

**PUBLIC**

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

**In the Matter of**

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

**and**

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

**DOCKET NO. 9393**

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## INTRODUCTION

Respondents ask the Court to ignore the fundamental truth underlying this case: but for Altria Group, Inc.’s (“Altria”) investment in JUUL Labs, Inc. (“JLI”) (the “Transaction”), Altria would be competing in the U.S. closed-system e-cigarette<sup>1</sup> market today. That competition would have benefited consumers in the form of price, shelf-space, and innovation competition. Complaint Counsel has put forth extensive and consistent qualitative and quantitative evidence in support of both its illegal agreement and unlawful acquisition claims. This evidence shows that Altria and JLI agreed that Altria would exit the market in exchange for 35 percent of JLI’s profits. This conduct is concerted action in unreasonable restraint of trade and has resulted in a substantial lessening of competition on price, innovation, and shelf space in the U.S. market for closed-system e-cigarettes. The Transaction is also an unlawful acquisition. Respondents have failed to demonstrate that either new entry or expansion or procompetitive efficiencies are capable of offsetting this harm to competition. As such, the Transaction is clearly anticompetitive and should be undone.

The totality of the evidence shows that Respondents entered into an overall agreement wherein Altria would exit the market and stop competing with JLI now and in the future. Altria fulfilled that agreement by removing its e-cigarette products from the market and by signing a six-year non-compete with JLI. Complaint Counsel has set forth extensive documentary and testimonial evidence supporting an inference of an agreement. Against this evidence, Respondents have merely provided the self-serving testimony of their own executives. While Respondents have proffered various pretextual justifications for Altria’s exit—ranging from financial woes to concerns about youth e-cigarette use—none of these of explanations find any

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<sup>1</sup> The terms e-cigarettes and e-vapor products are used interchangeably.

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support in the record. In asking the Court to believe their version of events, Respondents ask this Court to accept a story uniformly rejected by regulators, market analysts, and industry participants, and contrary to the immense amount of qualitative and quantitative evidence in the record.

Complaint Counsel has presented ample evidence demonstrating that the sale of closed-system e-cigarettes is the relevant product market in which to evaluate the current and future effects of the Transaction. Complaint Counsel is entitled to a presumption of anticompetitive harm because the Transaction significantly increased concentration in that already highly concentrated market. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963). In addition to this structural presumption, the record evidence in this case shows that Altria would have continued to place a significant competitive constraint on the U.S. closed-system e-cigarette market in the absence of the Transaction and further shows that Altria's exit harmed—and will continue to harm—consumers. The economic analysis performed by Complaint Counsel's expert witness further supports these conclusions and is entirely consistent with this record evidence.

Respondents argue that expansion by Reynolds and NJOY has offset any harm caused by Altria's exit. But it is not enough for Respondents to show that repositioning has replaced *some* of the competition lost due to Altria's exit. *See In re Otto Bock HealthCare N. America, Inc.*, Docket No. 9378, 2019 WL 2118886, at \*28 (F.T.C. May 6, 2019) (Initial Decision). Instead, Respondents must show that any new entry or expansion has been sufficient to replace the competition lost due to Altria's exit. They have failed to do so here.

Respondents also argue that Altria's provision of PMTA assistance to JLI is a "procompetitive benefit" capable of offsetting any consumer harm. But given the substantial uncertainty surrounding how the FDA will evaluate JLI's PMTA submission, and given that JLI

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could have received these same purported benefits in the absence of the Transaction, Respondents have fallen well short of meeting their burden to show procompetitive benefits under Section 1 or verifiable and merger-specific efficiencies under Section 7. Thus, a remedy is both justified and required to prevent future harm to competition. Accordingly, Complaint Counsel respectfully asks this Court to issue its Proposed Order, which would require a complete divestiture of Altria's equity stake in JLI and the immediate termination of all agreements associated with the Transaction.

### **FACTS**

Respondents' "Facts" section is misleading, incomplete, and contrary to the weight of the evidence. As set forth below, Respondents cherry-pick and mischaracterize evidence, omit key facts, and ignore ordinary course documents and testimony under oath.<sup>2</sup> The qualitative and quantitative evidence in this matter clearly supports the facts set forth in Complaint Counsel's Post-Trial Brief.

#### **I. Contrary to Respondents' Assertions, Altria Was a Well-Positioned and Meaningful Competitor in the Market for Closed-System E-Cigarettes Prior to Its Exit**

Respondents understate Altria's track record and ability to compete in the market for closed-system e-cigarettes, while overstating the challenges Altria faced in that market. Resps.' Post-Trial Br. at 5-24. Prior to the Transaction, Altria, through its innovation subsidiary Nu Mark, was an important competitor in the market for closed-system e-cigarettes in the U.S. Indeed, as the largest tobacco company in the U.S., Altria's combination of strong incentives, deep pockets, robust network of technology partnerships, massive shelf space at retailers, and extensive marketing, distribution, and sales programs positioned it to be a formidable competitor

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<sup>2</sup> Complaint Counsel's Responses to Respondents' Proposed Findings of Fact ("CCRRFF"), filed concurrently with this Reply Brief, contain Complaint Counsel's detailed responses to all of Respondents' purported factual assertions.

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unlike any other in the market. *See* Complaint Counsel’s Proposed Findings of Fact (“CCFF”) ¶¶ 409-26, 493-531.

As Respondents acknowledge, Altria recognized the importance of e-cigarettes and devoted a significant amount of time, money, and personnel towards its goal of leading the closed-system e-cigarette market. *See* Resps.’ Post-Trial Br. at 5-8. Respondents’ suggestion that Altria’s e-cigarette business was a failure is just flat out wrong and contrary to the qualitative and quantitative evidence in the record. *See* Resps.’ Post-Trial Br. at 5-8.

Altria’s MarkTen brand e-cigarettes were margin positive and commercially successful. CCFF ¶¶ 1088-131. Indeed, { [REDACTED] } CCFF ¶¶ 136-37, 489, 1091. Even after the rapid growth of JUUL, MarkTen still was the third best-selling brand of closed-system e-cigarettes in the U.S. CCFF ¶ 1738. Both Nu Mark’s MarkTen cigalikes and its recently introduced MarkTen Elite pod-based products were growing in sales when Altria discontinued them in late 2018. CCFF ¶¶ 1097, 1104, 1108, 1128. As of August 2018, the MarkTen cigalike platform was the second fastest growing e-cigarette brand in the U.S. behind only JUUL. CCFF ¶ 1368. Elite’s distribution grew significantly throughout 2018, growing from zero retail stores in February 2018 to 25,000 in September 2018. CCFF ¶ 1124. Altria planned to expand MarkTen Elite’s distribution to 37,000 stores by the end of 2018, and would have been able to meet that goal had Elite not been discontinued. CCFF ¶ 1148. Elite’s within-store sales (i.e., sales volumes at stores already carrying the product) volumes were growing, and its within-store sales performance was similar to those of rival brands, including JUUL, over the same period after its launch. CCFF ¶¶ 1114, 1122-23, 1161; CCRRFF ¶ 842. And both MarkTen cigalikes and MarkTen Elite were generating positive margins for Altria. CCFF ¶¶ 1106-07, 1127; CCRRFF ¶ 431.



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Contrary to Respondents’ suggestions otherwise, Nu Mark’s overall financial performance was improving and { [REDACTED] } CCFF ¶¶ 1068-75, 1088-111; CCRRFF ¶ 181. Furthermore, Altria was working on a number of advanced R&D projects aimed at developing the next generation of closed-system e-cigarettes. CCFF ¶¶ 1553-87. Altria also had the benefit of a Joint Research, Development and Technology Sharing Agreement (“JRDTA”) with Phillip Morris International (“PMI”), pursuant to which PMI and Altria would “collaborate to develop the next generation of e-vapor products for commercialization in the United States by Altria and in markets outside the United States by PMI.” CCFF ¶ 145. As discussed below, Altria had the right to commercialize PMI’s innovative VEEV e-cigarette in the U.S. *See infra* Discussion §§ II.D.3 and II.D.4.; CC’s Post-Trial Br. at 64-65, 81-82.

Given the breadth and depth of Altria’s resources and abilities, it is not surprising that the record evidence demonstrates that JLI viewed Altria as a long-term competitive threat in the closed-system e-cigarette market. *E.g.*, CCFF ¶¶ 503-06, 1129; CCRRFF ¶¶ 1185, 1193.

**A. The Challenges Identified by Respondents Are Not Unique to Altria, and Altria Was Well-Placed to Overcome Those Challenges**

Respondents repeatedly point to Altria’s purported struggle to “internally develop” alternative tobacco products, and their lack of the “right talent” to develop innovative products. Resps.’ Post-Trial Br. at 5-7. But Respondents’ focus on Altria’s own development capabilities is a red herring. As Respondents themselves acknowledge, “most of the U.S. players in the e-vapor industry acquired their products.” Resps.’ Post-Trial Br. at 8. In fact, of the four leading e-cigarette companies in the U.S. today, JLI is the *only one* who actually developed its own products. Resps.’ Post-Trial Br. at 8. For instance, { [REDACTED] }

[REDACTED]

[REDACTED] } CCFE ¶¶ 138, 168, 190-94.

Respondents’ attempt to focus the Court’s attention exclusively on JLI’s internal development of its e-cigarette products also deliberately ignores several major competitive advantages that Altria enjoyed. As the largest tobacco company in the U.S., Altria has significant capital reserves to invest in the closed-system e-cigarette market—as evidenced by the \$12.8 billion it spent to acquire a 35 percent interest in JLI. Altria’s considerable financial resources are matched only by its steadfast commitment to investing those resources in its e-cigarette business. CCFE ¶¶ 420-22, 427-29.

Moreover, Altria understates its own internal development and technological capabilities. Altria has a \$350 million Center for Research and Technology, which employs over 400 scientists, physicians, product developers, and engineers working on innovative products. CCFE ¶ 452; CRRFE ¶ 907. Nu Mark itself had a research and development group in Israel, called NMI, which was able to, among other things, come up with a solution to Elite’s leaking gasket in only a few months. CCFE ¶¶ 14-19, 443, 1209-10. Importantly, in discussing its own e-cigarette development capabilities, Altria ignores its strategic collaboration with PMI in developing next-generation e-cigarettes—a collaboration that effectively ended when Altria signed the JLI Transaction. CCFE ¶¶ 515-22, 1014, 1588-619, 1638-96. Under the JRDTA, [REDACTED] [REDACTED] CCFE ¶ 517.

