:7-19; 160:2-12	Five years
PX7006	Crosthwaite IH Dep. 73:3-81:24 [PX1000]	Five years

Ex No.	Pages	Duration
PX7008 RX0084	33:6-17; 36:8-12; 39:12-15; 40:6-8; 46:8-14; 52:10-15; 55:7-10; 59:13-17; 60:14-15; 61:12-19; 62:1, 8-15, 19-23; 63:5-6; 65:8-9; 67:11-20; 68:14-25; 69:2-14, 18-24; 70:3-24; 71:8-13; 72:21-25; 73:12-13, 17-20; 74:3-23; 91:13-25; 93:23-25; 94:1-2; 95:8-11; 96:13-22; 103:24-25; 104:1; 108:9-14; 111:1-7; 112:1-5, 12-16; 113:7-12; 114:6-11; 115:21-23; 119:7-9, 20-25; 120:4-8; 121:17-25; 122:1-25; 126:9-11; 128:5-8; 130:20-25; 131:1-24; 137:9-15; 140:3-7; 141:17-25; 142:13-16; 147:23-24; 152:17-23; 158:13-19; 165:12-17; 167:17-25; 178:6-12; 180:2-8; 181:24-25; 182:1-2; 185:13-19; 188:10-14; 199:5-8; 200:1-3, 18-20; 201:6-10, 22-23; 204:15-18; 205:10-14	Five years
PX7009 RX0079	27:21-28:2; 33:12; 48:13-50:4	Five years
PX7010	Gifford Dep. 96:8 - 97:23 [PX0007] Gifford Dep. 130:24 - 137:4 [PX1419] Gifford Dep. 147:6 - 162:23 [PX1229] Gifford Dep. 171:20 - 175:14 [PX1229] Gifford Dep. 196:3 - 216:15 [PX1166]	Five years
PX7011 RX0129	67:12-69:2; 76:15; 109:14; 109:24-110:5; 182:1	Five years
PX7015	Gogova Dep. 78:7-85:11 [PX1075]	Five years

Ex No.	Pages	Duration
PX7016	Jupe Dep. 291:24-307-25 [PX1615] Jupe Dep. 317:18-320:16 [PX1921] Jupe Dep. 308:2- 312:7 [PX1911]	Five years
PX7021 RX0121	25:5-23	Five years
PX7022	Begley Dep. 244:23-245:5 [PX1229] Begley Dep. 142:4-151:16 [PX4042, PX4073]	Five years
PX7024	Crosthwaite Dep. 58:22-63:22 [PX1459] Crosthwaite Dep. 72:6-80:7 [PX1195] Crosthwaite Dep. 256:14-261:24 [PX1470] Crosthwaite Dep. 228:17-239:20 [PX1471] Crosthwaite Dep. 239:21-248:18 [PX1439]	Five years
PX7026	Gardner Dep. 226:19-229:8 [PX4122]	Five years
PX7027 RX0116	79:6-11; 85:21-25; 86:1-25; 90:15-19; 91:7-12, 16-25; 92:1-17; 93:23-25; 94:25; 95:1-17; 98:7-11; 100:12-25; 101:1-7,11-15; 103:11-15	Five years
PX7028	Wappler Dep. 57:25-31:3 [PX3173] Wappler Dep. 109:25-114:16 [PX3188]	Five years
PX7031	Willard Dep. 164:21-171:10 [PX1292] Willard Dep. 101:6-102:9 [PX1344] Willard Dep. 103:6-13 [PX1344] Willard Dep. 105:20-106:13 [PX1344]	Five years
PX7033 RX0120	155:9-157:25; 160:14-162:3; 162:17-164:12; 165:14-21; 166:19-173:7	Five years
PX7034	Mountjoy Dep. 116:4-22 [PX1292]	Five years

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Ex No.	Pages	Duration
PX7035 RX0114	27:11-21; 121:9-11; 121:21-22	Five years
PX7036	Garnick Dep. 175:24-189:6 [PX1010] Garnick Dep. 168:23-172:18 [PX4274] Garnick Dep. 166:10-172:18 [PX1491] Garnick Dep. 238:7-252:18 [PX1491]	Five years
PX7040	Gifford Dep. 39:17-48:13 [PX4236] Gifford Dep. 49:17-58:8 [PX4237] Gifford Dep. 65:3-75:13 [PX4238]	Five years
PX7041	Quigley Dep. 84:7-88:20 [PX1491]	Five years
RX0019	002 to -005	Five years
RX0076	Begley Dep. 244:23-245:5 [PX1229] Begley Dep. 142:4-151:16 [PX4042, PX4073]	Five years