In light of these key competitive advantages, it comes as no surprise that an August 2, 2018 Nu Mark presentation recognized that an “external development and acquisition strategy” (i.e., working with third parties on product development and/or acquiring products) could be used to address any short term portfolio gaps. CRRFE ¶ 842. Indeed, prior to the Transaction

with JLI, Altria was evaluating several other e-cigarette acquisitions (including of pod-based products with nicotine salts) and was collaborating with several third parties on e-cigarette development. CCFE ¶¶ 1719-30. With its abundant financial resources, robust technology partnerships, extensive distribution system, enormous sales and marketing network, and regulatory expertise, Altria was—and still is—uniquely well-positioned to take a product it acquired or developed with a third party, prepare and submit a PMTA (if necessary), and place the product into commerce.

Respondents misconstrue and tell an incomplete story about Nu Mark’s financial state. Resps.’ Post-Trial Br. at 7. [REDACTED] } Altria was the only company to exit. CCFE ¶¶ 109-17, 1133-35, 1137-39, 1141-43. Indeed, the [REDACTED] [REDACTED] } CCFE ¶¶ 110, 114, 1134. [REDACTED] [REDACTED] } CCFE ¶¶ 111-12, 1138-39. Moreover, [REDACTED] [REDACTED] } CCFE ¶¶ 95, 1067. Not only that, Respondents fail to mention that Nu Mark’s financial performance was steadily improving. CCFE ¶¶ 1069-76, 1088-111. It is neither unusual nor remarkable that Altria’s e-cigarette business was not yet profitable.

**B. FDA Regulations Applied to All E-Cigarette Manufacturers, Not Just Altria, and as a Large, Well-Funded Competitor, Altria Was Well-Positioned to Comply with the FDA’s PMTA Requirements for E-Cigarettes**

Respondents point to FDA regulations as an impediment to “bring[ing] new products to market in a timely way” (Resps.’ Post-Trial Br. at 11-14), but these regulations apply equally to all e-cigarette manufacturers, and Altria was well-positioned to comply with these regulations.

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Indeed, Respondents appear to see no inherent tension between this argument and basing their entire efficiencies defense on the claim that Altria’s vast FDA expertise was essential for JLI to prepare its PMTAs. As Respondents observe, pursuant to the FDA’s Deeming Rule that became effective in August 2016, e-cigarette products that were on the market as of August 8, 2016 (“Deeming Date”) could remain on the market if manufacturers submitted a premarket tobacco product application (“PMTA”) by a certain deadline.<sup>3</sup> CCFF ¶¶ 198-99; *see* Resps.’ Post-Trial Br. at 11. New e-cigarette products, however, could only be introduced after receiving PMTA approval. *See* CCFF ¶ 200; Resps.’ Post-Trial Br. at 11.

Respondents observe that preparing a PMTA is an arduous process that costs many millions of dollars and requires numerous scientists and scientific studies. Resps.’ Post-Trial Br. at 13. Altria, however, was one of the few companies well-positioned to overcome this hurdle. Indeed, Altria was one of a handful of well-funded competitors (including JLI) with the resources and ability to put together robust PMTAs. The FDA has already rejected PMTA filings (by refusing to accept the filings due to the absence of required contents, or by accepting the filings but denying them after review) from smaller manufacturers covering 93 percent of the PMTAs submitted, and has, to date issued a marketing granted order to only one e-cigarette—a cigalike described by the FDA as a “closed ENDS device”<sup>4</sup> from large tobacco company Reynolds.<sup>5</sup> The FDA continues to consider PMTAs from a handful of large competitors,

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<sup>3</sup> The PMTA filing deadline for deemed products changed several times, but was ultimately set at September 9, 2020. CCFF ¶ 199. During the entirety of 2018, including in December 2018 when the JLI Transaction closed, the operative PMTA filing deadline for deemed products was August 2022. CCFF ¶ 201.

<sup>4</sup> “ENDS”—a term used by the FDA—stands for electronic nicotine delivery systems. *See* FDA, *Vaporizers, E-Cigarettes, and Other Electronic Nicotine Delivery Systems (“ENDS”)*, available at <https://www.fda.gov/tobacco-products/products-ingredients-components/vaporizers-e-cigarettes-and-other-electronic-nicotine-delivery-systems-ends>.

<sup>5</sup> *See* Statement of FDA Commissioner Janet Woodcock, *FDA Makes Significant Progress in Science-Based Public Health Application Review, Taking Action on Over 90% of More than 6.5 Million ‘Deemed’ New Tobacco Products Submitted* (Aug. 9, 2021), available at <https://www.fda.gov/news-events/press-announcements/fda-makes-significant-progress-science-based-public-health-application-review-taking-action-over-90>; Press Release, FDA,

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including additional applications from Reynolds.<sup>6</sup> This indicates that the market for closed-system e-cigarettes is likely to become even more concentrated among the large manufacturers, and shows why having Altria as an independent player would increase competition and benefit consumers.<sup>7</sup>

Notably, even with the Deeming Rule, several major manufacturers were able to introduce new e-cigarette products after August 8, 2016. CCFF ¶¶ 1198-201. This includes Altria, which introduced its MarkTen Bold cigalike containing nicotine salts in 2017, and its pod-based e-cigarette MarkTen Elite in February 2018. CCFF ¶¶ 1195-96. Respondents' claim that the Deeming Rule prevented any modifications from being made to existing e-cigarettes is misleading and contrary to the weight of the evidence. *See Resps.' Post-Trial Br.* at 11. In fact, { [REDACTED] } both Altria and JLI, could and did make modifications to their existing e-cigarette products after August 8, 2016. CCFF ¶¶ 205, 1202-17; *see infra* Facts § III.

Respondents' claim that because of the Deeming Rule Altria had { [REDACTED] } { [REDACTED] } (Resps.' Post-Trial Br. at 16) is plainly wrong and completely ignores the importance of innovation competition in this market. Altria (or any other manufacturer) could still develop new products—but would need to receive PMTA approval prior to placing them on the market. Indeed, prior to shutting down its e-cigarette business, Altria itself was working on developing new and improved products, including an improved version of MarkTen Elite with nicotine salts. CCFF ¶¶ 1555-86.

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*FDA Permits Marketing of E-Cigarette Products, Marking First Authorization of Its Kind by the Agency*, (Oct. 12, 2012), available at <https://www.fda.gov/news-events/press-announcements/fda-permits-marketing-e-cigarette-products-marking-first-authorization-its-kind-agency>.

<sup>6</sup> *Id.*

<sup>7</sup> Alex Norcia, *Vape Advocates and Prohibitionists Temporarily Unite to Slam the FDA*, FILTER (Sept. 29, 2021), available at <https://filtermag.org/vape-advocates-prohibitionists-slam-fda/> (reporting that the “[s]mall- and medium-sized vape producers have essentially concluded that the industry will transform into an oligopoly of well-financed brands”).

**II. In Response to JUUL’s Rapid Growth, Altria Acquired and Rapidly Introduced MarkTen Elite, Which Had Growing Sales Until Its Discontinuation**

While Respondents argue that Altria was caught “flat-footed” by the rising demand for pod-based products, they ignore the fact that Altria quickly developed and executed a strategy to address this issue through the launch and expansion of MarkTen Elite. *See* Resps.’ Post-Trial Br. at 14-15. Furthermore, the growing threat from JUUL, which was driving almost all the growth in pod products (*see* Resps.’ Post-Trial Br. at 15), presented the same challenge to Altria’s competitors. JLI quickly attained a dominant market share at the expense of Altria, Reynolds, and ITG. In fact, because of JUUL’s exponential growth, [REDACTED] [REDACTED]. CCFF ¶¶ 573, 1132, 1097, 1108-09; CCRRFF ¶ 258. As late as 2017, { [REDACTED] [REDACTED] } CCFF ¶¶ 136-37, 489 1091. Even after the rise of JUUL, Altria was the third largest. CCFF ¶ 1738.

Respondents’ attempt to portray Elite’s rapid rollout as a weakness falls flat. *See* Resps.’ Post-Trial Br. at 18. Respondents point to Altria’s rapid rollout of the Elite pod-based product in response to JUUL, but this actually serves as a real-world example of Altria’s competitive advantages as the largest tobacco company in the U.S. As Respondents note, Altria acquired Elite from Chinese manufacturer Smoore on October 31, 2017 and was able to roll it out into stores only four months later, in February 2018. Resps.’ Post-Trial Br. at 17-18; CCFF ¶¶ 468-73. This rapid rollout of Elite demonstrates the advantages conferred by Altria’s massive resources and existing shelf space, distribution, sales, and marketing infrastructure. Altria was able to rapidly increase the number of stores carrying Elite, and would have met its goal of 37,000 stores by the end of 2018 Elite had not been pulled from the market. CCFF ¶ 1148.

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Respondents omit several key facts from their discussion of Elite pods leaking. *See* Resps.’ Post-Trial Br. at 18. First, all pod-based products—not just Altria’s—experience some issues with leaking. CCFE ¶ 1222. Second, only 6 percent of Elite pods leaked significantly; the other 35 percent that leaked did so minimally. CCFE ¶ 1220. Third, and most importantly, Nu Mark quickly developed a new gasket for the Elite pods that solved the leaking problem. CCFE ¶¶ 1206-21. The new gasket was designed and ready for production by mid-summer 2018. CCFE ¶¶ 1209-10. On August 10, 2018, Altria leadership approved the implementation of the new gasket. CCFE ¶¶ 1215, 1364. The Elite products with the new gasket were put into retail stores in September and October 2018, only weeks before Altria announced it was pulling Elite off the market. CCFE ¶¶ 1216-17, 1221. Notably, Respondents’ argument that Elite’s leaking may have damaged the brand is belied by the fact that JUUL too had problems with leaking—which JLI fixed. CCFE ¶¶ 1203-05.

Respondents state that sales data showed that Elite was not “catching on,” but the evidence shows that Elite’s sales continued to grow in volume from its introduction in February 2018 up until it was pulled off the market only eight months later. CCFE ¶¶ 1112-28. This volume growth was not attributable simply to expanding distribution; Elite’s sales measured on a within-store basis were growing over this period as well. CCFE ¶¶ 1122-23; CRRFF ¶ 842. Notably, the sales data shows that Elite was doing similarly to *myblu* and even to JUUL at the same time after those products’ respective launches. CCFE ¶¶ 1114, 1161. Nu Mark President Brian Quigley testified that the sales data indicated that Elite was doing okay in the market. CCFE ¶ 1114. On July 26, 2018 in a public statement to investors, Altria’s then-CEO Howard Willard stated that MarkTen Elite and MarkTen Bold were “getting traction with consumers.” CCFE ¶ 1113.

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Respondents claim that Elite was “not a threat” to JLI because it lacked nicotine salts.<sup>8</sup> Resps.’ Post-Trial Br. at 19-20. As Quigley explained, Elite 1.0 may not have been a threat to overtake JUUL as the market leader, but Elite was a growing product. CCRRFF ¶ 842. The evidence shows that JLI viewed Elite as “long-term” threat. CCFF ¶¶ 1516-22. Also, as discussed further below, Altria was working on an improved version of Elite, called Elite 2.0, which would contain nicotine salts. *See infra* Facts § III.

As Respondents acknowledge, Nu Mark competed aggressively by offering significant price promotions on Elite. Resps.’ Post-Trial Br. at 21. Despite Respondents’ suggestion otherwise, Elite experienced sales growth from its launch to its withdrawal. CCFF ¶¶ 1112-31; CCRRFF ¶ 431.

### **III. Altria’s Assertion that MarkTen Cigalikes and Elite Would Not Have Received PMTA Approval Is Unfounded**

Altria’s assertion that MarkTen and Elite would not have received PMTA approval is unfounded. *See* Resps.’ Post-Trial Br. at 23. First, Altria asserts that MarkTen and Elite could not win PMTA approval because they “could not convert adult smokers.” Resps.’ Post-Trial Br. at 22. But Altria’s *only* basis for this is that MarkTen and Elite were not the market leaders in closed-system e-cigarettes.<sup>9</sup> In fact, Altria *never conducted any studies* to specifically measure conversion for either MarkTen cigalikes or Elite, so there is no credible basis for the claim that these products could not convert smokers.<sup>10</sup> CCFF ¶¶ 1304-08. The only studies that Altria conducted that had any bearing on conversion for Elite (a “Home Use Test”) or MarkTen

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<sup>8</sup> Nicotine salts are produced by combining nicotine with an organic acid, which creates a salt. *See* Resps.’ Post-Trial Br. at 9-10. Nicotine salts allow more nicotine to be absorbed into the lungs. CCFF ¶ 135.

<sup>9</sup> Even though Nu Mark’s e-cigarettes were not the market leaders, Altria’s Craig Schwartz testified that Nu Mark (whose primary products were MarkTen cigalikes and Elite) generated about \$500 million in sales revenue in 2018. CCFF ¶¶ 130, 1099. Clearly, a considerable number of consumers were buying Nu Mark’s e-cigarettes.

<sup>10</sup> Conversion rates are a measure of the rate at which consumers that use an e-cigarette product stop smoking, whereas market share is a measure of sales percentage relative to competitors. CCFF ¶ 1309.



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cigalikes (an “Actual Use Study”) actually showed that Elite and MarkTen cigalikes *did* convert smokers. CCFF ¶¶ 1311-15, 1320-22. Moreover, the FDA has not set any sort of conversion threshold that e-cigarettes must meet in order to obtain approval.

Even assuming that Altria’s e-cigarettes had lower conversion rates than products with nicotine salts,<sup>11</sup> Altria ignores another key factor that the FDA considers in determining whether an e-cigarette is appropriate for the protection of public health: initiation risk, or the risk that non-tobacco users will begin using e-cigarettes. CCFF ¶¶ 1323-27. The evidence suggests that the risk of initiation is higher in e-cigarettes with nicotine salts. CCFF ¶ 1336. Consistent with this, JUUL, which contains nicotine salts, was seen as the primary driver of the youth vaping crisis, whereas Altria’s MarkTen Elite product, which did not contain nicotine salts, did not have a youth initiation problem. CCFF ¶¶ 1250-52, 1323-52; CCRRFF ¶¶ 919, 925. Indeed, there may be an important role on the continuum of risk for products without nicotine salts. {

[REDACTED]

} CCFF ¶¶ 1332-33. The lower initiation risk of e-cigarettes without nicotine salts may mean such products are *more likely* to win PMTA approval.

Respondents also point to certain “technical problems” with MarkTen cigalikes and Elite, claiming these problems would further impair these products ability to obtain FDA approval. Resps.’ Post-Trial Br. at 23. But Respondents fail to mention that Altria either had already developed or was working on solutions to these problems. Respondents note that the MarkTen cigalike battery would sometimes overheat, leading to a “dry puffing” issue that created formaldehyde. Resps.’ Post-Trial Br. at 23. As Respondents allude to, however, Altria had

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<sup>11</sup> As noted above, Altria did have an e-cigarette product on the market that contained nicotine salts, the MarkTen Bold cigalike. CCFF ¶ 1196.

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already designed a new battery to solve this problem. CCFE ¶¶ 1277-78; *see* Resps.’ Post-Trial Br. at 23. Respondents claim that the new battery could not be implemented for years because of the need to get PMTA approval beforehand, but the evidence shows otherwise. Altria’s Craig Schwartz testified that the FDA permitted product changes that addressed quality or safety issues, without requiring PMTA approval for those changes. CCRRFF ¶ 662. Indeed, [REDACTED] Altria) could and did make changes to their existing products. CCFE ¶¶ 1202-17. For example, as discussed above, Altria implemented a new gasket for Elite to address the leaking issue. CCFE ¶¶ 1206-21. Likewise, in 2018 JLI changed components in its JUUL device to address a leaking problem. CCFE ¶¶ 1203-05. Even if Altria could not change the battery in MarkTen cigalikes without a PMTA, Altria MarkTen PMTA was already 75 percent complete, and Altria planned to use a data-bridging strategy to include the new battery in its initial MarkTen PMTA. CCFE ¶¶ 1264, 1295-96.

Contrary to Respondents’ assertion that Elite 2.0 was “purely conceptual” (Resps.’ Post-Trial Br. at 24), Altria had concrete plans for what Elite 2.0 would be, and had already begun work on Elite 2.0. As of August 2018, internal Altria documents show that work on Elite 2.0 was progressing on schedule for the product design to be finalized in the second quarter of 2020, and for a PMTA to be submitted in January 2022. CCFE ¶¶ 1294, 1299. Elite 2.0 would have nicotine salts, reduced pod leakage (using the already-existing and commercialized new gasket), limited carbonyl formation and temperature limits using an already-identified electronics platform, new flavors, and nicotine strengths of 1.8 percent (the same as Elite 1.0) and 2.5 to 4 percent. CCFE ¶ 1289. Importantly, Altria was already testing e-liquid formulations that contained nicotine salts for Elite 2.0. CCFE ¶¶ 1284, 1287, 1290-92. In fact, Altria’s Richard Jupe testified that Altria’s product development team had already figured out the right mix of

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nicotine to salts for Elite 2.0 to achieve nicotine satisfaction. CCF ¶¶ 1284, 1287. Indeed, the results from an early October 2018 consumer study indicated that one prototype Elite 2.0 formula with nicotine salts had been received very positively. CCF ¶¶ 1290-92. Moreover, in addition to offering e-liquid formulations with nicotine salts, Nu Mark also planned to offer Elite 2.0 with formulations that did *not* contain nicotine salts, further confirming that Altria recognized it was important for consumers to have that option. CRRFF ¶ 616.

#### **IV. Altria’s May 2018 Restructuring Demonstrates Altria’s Commitment to E-Cigarettes**

Altria’s May 2018 restructuring into two divisions (one for legacy core tobacco products and one for innovative products) demonstrates the depth of Altria’s commitment to what it views as a critical part of its future—innovative tobacco products, namely e-cigarettes. *See* Resps.’ Post-Trial Br. at 25. Indeed, Willard testified that this restructuring was in furtherance of pursuing Altria’s “aspiration of being the U.S. authorized leader in noncombustible reduced-risk products.” Resps.’ Post-Trial Br. at 26 (citing Respondents’ Proposed Findings of Fact (“RPF”) ¶ 580). Respondents note that Willard appointed Brian Quigley as the new CEO of Nu Mark, asking him to “make an assessment in his judgment on whether or not there were opportunities to make adjustments that would deliver greater success.” Resps.’ Post-Trial Br. at 26 (citing RPF ¶ 586). Notably, this directive is a far cry from asking Quigley to determine whether Nu Mark should discontinue all of its products.

Nonetheless, barely six months after this major restructuring, Altria discontinued all of its e-cigarette products and shut down Nu Mark. Altria’s shut down of Nu Mark took place *less than two weeks* prior to it entering into the JLI Transaction. CCF ¶¶ 848, 861. Yet Respondents take the position that Altria’s decision to discontinue its e-cigarettes and shut down Nu Mark was completely unrelated to the impending JLI Transaction. This simply defies logic.

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In fact, when Willard appointed Quigley as head of Nu Mark and K.C. Crosthwaite as Chief Growth Officer, Willard told them that Altria’s Plan A for e-vapor products was a deal with JLI, which would be Crosthwaite’s focus, and that Plan B was Nu Mark without JLI. CCFF ¶ 1718. In other words, Willard *explicitly acknowledged* that without a JLI deal, Nu Mark would continue to compete on its own in the closed-system e-cigarette market. Respondents portray Quigley, who was previously the CEO of Altria’s smokeless tobacco business (U.S. Smokeless Tobacco), as a “fixer,” but Quigley was given a grand total of less than five months to turn around Nu Mark—as compared to over six years to revive U.S. Smokeless Tobacco. CCFF ¶¶ 1152-53.

**V. In Early Negotiations, JLI Made Clear to Altria that as Part of Any Deal, Altria Could No Longer Compete in E-Cigarettes**

Respondents provide an incomplete picture of deal negotiations prior to August 2018. Respondents assert that deal negotiations did not pick up in earnest until August 2018 (Resps.’ Post-Trial Br. at 25), but the record reflects numerous communications between Altria and JLI deal negotiators from April through July 2018. CCFF ¶¶ 646-79. Indeed, deal negotiations during that period progressed to the point where JLI sent the initial July 30, 2018 term sheet. CCFF ¶¶ 681-83. As JLI’s Nick Pritzker testified, Altria’s negotiators were expecting the July 30, 2018 term sheet. CCFF ¶ 682.

Respondents omit the key fact that, early on in negotiations, JLI made clear that if there was to be a deal, Altria would have to exit its existing e-cigarette business and agree not to compete. CCFF ¶¶ 868-69, 872, 881-88. Pritzker testified that Altria and JLI negotiators started discussing what Altria would do with its existing products around the time that deal negotiations started to center around Altria purchasing less than a 100 percent share in JLI—which was no later than April 2018. CCFF ¶ 881; *see also* CCFF ¶ 868 (discussing April 20, 2018 letter from

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JLI CEO Kevin Burns to Altria's Willard contemplating Altria acquiring a 50.1 percent interest in JLI). Valani testified that JLI's negotiators *told* Altria's negotiators that if JLI was going to do a transaction, Altria could not compete in e-cigarettes with its own products, but would instead have to participate in e-cigarettes exclusively through JLI. CCF ¶ 883. Valani further testified that Altria realized "probably pretty early on" in negotiations that JLI was not going to do a transaction unless Altria agreed that it would not market its own e-cigarette products. CCF ¶ 884.