Attachment 1

Ex No.	Pages	Duration
RX0080	Crosthwaite Dep. 58:22-63:22 [PX1459] Crosthwaite Dep. 72:6-80:7 [PX1195] Crosthwaite Dep. 256:14-261:24 [PX1470] Crosthwaite Dep. 81:11-93:25 [PX1300] Crosthwaite Dep. 96:2-96:19 [PX1300] Crosthwaite Dep. 96:20-104:5 [PX1300] Crosthwaite Dep. 104:6-105:12 [PX1300] Crosthwaite Dep. 105:10-110:9 [PX1302] Crosthwaite Dep. 228:17-239:20 [PX1471] Crosthwaite Dep. 239:21-248:18 [PX1439]	Five years
RX0081	Crosthwaite IH Dep. 73:3-81:24 [PX1000]	Five years
RX0089	Devitre IH Dep. 72:23-77:7 [PX1347]	Five years
RX0097	Gardner Dep. 226:19-229:8 [PX4122]	Five years
RX0099	Garnick Dep. 175:24-189:6 [PX1010] Garnick Dep. 168:23-172:18 [PX4274] Garnick Dep. 166:10-172:18 [PX1491] Garnick Dep. 238:7-252:18 [PX1491]	Five years
RX0100	Garnick IH Dep. 71:2-79:16 [PX1251] Garnick IH Dep. 40:21-166:6] [PX1122]	Five years

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Ex No.	Pages	Duration
RX0101	Gifford Dep. 39:17-48:13 [PX4236] Gifford Dep. 49:17-58:8 [PX4237] Gifford Dep. 65:3-75:13 [PX4238]	Five years
RX0102	Gifford Dep. 96:8 - 97:23 [PX0007] Gifford Dep. 130:24 - 137:4 [PX1419] Gifford Dep. 147:6 - 162:23 [PX1229] Gifford Dep. 171:20 - 175:14 [PX1229] Gifford Dep. 196:3 - 216:15 [PX1166]	Five years
RX0103	Gogova Dep. 78:7-85:11 [PX1075]	Five years
RX0110	Jupe Dep. 291:24-307-25 [PX1615] Jupe Dep. 317:18-320:16 [PX1921] Jupe Dep. 308:2- 312:7 [PX1911]	Five years
RX0115	Mountjoy Dep. 116:4-22 [PX1292]	Five years
RX0122	Quigley Dep. 84:7-88:20 [PX1491]	Five years
RX0123	Quigley IH Dep. 183:2-188:4 [PX1067]	Five years
RX0124 PX7039	110:2-4; 111:9-12; 111:16; 112:24-25; 113:5-6; 113:11-12; 113:16-17; 113:19-20; 113:22-25; 114:3-5; 131:12-14	Five years
RX0130	Wappler Dep. 57:25-61:3 [PX3173] Wappler Dep. 109:25-114:16 [PX3188]	Five years
RX0134	Willard Dep. 164:21-171:10 [PX1292] Willard Dep. 101:6-102:9 [PX1344] Willard Dep. 103:6-13 [PX1344] Willard Dep. 105:20-106:13 [PX1344]	Five years
RX0135	Willard IH Dep. 196:24-214:6 [PX1393]	Five years
RX0201	013 to end	Five years
RX0221	8	Five years
RX0222	003 to end	Five years
RX0228	All	Five years
RX0279	085 to -218, -219 to -232	Five years

Ex No.	Pages	Duration
RX0288	008 to -014, -018 to -037, -050 to -053, -041 to -051	Five years
RX0297	001 to -002	Five years
RX0301	010 to -012, -015 to -018	Five years
RX0311	004 to 007	Five years
RX0353	002 to end	Five years
RX0372	001 to -019, -023 to end	Five years
RX0389	003 to -017, -019	Five years
RX0408	All	Five years
RX0455	002 to -007	Five years
RX0491	All	Five years
RX0563	6	Five years
RX0584	8	Five years
RX0601	002 to end	Five years
RX0613	All	Five years
RX0614	All	Five years
RX0630	14	Five years
RX0648	002 to -003	Five years
RX0650	002 to end	Five years
RX0658	002 to end	Five years
RX0686	All	Five years
RX0711	All	Five years
RX0713	All	Five years
RX0804	002 to end	Five years
RX0818	003 to -008	Five years
RX0833	"Of course" to "with the FDA" -001	Five years
RX0854	003 to -010, -025 to -042, -121 to -127, -064 to -074, -113 to -119, -079 to -081, -106 to -112, -128 to -141	Five years
RX0856	001 to -010, -025, -029 to -043	Five years
RX0868	017, -021 to -032, -045 to end	Five years

Ex No.	Pages	Duration
RX0870	019 to -012, -025, -026 to -030	Five years
RX0871	All	Five years
RX0872	All	Five years
RX0873	All	Five years
RX0883	All	Five years
RX0886	All	Five years
RX0887	All	Five years
RX0888	All	Five years
RX0889	All	Five years
RX0926	003 to -004	Five years
RX0929	002 to end	Five years
RX0930	All	Five years
RX0931	004 to end	Five years
RX0932	All	Five years
RX0936	002 to end	Five years
RX0937	All	Five years
RX0940	004 to end	Five years
RX0941	004 to end	Five years
RX0945	All	Five years
RX0946	All	Five years
RX0949	All	Five years
RX0951	All	Five years
RX0953	All	Five years
RX0954	All	Five years
RX0955	All	Five years
RX0956	All	Five years
RX0957	All	Five years
RX0959	All	Five years
RX0960	All	Five years
RX0961	All	Five years
RX0968	All	Five years