The record also reflects that during the negotiations prior to the July 30, 2018 term sheet, Altria conveyed to JLI that there was uncertainty as to how Altria would exit its existing e-cigarette business, and that the source of that uncertainty was the PMI JRDTA. CCF ¶¶ 899, 928-31. As discussed below in Discussion Section I.A.1.i., Altria was concerned that under its JRDTA with PMI, it did not have the right to divest or contribute its e-cigarette products to a third party until July 2020, when the JRDTA expired. CCF ¶ 927. Therefore, one option for Altria's exit that Respondents discussed was that Altria could simply cease to operate its e-cigarette business (as opposed to divesting it or contributing it). CCF ¶¶ 968-82.

Indeed, the evidence indicates that JLI's deal adviser at Goldman Sachs, Peter Gross, came away with the impression that Altria would simply shut down its e-cigarette products. CCF ¶¶ 675, 971. Around July 24, 2018, Gross spoke to Altria CEO Willard. CCF ¶¶ 673, 969-70. On July 26, 2018, Gross joined a JLI board meeting by telephone and described his recent conversations with Altria. CCF ¶ 674. On July 27, 2018, Gross wrote to Pritzker that he was "under the impression that [Altria] would just shut down Mark 10." CCF ¶¶ 675, 971. On July 30, 2018, just three days after Gross's email to Pritzker, JLI sent an initial term sheet to

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Altria that required Altria to “cease to operate” its e-cigarette business in the event that divesting it or contributing it to JLI was “not reasonably practicable.” CCF ¶¶ 680-85; 894.

**VI. Respondents Mischaracterize Altria’s Summer 2018 Review of Its E-Cigarette Business, Which Led to a Strategic Commitment to Develop Improved Products, but Did Not Contemplate Removing Existing Products from the Market**

Respondents’ description of Altria’s summer of 2018 assessment of its e-cigarette business (Resps.’ Post-Trial Br. at 27-37) cherry-picks and mischaracterizes evidence, and ignores ordinary course documents and testimony. Respondents state that the summer of 2018 business review revealed that Altria’s e-cigarette business was in “dire shape.” Resps.’ Post-Trial Br. at 30. Contrary to this assertion, the evidence actually shows the following: (1) Altria had plans to improve its existing and future e-cigarette products, including by adding nicotine salts; (2) Altria was already working to develop pod products with nicotine salts; (3) sales of Altria’s existing e-cigarettes were growing; (4) Nu Mark recommended keeping Altria’s existing e-cigarettes on the market while working to develop improved products; and (5) Altria was making public statements about its e-cigarettes “getting traction with consumers.” *See infra* Facts §§ VI.A.-E.; CCF ¶ 1113.

**A. Altria Identified the Need for Products with Nicotine Salts, and Was Working on Developing Those Products**

Prior to its exit, Altria was consistently conducting R&D and working to improve its products, including developing e-liquid formulations with nicotine salts. Indeed, as noted above, Altria planned for Elite 2.0 to include formulas that had nicotine salts (as well as higher nicotine levels), and was already in the process of conducting consumer tests on e-liquids with various ratios of nicotine salts and various nicotine levels. *See supra* Facts § III. Respondents point to testimony that Altria still needed to determine the right ratio of acids in combination with the right ratio of nicotine. Resps.’ Post-Trial Br. at 29. However, as noted above, Altria’s Jupe

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testified that the product development team had already determined the optimal ratio for nicotine to acid (i.e. salt level). CCF ¶¶ 1284, 1287.

Respondents argue that Altria could not add nicotine salts to its products without first obtaining FDA approval, but the key point is that *more than three years* have now gone by since Altria decided that all of its future products would be offered with nicotine salts. *See Resps.* Post-Trial Br. at 28. That is three years in which Altria would have been working internally or with third parties to develop or acquire e-cigarette products that contain nicotine salts—in addition to working on other improvements. Given that Altria was already conducting consumer trials with various nicotine salt formulations in the fall of 2018 (CCF ¶¶ 1284, 1287, 1290-92), it is highly likely that had Altria not shut down its e-cigarette business and all e-cigarette R&D due to the Transaction, it would have already submitted a PMTA for pod-based e-cigarettes containing nicotine salts, or be well on its way to doing so. In fact, internal Altria documents from August and September 2018 show that Altria was on track to submit a PMTA for Elite 2.0 with nicotine salts by January 2022. CCF ¶¶ 1294, 1299; CCRRF ¶¶ 911, 970.

**B. The Evidence Indicates that Altria Saw a Role for Products that Did Not Contain Nicotine Salts**

Respondents fail to mention that, even though Elite and MarkTen cigalikes (other than MarkTen Bold) did not have nicotine salts, Nu Mark still believed those products had a role to play in the market because they appealed to customers looking for a different vaping experience than JUUL customers. CCF ¶¶ 1311-20; CCRRF ¶ 842. As Altria's own market studies showed, Nu Mark's e-cigarettes without nicotine salts appealed to customers looking for a smoother, "fuller" vaping experience, as opposed to the harsher cigarette-like experience provided by e-cigarettes with nicotine salts. CCF ¶¶ 1315-16; CCRRF ¶ 842. Indeed, Altria's own internal documents showed that some customers preferred Altria's e-cigarettes to JUUL.

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CCFF ¶¶ 1315-16; CCRRFF ¶ 842. Moreover, as discussed above, e-cigarettes without nicotine salts likely present less risk than e-cigarettes with nicotine salts. *See supra* Facts § III.

Respondents again claim that e-cigarettes without nicotine salts could not convert smokers (Resps.’ Post-Trial Br. at 28), but as discussed above in Facts Section III, Altria never conducted any studies measuring conversion. CCFF ¶¶ 1304-08. In fact, the only studies they conducted that revealed anything about conversion showed that Elite and MarkTen cigalikes *could* convert smokers. CCFF ¶¶ 1311-15, 1320-22.

As Respondents note, Quigley concluded that he needed to “right size” expectations for Nu Mark’s existing e-cigarette products. Resps.’ Post-Trial Br. at 29. As Quigley testified, that meant explaining to Altria leadership that while Nu Mark’s existing e-cigarettes would not beat JUUL, they did have a role in the market nonetheless. CCRRFF ¶ 842; *see also* CCFF ¶¶ 1315-19. To be clear, Quigley was not suggesting removing either MarkTen cigalikes or Elite from the market. CCRRFF ¶ 842. In fact, his position was that Altria should keep its existing products on the market. CCFF ¶¶ 1043, 1097, 1155; CCRRFF ¶ 842.

**C. Participants at the June 2018 Level Setting Meeting Identified Steps to Improve Nu Mark, and Did Not Suggest Discontinuing Existing Products**

The changes that Quigley suggested at the June 21-22, 2018 level setting meeting (Resps.’ Post-Trial Br. at 30-31) show that Altria planned to work hard to improve Nu Mark, not that Altria was going to throw in the towel and shut down the business. Respondents note that Quigley suggested “growth” or “speed” teams to focus on product development, but Quigley did not suggest that the creation of growth teams would mean discontinuing Nu Mark’s existing products. *See* Resps.’ Post-Trial Br. at 31. Indeed, Altria leadership had no plans to stop selling



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MarkTen or MarkTen Elite as of June 2018.<sup>12</sup> CCFE ¶ 1356. Also, notably, the challenges identified by Altria’s Jupe at the same meeting (Resps.’ Post-Trial Br. at 31) were all items that Nu Mark was working on—creating a version of Elite with a higher nicotine level, reformulating e-liquids, and planning for the future implementation of a new battery for MarkTen cigalikes (as noted above, the new battery had already been developed). *See supra* Facts § III.

**D. Respondents Mischaracterize and Omit Key Information Regarding Quigley’s August 2018 Meetings with Altria Leadership**

Respondents mischaracterize and omit key information regarding Quigley’s August 2018 meetings with Willard, Gifford, Garnick, and Crosthwaite. *See* Resps.’ Post-Trial Br. at 34-36. Respondents suggest that at the August 3 meeting,<sup>13</sup> Quigley presented only negative information about Elite and downplayed the significance of MarkTen cigalikes. But the presentation itself and Quigley’s own testimony show otherwise. In fact, Quigley advocated at that meeting for keeping both Elite and MarkTen cigalikes on the market, while working to develop improved products in order to achieve “leadership” by 2025. CCRRFF ¶ 842. Importantly, Quigley was *not* suggesting that Altria exit e-cigarettes and not compete at all until 2025.

Respondents fail to mention that the night before the August 3, 2018 meeting, Quigley called Willard and told him that “it’s important that we continue to invest in Elite.” CCRRFF ¶ 842. Quigley reported to his Nu Mark colleagues that on that call, Willard “agreed we should do that work [to build the Elite business].” CCFE ¶ 1360; CCRRFF ¶ 842. Respondents likewise fail

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<sup>12</sup> Respondents’ claim that Altria was “not actively negotiating” with JLI in June 2018 meeting is misleading. *See* Resps.’ Post-Trial Br. at 29-30. As discussed above in Facts Section V, Altria and JLI negotiators were in regular communication during that period. CCFE ¶¶ 646-67.

<sup>13</sup> Respondents state that this meeting occurred on August 2, 2018, which is the date that Quigley sent the presentation to Willard, Gifford, Garnick, and Crosthwaite. Resps.’ Post-Trial Br. at 34. But Quigley testified that the meeting was actually postponed and took place on August 3, 2018. CCRRFF ¶ 839.

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to mention that Quigley’s goal going into the August 3 meeting was to “prove to [Altria leadership] that our cig-a-like business was meaningful.” CCRFF ¶ 842.

The underlying August 3, 2018 presentation itself makes clear that Quigley’s recommendation was that Altria continue to compete in e-cigarettes, including keeping both Elite and MarkTen cigalikes on the market. The presentation describes Nu Mark’s plan for years 2018-2022 as: “Improve our ability to compete by acquiring products and preserving select existing products, while we build capabilities and the superior product portfolio for the future.” CCRFF ¶ 842. The presentation likewise stated that Nu Mark’s “Near Term Strategic Focus” should include “[p]reserv[ing] the right products from our current in-market portfolio to compete,” and “[e]hanc[ing] external development and acquisition strategy to address portfolio gaps.” CCRFF ¶ 842. The presentation showed that both MarkTen and Elite were generating positive margins, and that overall MarkTen brand sales had increased by 24 percent from the first half 2017 to the first half 2018. CCRFF ¶ 842. Quigley recommended that Nu Mark execute the gasket change on MarkTen Elite, execute the Elite 1.0 and 2.0 PMTA strategies with the gasket modification, and move forward on the MarkTen PMTA to achieve market authorization for MarkTen cigalikes with the new battery. CCRFF ¶ 842.

The August 3 presentation also makes clear that Nu Mark even saw Elite 1.0 as a potential long-term product, in addition to Elite 2.0. A slide entitled “Product Assessment Summary” lists MarkTen cigalikes, MarkTen Bold, and “Elite (Flavor Forward)” under the category of “What We Have to Compete Today.” CCRFF ¶ 842. As Quigley explained, based on Altria’s qualitative research, Elite 1.0 appealed to customers who wanted a flavorful vaping experience. CCRFF ¶ 842. Notably, “Elite (Flavor Forward)” is also listed under “Long-Term Potential Concepts,” and Quigley confirmed that Nu Mark did see the current Elite 1.0 as a

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potential long-term product appealing to certain customers. CCRRFF ¶ 842; *see also* CCF ¶¶ 1315-16 (discussing testimony of Altria’s Michele Baculis that Elite 1.0 and JUUL had “different opportunities and strengths,” and that Elite provided “a better inhale/exhale experience”). A product called “Elite (Immediate Satisfaction)” was also listed under “Long-Term Potential Concepts.” CCRRFF ¶ 842. Quigley explained that this was the new version of Elite with higher nicotine levels and salts, on which Altria had started development work. CCRRFF ¶ 842.

Respondents also mischaracterize the “bridge plan” that Quigley recommended to Altria leadership during the August 3, 2018 meeting. *See* Resps.’ Post-Trial Br. at 35. The bridge plan specifically referred to pursuing a PMTA for Elite 1.0 in order to keep a pod product on the market, while focusing on getting an improved Elite 2.0 product through the PMTA process:

So again, my focus was I had a business with volume losing money. My operational view was grow more volume with what I have and then get more products in the future to build on that. So I did not feel it made sense to walk away from the pod business. So without executing an Elite 1.0 PMTA, that would mean that we would run the risk of losing our pod business if we only submitted a PMTA for the 2.0 product. If we did not get action back from FDA approving that product prior to the PMTA date in 2022, we would be out of the market. So it was like a contingency plan, like, well, let’s be able to retain the product we have and really focus on getting the better product through the PMTA process. CCF ¶ 1155.

The entire purpose of the bridge plan was to ensure that Altria continued to have a pod product on the market. CCRRFF ¶ 850. The slide that Respondents point to for the “bridge plan” does not discuss the bridge plan at all. Resps.’ Post-Trial Br. at 35 (citing RPF ¶ 850 (citing PX1644 (Altria) at 004)); *see* CCRRFF ¶ 850.

Respondents point to trial testimony suggesting it made sense to Quigley that Gifford suggested the possibility of pulling Elite at the August 3 meeting. *See* Resps.’ Post-Trial Br. at 35-36. But this directly contradicts Quigley’s prior testimony in this case. Quigley testified at his

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investigational hearing that he did not understand why Altria was considering discontinuing its e-cigarette products:<sup>14</sup>

Q: We've already looked at some documents that show that both MarkTen cigalikes and MarkTen Elite, which had just been launched, were growing; is that right?

A: Correct.

Q: Did you understand why Howard [Willard], Billy [Gifford], Murray [Garnick], and K.C. [Crosthwaite] might want to just shut down the business?

A: I could not understand why.

Q: Did you get some sense that's what they wanted to do?

A: Frankly, I did not understand what was going on at the place at that point in time. [] I didn't know what was happening. All I knew was for some reason whatever I said seemed like the wrong answer." CCRRFF ¶ 842.

Quigley specifically testified that he was surprised when Gifford suggested the possibility of pulling Elite at the August 3 meeting, given that Altria had just launched Elite.<sup>15</sup> CCF ¶¶ 1151, 1511. As Respondents acknowledge, one outcome of this August 3 meeting was that Quigley was to continue working on Elite. Resps.' Post-Trial Br. at 36. An additional outcome was that Quigley convinced Willard, Gifford, Crosthwaite, and Garnick that there was "more to the MarkTen cig-a-like business than [they] thought" and "that they wanted to talk more about it and hear more about it." CCRRFF ¶ 842. Quigley also testified that Altria leadership agreed to go forward with the MarkTen cigalike PMTA at the August 3, 2018 meeting. CCRRFF ¶ 842.

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<sup>14</sup> Quigley's investigational hearing testimony is more reliable than his deposition or trial testimony. Quigley's investigational hearing took place in December 2019, closer in time to the events in question than his deposition (February 2021) or trial (June 2021) testimony. In July 2020, Quigley became the Chief Operating Officer of medical device company Respira. CCF ¶ 2037. In his role at Respira, Quigley has reached out to Altria to inquire about Altria's interest in doing business with Respira. CCRRFF ¶ 875. Quigley also serves as a member of the Board of Directors of Lexaria Nicotine, one of the companies associated with Lexaria Biosciences, of which Altria is a partial owner. CCRRFF ¶ 875; CCF ¶¶ 2037-39.

<sup>15</sup> Quigley's August 3, 2018 meeting with Willard, Gifford, Garnick, and Crosthwaite took place two days after Willard and Gifford met with JLI's Pritzker, Valani, and Burns at the Park Hyatt in Washington, D.C. CCF ¶¶ 689-91.

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Quigley met with Willard, Gifford, Crosthwaite, and Garnick again on August 10, 2018 in order to propose filing a PMTA for MarkTen Elite and to clear up the misperception that because Elite was a pod product, it should be able to beat JUUL. CRRFF ¶ 842. Quigley believed Elite “could grow, but it was not going to grow a thousand percent” like JUUL. CRRFF ¶ 842. At the August 10 meeting, Quigley presented data showing that since May 2018, same-store sales of Elite were growing, and that MarkTen Elite’s “Avg. Weekly Volume per Store Selling” was in a similar range as JUUL when it first launched. CRRFF ¶ 842. Quigley thought the goal for Elite should be “to grow it profitably and to be a platform to help [Altria] learn about how to create better products with higher nicotine in the future.” CRRFF ¶ 842. Quigley testified that he thought “it was too early to tell” whether Elite was accomplishing those goals and that “having Elite in the market would give us more insight to come up with the answer.” CRRFF ¶ 842. The outcome of that meeting was that Nu Mark would move forward with implementing the new gasket for Elite in order to fix the issue with leaking pods. CFF ¶ 1364. At the August 10 meeting, the same group also decided to continue moving forward with the PMTA for the MarkTen cigalike products. CFF ¶ 1365.

**E. Respondents Incorrectly Contend that the August 2018 Board Presentation Was Not Influenced by the Ongoing JLI Negotiations**

Respondents’ suggestion that the August 2018 presentation was not influenced by the ongoing JLI negotiations is contrary to the weight of the evidence. By mid-July 2018, JLI had already conveyed to Altria’s negotiators its requirement that if there was going to be a deal, Altria would have to exit e-cigarettes and agree to a non-compete. CFF ¶¶ 868-69, 872, 881-88; *see supra* Facts § V. Respondents also fail to note that Altria’s Crosthwaite, Willard, and Garnick, all of whom were involved in negotiations and who would have been aware of JLI’s demand, supervised the preparation of the August 2018 Altria board presentation. CRRFF ¶

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732; CCF 1367-71. Altria executives Quigley and Joe Murillo, who were not involved with JLI negotiations, both expressed concerns that the presentation showed bias against Nu Mark's products. CCF 732; CCF 1367-71. After reviewing a draft of the presentation, Quigley wrote to Crosthwaite on August 14, 2018 that the presentation was "clearly only the bad news version of the story" and that it contained some points that were "flat out incorrect." CCF 732; CCF 1367. For example, Quigley told Crosthwaite that, contrary to what the presentation indicated, the MarkTen cigalike brand was "growing in volume" and was the "second fastest growing brand in terms of volume behind juul." CCF 732; CCF 1368.

Respondents point to a slide in the August 2018 board presentation that purports to show problems with Elite. Resps.' Post-Trial Br. at 34 (citing RPF 732). But Quigley testified that this slide was an example of the presentation telling "only the bad news version of the story," because it did not reflect that the new gasket would fix the leaking issue. CCF 732.<sup>16</sup> Nor did it reflect that Nu Mark's planned Elite 2.0 would contain acids (i.e., salts) and a higher nicotine level. CCF 1289. In fact, Murillo commented to Garnick that the "x" for conversion potential on the Elite slide "was an opinion based on current performance and comparison to Juul. It would be fair to have an x with an ?, especially if this encompasses possible Elite 2.0." CCF 732; CCF 1308, 1371. Despite the concerns expressed by Quigley and Murillo, the substance of the final August 2018 board presentation was unchanged, as Respondents note. Resps.' Post-Trial Br. at 36. ). Garnick presented the August 2018 presentation [REDACTED] [REDACTED] See Resps.' Post-Trial Br. at 36. Even though he was [REDACTED], Quigley was not permitted to participate in the board meeting in which Nu Mark was discussed, which was unusual and inconsistent with past

<sup>16</sup> The evidence shows that the new gasket for Elite would also have reduced the formaldehyde formation referred to on the same slide. CCF 1228-31.

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practices. CCFE ¶ 1372. {

} CCFE ¶ 741.

**VII. In Late July and August 2018, JLI Made Clear that Altria Must Exit E-Cigarettes and Agree Not to Compete, and Altria Agreed that It Would Do So**

Respondents’ purported facts regarding deal negotiations in July and August 2018 are misleading. *See Resps.’ Post-Trial Br. at 37-43.* Despite Respondents’ contentions otherwise, the evidence plainly demonstrates that during this period, JLI clearly conveyed that Altria must exit e-cigarettes and agree not to compete as part of any deal. CCFE ¶¶ 868-924. The evidence likewise shows that Altria agreed to JLI’s demand. CCFE ¶¶ 945-86.

Respondents’ claim that the “cease to operate” language was intended solely to address what might happen during the antitrust clearance process is contrary to the weight of the evidence. *Resps.’ Post-Trial Br. at 37-38.* The evidence clearly shows that the purpose of this term was to require Altria to dispose of its existing e-cigarette business. Indeed, JLI’s Valani testified that the divest/contribute/cease to operate term “reflect[ed] the intent” of Altria “not being directly competitive in the electronic cigarette space.” CCFE ¶ 897. Valani explained “there was a question as to how [Altria] would fulfill such obligation to us,” and that the divest/contribute/cease to operate term was “meant to give them some ability to handle that.” CCFE ¶ 899. Referring to the same provision, Pritzker testified that the “goal was for [Altria] not to be competing against Juul if they had a significant interest in Juul, and I didn’t care how that would come about.” CCFE ¶ 898.

Consistent with the divest/contribute/cease to operate term, JLI’s July 30 term sheet also contained a non-compete provision. CCFE ¶ 911. The “carve-out” that Respondents point to for MarkTen and MarkTen Elite (*Resps.’ Post-Trial Br. at 39*) is not really a carve-out at all—it still requires Altria to dispose of these products by, at most, nine months post-signing (by divesting

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them or contributing them to JLI). CCFF ¶¶ 894-95. As Respondents acknowledge, less than a week later, on August 4, 2018, JLI sent a revised term sheet that added the word “shutdown” to the non-compete provision, so that the provision required Altria to “refrain from competing anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their divestiture, **shutdown**, or contribution described above).” CCFF ¶¶ 694, 913 (emphasis added); *see* Resps.’ Post-Trial Br. at 40 n.271.