Ex No.	Pages	Duration
RX0971	007 to -012	Five years
RX0973	All	Five years
RX0974	048 to -012	Five years
RX0988	All	Five years
RX0989	All	Five years
RX0990	All	Five years
RX0998	All	Five years
RX1215	All	Five years
RX1217	031; 032; 052; 053; 064; 065; 066; 068; 069; 070; 085; 086	Five years
RX1217	8, 24 [PX0018] 22 [PX7041] 62 [PX1229] 103 [PX1289]	Five years
RX1250	All	Five years
RX1251	All	Five years
RX1252	All	Five years
RX1258	All	Five years
RX1259	All	Five years
RX1260	All	Five years
RX1262	All	Five years
RX1295	All	Five years
RX1493	All pages	Five years
RX1515	All pages	Five years
RX1529	All pages	Five years
RX1530	All pages	Five years
RX1535	Page 1	Five years
RX1536	All pages	Five years
RX1537	All pages	Five years
RX1576	All pages	Five years
RX1577	Pages 1-2	Five years

Ex No.	Pages	Duration
RX1579	All pages	Five years
RX1584	All pages	Five years
RX1585	All pages	Five years
RX1599	All pages	Five years
RX1600	All pages	Five years
RX1601	All pages	Five years
RX1602	All pages	Five years
RX1603	All pages	Five years
RX1604	All pages	Five years
RX1607	All pages	Five years
RX1608	All pages	Five years
RX1771	All	Five years
RX1911	006-007; -015; -019-020; -025; -030; -033; -035; -037-039; -040	Five years
RX1982	003 to -010, -025 to -042	Five years
RX1983	All	Five years
RX1987	Pages 4-28, 30-174	Five years
RX1988	All pages	Five years
RX1989	All pages	Five years
RX1991	All pages	Five years
RX1993	All pages	Five years
RX1994	All pages	Five years
RX2009	006 - 009	Five years
RX2013	006 - 014, 022 - 030, 038 - 046, 054 - 062	Five years
RX2014	003, 005 - 015	Five years

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

In the Matter of	)	
Altria Group, Inc., a corporation,	)	Docket No. 9393
and	)	
JUUL Labs, Inc. a corporation,	)	
Respondents.	)	

ORDER GRANTING NON-PARTY PHILLIP MORRIS INTERNATIONAL INC.'S SECOND MOTION FOR *IN CAMERA* TREATMENT

On June 22, 2021, non-party Phillip Morris International Inc. ("PMI") filed a second motion for *in camera* treatment for one document that Respondents intend to offer into evidence. No party opposes the motion. For the reasons set forth below, PMI's motion is GRANTED.

The standards by which PMI's motion is evaluated are set forth in the Order on Non-Parties' Motions for *In Camera* Treatment, issued May 26, 2021. PMI seeks *in camera* treatment for a period of five years for one additional document identified for the record as RX2080. PMI supports its motion with a declaration from an assistant general counsel. The declaration provides details about the information PMI seeks to protect and explains how the information meets the *in camera* treatment standards. Accordingly, *in camera* treatment, for a period of five years, to expire June 1, 2026, is GRANTED for RX2080.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: June 23, 2021

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

In the Matter of	)	
Altria Group, Inc., a corporation,	)	Docket No. 9393
and	)	
JUUL Labs, Inc. a corporation,	)	
Respondents.	)	

ORDER GRANTING NON-PARTY PHILLIP MORRIS INTERNATIONAL INC.'S THIRD MOTION FOR *IN CAMERA* TREATMENT

On September 27, 2021, non-party Phillip Morris International Inc. ("PMI") filed a third motion for *in camera* treatment for two additional documents that Respondents offered into evidence. No party opposes the motion. For the reasons set forth below, PMI's motion is GRANTED.

The standards by which PMI's motion is evaluated are set forth in the Order on Non-Parties' Motions for *In Camera* Treatment, issued May 26, 2021. PMI seeks *in camera* treatment for a period of five years for two additional documents identified as RX1030 and RX1058. PMI supports its motion with a declaration from an assistant general counsel. The declaration provides details about the information PMI seeks to protect and explains how the information meets the *in camera* treatment standards. Accordingly, *in camera* treatment, for a period of five years, to expire June 1, 2026, is GRANTED for RX1030 and RX1058.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: September 28, 2021

PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2022, 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
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)
James Abell (jabell@ftc.gov)
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Federal Trade Commission
400 7th Street, SW
Washington, DC 20024

Complaint Counsel

s/ *Beth A. Wilkinson*

Beth Wilkinson
Counsel for Altria Group, Inc.

PUBLIC

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: May 18, 2022

s/ *Beth A. Wilkinson*

Beth Wilkinson
Counsel for Altria Group, Inc.