Respondents’ assertion that JLI was not concerned about competition from Altria’s existing products is also contrary to the weight of the evidence and relies solely on self-serving testimony. Resps.’ Post-Trial Br. at 39. The evidence is overwhelming that JLI told Altria in no uncertain terms that it was “not acceptable” for Altria retain the ability to compete with *existing* or future products. CCFF ¶¶ 915-24; CCRRFF ¶ 788. As Valani testified, JLI wanted to avoid the risk that Altria would have conflicting incentives if it continued to sell its own e-cigarettes concurrent with having an ownership interest in JLI. CCFF ¶¶ 870-72; CCRRFF ¶ 788; *see also* CCFF ¶ 879. Pritzker likewise testified that if Altria was going to have a minority interest in JLI, Altria would have access to proprietary JLI information and it would not be “viable for [Altria] to be spending their energies” on other e-cigarettes. CCRRFF ¶ 791. Consistent with this, Pritzker testified that he would have resisted any agreement that would have allowed Altria to market its MarkTen and MarkTen Elite e-cigarettes indefinitely. CCFF ¶ 877; CCRRFF ¶ 791. Other evidence in the record demonstrates that JLI viewed Altria as a long-term *competitive* threat in the closed-system e-cigarette market. *E.g.*, CCFF ¶¶ 503-06, 1129; CCRRFF ¶¶ 1185, 1193.

Respondents state that the July 30 term sheet was drafted by outside counsel, but fail to mention that it was drafted at the direction of—and based on input from—JLI’s negotiators. *See*



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Resps.’ Post-Trial Br. at 40. Indeed, as JLI’s own board meeting minutes make clear, the July 30 term sheet was drafted based on conversations that JLI’s Valani and Pritzker had with Altria’s negotiators, and it reflected input and edits from Pritzker (based on his conversations with Altria), JLI’s board (which included both Pritzker and Valani), and JLI management. CCFF ¶¶ 678-79. In addition, several days prior to the Pritzker sending the July 30 term sheet, JLI adviser Gross had joined a JLI board meeting by telephone and described his recent conversations with Altria. CCFF ¶ 674. JLI’s board, including Pritzker and Valani, reviewed the July 30 term sheet and authorized Pritzker to send it to Altria. CCFF ¶ 679. Moreover, to the extent Respondents suggest that outside counsel’s role in drafting term sheets somehow insulates Respondents from antitrust liability, that suggestion is incorrect. *See infra* Discussion § I.A.1.iv.

Respondents assert that the August 1, 2018 meeting between Altria negotiators Willard and Gifford and JLI negotiators Valani, Pritzker, and Burns in Washington, D.C. focused on terms in the July 30 term sheet relating to ownership and control. Resps.’ Post-Trial Br. at 39. But Respondents fail to mention that by this point in negotiations, JLI had already demanded and Altria already understood that any deal required Altria to exit its existing e-cigarette business and not compete in the future. CCFF ¶¶ 866-994. Therefore, it would not be surprising if the negotiators focused on other topics at the August 1, 2018 meeting.

Respondents misleadingly suggest that Willard’s talking points for an August 6, 2018 call with JLI show that “Altria recognized that, to secure antitrust clearance, it would ‘potentially’ need to ‘exit [its] own vapor business’ by divesting or contributing the business.” Resps.’ Post-Trial Br. at 40 (citing RPF ¶ 1205 (internal quotations from PX1389)). But these talking points say nothing connecting Altria’s exit to the antitrust review process, nor do they reference divesting or contributing the business as Altria’s only available options for exiting. CCRRFF ¶

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1205. In fact, another version of the talking points makes clear that, in terms of ultimately disposing of its existing e-cigarette business, Altria was expressing its willingness to take “concessionary measures” for JLI, not the FTC. Specifically, the draft talking points noted that “Altria has come a long way to accommodate you [JLI] in this process, including . . . [Demonstrating flexibility with our existing vapor business, if necessary, in order to form the partnership.]” CCRRFF ¶ 1205 (discussing PX1390 (Altria) at 003-04 (brackets in original)); CCFE ¶¶ 977-80.

As Respondents observe, Altria sent JLI a revised term sheet on August 9, 2018. In the August 9 term sheet, Altria struck the divest/contribute/cease to operate term in its entirety. Resps.’ Post-Trial Br. at 40; CCFE ¶¶ 706, 915. Altria added language to the August 9 term sheet that upon HSR clearance, it would grant JLI a license to the IP for the MarkTen products (to the extent Altria had control over the IP rights). Resps.’ Post-Trial Br. at 40; CCRRFF ¶ 809. Altria edited the non-compete provision to provide that Altria would refrain from competing in e-cigarettes other than with its “existing and under development products prior to the [ ] IP license.” Resps.’ Post-Trial Br. at 41; CCFE ¶ 707. In other words, Altria was reserving the right to compete through its existing and under development products up until HSR clearance, at which point the non-compete would also apply to those products, given the start of the IP license upon antitrust clearance. And if antitrust clearance was not granted, then Altria was reserving for itself the right to compete in perpetuity with its existing and under development e-cigarettes.

In response to Altria’s August 9 term sheet, JLI provided an August 15, 2018 issues list that made crystal clear that it was “not acceptable” for Altria to retain any right to compete through its *existing* or future products. CCFE ¶¶ 915-22. Respondents misleadingly assert that the language in the issues list shows that JLI was only concerned about Altria’s products under

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development and future products. Resps.’ Post-Trial Br. at 41. But the language in the list itself plainly shows that JLI’s non-compete demand also applied to Altria’s *existing* e-cigarette products, with the second bullet (of nine total) laying out this requirement:

We understood that you (and your successors and current and future affiliates) would not compete against us in vapor in the US and that JUUL would be the vehicle for all vapor assets. You have retained the right under certain circumstances to compete not only with existing Mark Ten products, but also with products under development and future products. The commitment to divest Mark Ten has been stricken. This is not acceptable to us. CCFF ¶ 918.

This language makes abundantly clear that JLI was requiring Altria to dispose of its *existing* MarkTen e-cigarette products (in addition to products under development), and indeed Altria understood it that way. Willard and Gifford understood this bullet point to be JLI’s response to Altria striking out the divest/contribute/cease to operate commitment in its August 9, 2018 term sheet, and understood the statement “[t]his is not acceptable to us” to refer to Altria’s retention of any rights to compete with its *existing* or future e-cigarette products. CCFF ¶¶ 921-22. The message was clear: Altria must exit completely; it could not keep the rights to any of its existing MarkTen e-cigarette products. Respondents cite to Valani’s self-serving trial testimony that JLI’s non-compete demand was contingent upon “complete and total regulatory sanction” (Resps.’ Post-Trial Br. at 41-42), but for the reasons described below in Discussion Section I.A.2, that testimony should be given little weight.

Respondents’ claim that there is “no evidence” that the non-compete was discussed at the August 18, 2018 meeting in San Francisco is plainly wrong. Resps.’ Post-Trial B. at 42. In fact, Altria’s outline for the August 18 meeting (which Respondents do not mention in their brief) reflects that one of the first things Willard planned to tell JLI was that Altria struck the divest/contribute/cease to operate language due to antitrust concerns, but that it was nonetheless willing to commit to the substance of what JLI wanted, which was for Altria exit the market and

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agree to a non-compete. CCFE ¶¶ 730-31, 956-57. Valani testified that it was “likely” that the non-compete term was discussed at the August 18, 2018 meeting. CCFE ¶ 954.

Respondents point to the fact that the August 19, 2018 term sheet did not include the “cease to operate” language. Resps.’ Post-Trial Br. at 42. Given that Altria told JLI that inclusion of the “cease to operate” language might lead to antitrust liability (CCFE ¶¶ 730-31, 956), this is not surprising. What matters is that Altria had agreed to the substance of JLI’s demand—that it commit to exit its own e-cigarette business and agree to a non-compete. Despite Respondents’ suggestion otherwise, the August 19 term sheet is fully consistent with an agreement for Altria to exit, given that it requires Altria to dispose of its existing e-cigarette assets (by divestiture or contribution) and enter a non-compete. CCFE ¶¶ 732-34, 957. In fact, every single term sheet from August 19, 2018 forward required Altria to exit e-cigarettes and enter a non-compete. CCFE ¶¶ 733, 798, 826. Likewise, the August 22 issues list that Respondents point to (Resps.’ Post-Trial Br. at 43) further confirms that Altria would exit its own e-cigarette business. CCFE ¶¶ 958-60; CCRRFF ¶ 836.

As discussed below, although the cease to operate language was removed from the August 19 term sheet, the next term sheet, which was sent by Altria to JLI on October 15, 2018, contained a reference to Altria “otherwise exiting” the market. CCFE ¶¶ 800, 983; *see infra* Discussion § I.A.1.ii. Only 10 days later, on October 25, 2018, Altria took its first major step towards doing just that by announcing that it was pulling its pod-based products MarkTen Elite and Apex by MarkTen, as well as flavored MarkTen cigalikes. CCFE ¶¶ 986-88; *see infra* Discussion § I.A.1.ii.

While other terms remained the subject of negotiation, there was never further substantive dispute on this issue. It was settled and agreed to that Altria would exit the closed-system e-cigarette market if it wanted a deal with JLI.

#### **VIII. The September 2018 Break in Negotiations Is Irrelevant and Was Short-Lived**

While the Respondents were still negotiating some terms, after July 2018, Altria had already agreed to JLI's demand that it exit the e-cigarette business and enter a non-compete as part of any transaction. Therefore, Respondents' emphasis on the September 2018 "break" is irrelevant and misleading. As Respondents note, negotiations stalled because of issues unrelated to the exit/non-compete issue. Resps.' Post-Trial Br. at 43-44. Indeed, *Respondents themselves* acknowledge that the exit/non-compete issue had already been settled prior to the purported break in negotiations. *See* Resps.' Post-Trial Br. at 43.

Respondents overstate the length of the break in negotiations, suggesting that no negotiations took place between August 27, 2018 and October 5, 2018. Resps.' Post-Trial Br. at 44. To the contrary, the evidence shows that Altria and JLI negotiators continued to discuss a potential transaction well into September 2018. CCFE ¶¶ 751-68. For example, on September 5, 2018, Altria board member Devitre emailed Garnick: "I spoke to my friend [JLI's Valani]. I have conveyed his views to Howard [Willard]. They are ready to move to anti-trust lawyers speaking to each other as soon as possible." CCFE ¶ 754. On September 11, 2018, Devitre and Valani spoke by phone for over half an hour, with Valani telling Devitre that JLI was focused on a tender offer and not interested in further discussions. CCFE ¶ 765.

Importantly, *even after* the September 11 call with JLI, Altria continued to discuss internally a transaction with JLI. CCFE ¶¶ 766-72. In fact, it was on the next day, September 12, 2018, that the FDA issued letters to the five leading e-cigarette manufacturers (JLI, Altria, Reynolds, ITG, and JTI) requesting that each company submit to the FDA within 60 days its

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plans to address the issue of youth use of e-cigarette products. CCF ¶ 766. Altria immediately concluded that the FDA letter would have “a profound impact on the Tree discussions,” believing that JLI would have a greater incentive to do a transaction with Altria in light of the letter. CCF ¶¶ 767, 770. Indeed, by September 18, 2018, Altria’s deal advisers as Perella Weinberg Partners were preparing analysis of the JLI transaction at the direction of Altria. CCF ¶ 769.

Although Respondents suggest that negotiations restarted with Altria’s October 5, 2018 letter, the evidence shows that negotiations actually resumed on October 1, 2018. CCF ¶ 774. Indeed, several discussions occurred between Altria and JLI negotiators in the first few days of October 2018, prior to Altria sending the October 5 letter. CCF ¶¶ 774-76. Therefore, the “break” in negotiations that Respondents point to lasted only about two and a half weeks (from September 11 to October 1), and during that entire time Altria planned to continue pursuing the Transaction.<sup>17</sup> CCF ¶¶ 751-72.

**IX. In Discussing the Growth Teams, Respondents Acknowledge that Altria Would Still Be Competing in the U.S. Closed-System E-Cigarette Market But For the JLI Transaction**

As noted above, while Altria’s leadership preferred “Plan A,” a deal with JLI, Altria leadership was fully committed to Altria competing in the closed-system e-cigarette market on its own in the event the JLI deal did not happen (“Plan B”). CCF ¶¶ 1718-19. Altria’s creation of the Growth Teams demonstrates that commitment to competing in closed-system e-cigarettes. Indeed, by stating that Altria would not have created the Growth Teams had it been certain that the JLI Transaction would happen, *Respondents admit that Altria would still be competing in the*

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<sup>17</sup> Altria points to trial testimony from Gifford in support of the proposition that Altria believed the deal was off during September 2018 (Resps.’ Post-Trial Br. at 44), but for the reasons set forth below in Discussion Section I.A.2, that self-serving testimony should be given little weight.

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*closed-system e-cigarette market if not for JLI Transaction.* Resps.’ Post-Trial Br. at 46.

Consistent with this, Altria disbanded its e-cigarette growth teams upon closing the Transaction—as the non-compete required it to do. CCFF ¶¶ 1006-10. Altria’s Garnick testified that if the JLI transaction had not occurred, Altria would have continued to fund the Growth Teams. CCFF ¶ 1010. Indeed, several weeks after the creation of the Growth Teams, Altria’s Garnick summarized in an internal email what would happen to all of Altria’s e-cigarette work once the JLI deal was signed: “no evapor product fits with Tree.” CCRRFF ¶ 935.

As Respondents observe, the purpose of the Growth Teams was to develop innovative, “leapfrog” e-cigarette products. Resps.’ Post-Trial Br. at 45. Altria planned to make a substantial financial commitment to the Growth Teams, informing the teams that budget would not be a constraint, and that they could retain any third parties or hire any new talent that they needed to develop new e-cigarette products. CCFF ¶¶ 1578-79; *see* CCFF ¶ 437. Garnick suggested Altria would have committed to \$100 million for growth teams. CCFF ¶ 438. Contrary to what Respondents claim, however, the Growth Teams were not “starting from scratch.” Resps.’ Post-Trial Br. at 45. The Growth Teams were empowered to continue to innovate on existing products, develop new products, or acquire new products. CCFF ¶¶ 1541, 1578, 1581; CCRRFF ¶ 904. In addition, Altria’s Growth Teams had existing R&D and third-party collaborations (including the JRDTA with PMI) to draw from. CCRRFF ¶ 902. The Growth Teams also had access to Altria’s \$350 million Center for Research and Technology, which housed over 400 scientists, physicians, product developers, and engineers working on innovative products. CCFF ¶ 452; CCRRFF ¶ 907.

Respondents inaccurately state that the regulatory team and Quigley were in agreement that work on all current and future versions of Elite should stop. *See* Resps.’ Post-Trial Br. at 46;

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CCRRFF ¶¶ 911-12. In fact, Quigley recommended to Garnick that Altria complete the Elite high nicotine formula development by the end of the year and conduct the Elite Home Use Test. CCRRFF ¶ 912. Furthermore, Garnick told Willard that development work on MarkTen Elite should be put “to bed in a way that can be easily revived later if the [growth] team wants to pursue it.” CCRRFF ¶ 913.

Importantly, the Altria documents that Respondents cite discuss only what will happen to ongoing R&D work on Elite; they do not suggest that the creation of the Growth Teams meant that Altria would pull the *existing* MarkTen Elite product off the market. *See* Resps.’ Post-Trial Br. at 46; CCRRFF ¶¶ 911-12; *see also* CCRRFF ¶ 904 (citing to testimony from Altria’s Jupe that Growth Teams did not have the authority to discontinue existing products). Indeed, as described above, Quigley believed it was important for Altria keep a pod product on the market.<sup>18</sup> *See* CCF ¶ 1155; CCRRFF ¶ 842. When Altria leadership announced the creation of the Growth Teams on October 5, 2018, they made no mention of discontinuing any of Nu Mark’s existing e-cigarette products.<sup>19</sup> CCRRFF ¶ 962 (RX0842 (Altria) (Growth Strategy Update: Innovative Products)). To the contrary, the announcement explicitly stated that going forward Nu Mark’s focus would be on the “current products in the marketplace.” CCRRFF ¶ 962 (RX0842 (Altria) at 003 (Growth Strategy Update: Innovative Products)); *see* Resps.’ Post-Trial Br. at 50 (observing that Altria’s announcement stated that Nu Mark’s focus would be narrowed to “the current products in the marketplace” while the Growth Teams would take responsibility for innovation work).

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<sup>18</sup> Respondents suggest that the Growth Teams reflected the culmination of Quigley’s summer 2018 review of Nu Mark’s business (*see* Resps.’ Post-Trial Br. at 45), but fail to note that Quigley advocated for the continued investment in both Elite and the MarkTen cigalikes as well. CCF ¶¶ 1036, 1043, 1097, 1104, 1155; CCRRFF ¶ 904.

<sup>19</sup> As discussed below in Facts Section XI, on the very same day that Willard announced the formation of the Growth Teams, he also sent a letter to JLI proposing revised deal terms. CCF ¶¶ 779-82.



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Respondents point to testimony from Altria’s Willard stating that it would have been “five or six years” before products designed by the Growth Teams could go on the market. Resps.’ Post-Trial Br. at 45. This assertion ignores evidence that Altria projected its growth teams would have a new product ready by 2020, and that Altria internally acknowledged the possibility that a new platform or acquired products could be in place in 2019. CCF ¶ 1581. This assertion also ignores that the Growth Teams could have acquired products—indeed, Altria’s rapid rollout of Elite demonstrated that Altria could quickly get a newly acquired product into the marketplace. This assertion also disregards that [REDACTED] [REDACTED] CCF ¶¶ 1638-716.

Respondents also fail to note that *almost three years have now gone by* since Altria disbanded the Growth Teams due to the JLI Transaction. *Even if* it would be five or six years before the Growth Teams introduced a new e-cigarette onto the market, Altria is now *almost three years* (and counting) behind where it otherwise would have been in developing or otherwise introducing a “leapfrog” e-cigarette product. Once again, Respondents ignore the critical importance of innovation competition in this market in favor of a myopic snapshot of the competition that took place between Altria and JLI’s on-market e-cigarettes. As discussed more below, this harm, by itself, outweighs any of Respondents’ claimed benefits or efficiencies stemming from this Transaction.

**X. Altria’s Claim that It Pulled Elite Off the Market in Response to the FDA’s September 12, 2018 Letter Is Implausible and Inconsistent with the Evidence**

Respondents’ assertion that Altria removed its MarkTen Elite (and Apex by MarkTen) pod-based products from the market in response to the FDA’s September 2018 letter about youth-vaping is implausible and entirely inconsistent with Altria’s subsequent investment in JLI,

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whose pod-based market-leading e-cigarette, JUUL, was widely recognized as the driver of the youth-vaping crisis.

On September 12, 2018, the FDA issued letters to the five top e-cigarette manufacturers (Altria, JLI, Reynolds, ITG, and JTI), requesting that each company submit to the FDA within 60 days its plan to address the issue of youth e-cigarette use. CCFF ¶ 766. The letter included a list of possible actions the manufacturers could consider, including removing flavored e-cigarettes until those products were reviewed by the FDA. CCRRFF ¶ 922. Notably, the letter did *not* suggest that the manufacturers consider removing all pod-based products from the market. Indeed, of the five leading competitors who received the September 12 FDA letter, Altria was the only one that removed its pod-based e-cigarettes. *See* CCFF ¶¶ 155, 165, 168, 178, 185.

Altria's purported rationale for pulling its products is belied by the fact that Altria knew that its products did not have youth initiation issues. CCRRFF ¶¶ 919, 925; CCFF ¶¶ 1323-52. In fact, Altria viewed *JUUL* as the driver of the youth vaping epidemic. CCFF ¶¶ 1249-52. Internal Altria draft talking points circulated on October 15, 2018—just *ten days* before Altria pulled its pod-based products due to purported concern about youth vaping—state that “*JUUL* has created a youth usage epidemic.” CCFF ¶ 1252 (emphasis added).

In its October 25, 2018 letter to the FDA, Altria stated a belief that “pod-based products significantly contribute to the rise in youth use of e-vapor products,” and explained that even though Altria did not believe that it had a current issue with youth usage of its pod-based products, it “did not want to risk contributing to the issue.” CCFF ¶ 987. Therefore, Altria told the FDA that it was pulling its pod-based products MarkTen Elite and Apex by MarkTen until receiving PMTA approval or “the youth issue is otherwise addressed.” CCFF ¶ 987. But *on the very same day* that Altria announced it was pulling its pod-based products due purported concern

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about youth vaping, Altria’s Willard and Gifford assured JLI’s Pritzker, Valani, and Burns that Altria still wanted to move forward with acquiring an interest in JLI. CCFE ¶ 814. On October 29, 2018, only four days after Altria announced it was pulling its pod-based products, Altria and JLI reached agreement on a term sheet. CCFE ¶¶ 815-30.

Altria investing in the pod-based, market-leading JUUL—a product with known youth-usage issues—is *entirely inconsistent* with any assertion that Altria removed its own pod-based products due concern about youth vaping and wanting to please the FDA. Unsurprisingly, Altria investing in JLI immediately after it told the FDA that it was pulling its own pod-based products in an effort to combat youth usage did not, in fact, please the FDA. Indeed, then FDA Commissioner Scott Gottlieb sent a letter to Altria stating that Altria’s “newly announced plans with JUUL contradict the commitments [Altria] made to the FDA.” CCFE ¶¶ 1240-42.

**XI. Altria Did Not Pull Elite from the Market Until Negotiations with JLI Were Far Advanced**

As described below, Altria did not pull its pod-based products off the market until *after* negotiations with JLI were in an advanced stage, which further belies Altria’s assertion that pulling those products was in response to the FDA letter and had nothing to do with the JLI Transaction. *See Resps.’ Post-Trial Br.* at 46-49. Indeed, Altria announced it was pulling its pod-based products (Elite and Apex) off the market on October 25, 2018, *only four days* before agreeing to deal terms with JLI. CCFE ¶¶ 812, 820-25, 987. Most importantly, well *prior* to Altria pulling these products off the market, Altria and JLI had already agreed that Altria had to exit the closed-system e-cigarettes market as part of any deal. CCFE ¶¶ 880-986.

Altria asserts that the decision to pull Elite was made at a meeting [REDACTED] in late September 2018. *See Resps.’ Post-Trial Br.* at 48. But what Respondents do not mention is that at that meeting, a discussion of continuing to pursue the JLI Transaction preceded

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any discussion of removing Elite. CRRFF ¶ 943. Indeed, [REDACTED]

[REDACTED]

[REDACTED] CCF ¶¶ 1244-47. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } CCF ¶ 1245. [REDACTED]

[REDACTED]

[REDACTED] } CCF ¶ 1246.

Altria did not make any internal or external announcement or commitment regarding pulling pods until it was close to agreeing to overall deal terms with JLI. CCF ¶¶ 812, 820-25, 987. As noted above, one of the long-settled deal terms was that Altria would only compete in closed-system e-cigarettes through JLI. CCF ¶¶ 880-986.

In the first days of October 2018, Altria’s Willard verbally proposed revised deal terms to JLI’s Pritzker to see if he thought it would be constructive for Altria to send a letter setting out those terms. CCF ¶ 775. Pritzker confirmed that the terms were sufficiently responsive to JLI’s concerns that Willard should send him a letter memorializing those terms. CCF ¶ 775.

Respondents incorrectly assert that on October 4, 2018, [REDACTED]

[REDACTED] } Resps.’ Post-Trial

Br. at 49. To the contrary, the evidence demonstrates that [REDACTED]

[REDACTED]

[REDACTED]



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October 25 letter to the FDA, Altria's Garnick wrote to Murillo summarizing the ultimate outcome of the pending JLI deal on Altria's e-cigarette business: "no evapor product fits with Tree." CCRRFF ¶ 935.

It was only at this point, on October 25, 2018, that Altria announced it was pulling its pod-based e-cigarettes from the market.<sup>21</sup> CCFF ¶¶ 812, 987. In its October 25, 2018 letter to the FDA, the *only* reason that Altria gave for this action was its purported concern that "pod-based products significantly contribute to the rise in youth use of e-vapor products." CCFF ¶¶ 987, 1239. Contrary to what Respondents suggest, Altria's October 25 letter to the FDA made no mention of its pod products' ability to convert smokers. *See Resps.'* Post-Trial Br. at 53-54; CCFF ¶¶ 987, 1239. Just four days later, on October 29, 2018, Altria and JLI met in New York and agreed on terms for a deal. CCFF ¶¶ 820-25.

## **XII. Altria's Stated Reasons for Pulling the Remainder of Its E-Cigarette Products Off the Market Only Two Weeks Prior to the JLI Transaction Are Pretextual**

As set forth in Discussion Section I.B. below, the reasons Altria provides for removing its remaining e-cigarette products from the market in December 2018 are pretextual. *See Resps.'* Post-Trial Br. at 56-59. Respondents again misrepresent Nu Mark's financial condition. For example, Respondents' statement that Nu Mark had lost \$101 million in the first nine months of 2018 is misleading, given that Nu Mark spent \$100 million alone in 2018 on its Innovative Tobacco Program ("ITP") program to obtain premier shelf space at retailers for its e-cigarettes for a three-year period lasting until 2021. CCFF ¶¶ 431-32, 1448. In reality, Nu Mark's financial performance had been improving. CCFF ¶¶ 1074-75, 1088-111. Respondents point to Nu Mark's

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<sup>21</sup> As discussed below in Discussion Section I.A., the evidence plainly contradicts Respondents' claim that JLI would have been "perfectly happy" for Elite to remain on the market. *See Resps.'* Post-Trial Br. at 54. The evidence is clear that it was important to JLI that Altria dispose of its existing e-cigarette products as part of any deal. CCFF ¶¶ 867-924.

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lack of profitability (Resps.’ Post-Trial Br. at 56-57), but Altria, [REDACTED]

[REDACTED] CCFF ¶¶ 1064-87, 1132-43.

Altria announced its decision to discontinue its remaining e-cigarette products on December 7, 2018, *less than two weeks* prior to signing the JLI Transaction. CCFF ¶¶ 848, 861. As set discussed below, the totality of the evidence shows that Altria’s decision to remove all of its existing products—both cigalikes and pod-based products—was driven by its impending Transaction with JLI and corresponding commitment to JLI to exit the market.

**XIII. The Transaction Closed on Schedule, and the Final Non-Compete Prohibited Altria from Participating in E-Cigarettes for a Minimum of Six Years, Including with Existing Products**

Despite Respondents’ attempt to suggest otherwise, deal negotiations proceeded on schedule with the goal of closing the Transaction before Christmas—a goal that was met when the Transaction closed on December 20, 2018. CCFF ¶ 839. Indeed, Respondents overstate the issues that arose in December 2018 while finalizing the Transaction documents. CCRRFF ¶¶ 1111-22; *see* Resps.’ Post-Trial Br. at 58-59.

As discussed in Complaint Counsel’s Post-Trial Brief, the final Transaction included a non-compete prohibiting Altria from participating in the U.S. closed-system e-cigarette market for a minimum of six years. CCFF ¶¶ 38, 40, 1001; *see* CC’s Post-Trial Br. at 15-16. Respondents attempt to minimize the anticompetitive effects of the non-compete by pointing to a purported “carve-out” for Altria’s existing products. Resps.’ Post-Trial Br. at 59-60. Respondents are referring to the non-compete clause providing that Altria “may engage in the business relating to (I) its GreenSmoke, MarkTen [], and MarkTen Elite brands, in each case, *as such business is presently conducted.*” CCFF ¶¶ 864, 1002 (emphasis added). But Respondents ignore that by the time the Transaction was executed, Altria had *already* discontinued the

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entirety of its e-cigarette portfolio. CCF ¶¶ 987-99, 1001-05. Altria had already stopped selling MarkTen Elite altogether and the only business “presently conducted” with respect to MarkTen and Green Smoke was for retailers to sell through remaining inventory. CCF ¶¶ 1003-04. Therefore, the plain language of the non-compete actually *ensures* that the only business Altria could engage in with its existing e-cigarette products was the ongoing wind-down of MarkTen and Green Smoke cigalikes. Altria could not reintroduce its discontinued products, nor could it introduce any future products (or even conduct R&D relating to e-cigarettes). CCF ¶¶ 1001-05.

Respondents suggest the final non-compete allowed Altria to place its discontinued products back on the market. For the reasons discussed above, this is plainly wrong, and there is no evidence whatsoever to support this clearly incorrect reading of the non-compete.

Respondents misrepresent and take completely out of context Pritzker’s testimony that his “understanding was that Altria could have brought its withdrawn products ‘back on the market if [it] wished,’” *See Resps.’ Post-Trial Br.* at 60. Pritzker was responding to a question about whether Altria could have put its e-cigarettes back on the market *prior to signing the Transaction* (and therefore prior to the non-compete going into effect). CRRFF ¶ 1130. He was *not* suggesting that the final non-compete permitted Altria to put its e-cigarettes back on the market. In fact, Pritzker testified that the possibility that Altria could reintroduce its withdrawn products was a reason JLI still wanted a non-compete in the final transaction documents, even though Altria had withdrawn its products. CRRFF ¶ 1130. As discussed below in Discussion Section I.A.1.v., the non-compete went into effect upon signing, and thus by its own terms prohibited Altria from reintroducing any of its e-cigarettes products from that point forward.

Respondents’ observation that the final Transaction agreement requires Altria to offer to divest its e-cigarette assets if required by the FTC is disingenuous at best. *See Resps.’ Post-Trial*



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Br. at 60. By the time the parties initiated HSR review of the Transaction in February 2019, Altria had already discontinued all of its e-cigarette products, shut down its e-cigarette R&D infrastructure pursuant to the non-compete with JLI, laid off employees, [REDACTED]

[REDACTED] CCFF ¶¶ 812, 848, 866, 1006-15; CCRFF ¶ 1132. At no point did Respondents ever propose any divestiture to the FTC; instead, they took the position that Altria and JLI were no longer competitors given that Altria had exited the business shortly before signing the Transaction. Moreover, as discussed above in Facts Section V., Altria did not believe it even had the legal right to divest any e-cigarette IP until after its JRDTA with expired in July 2020.

#### **XIV. The Evidence Demonstrates that JLI Would Have Submitted PMTA Filings Without Altria's Assistance**

Respondents' claim that the regulatory assistance that Altria provided JLI was "a key part of the deal," because securing a PMTA was "literally existential" for JLI is misleading and omits key parts of the record. Resps.' Post-Trial Br. at 60. The evidence shows that JLI could have and would have been able to prepare its PMTA submissions without Altria's assistance.

Respondents' depiction of the dire state of affairs within the JLI regulatory team fails to provide the background of JLI's efforts to augment its regulatory capabilities. *See* Resps.' Post-Trial Br. at 61. Even before the deal with Altria was signed on December 20, 2018, JLI had significantly expanded its regulatory capabilities in anticipation of filing PMTAs for its e-cigarettes and had begun the necessary preparations to file the applications. CCFF ¶¶ 1923-24, 1930. During Kevin Burns' tenure as CEO, JLI "[h]ired a lot of people" and expanded its scientific affairs department from three to 100 people. CCFF ¶ 1929. This expansion of JLI regulatory affairs yielded an impressive result: by the time Burns stepped down as CEO, JLI had

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conducted twenty behavioral studies when it had conducted none before he was hired. CCFF ¶ 1929. Having already embarked on a significant expansion of its regulatory capabilities prior to signing the deal with Altria, JLI was well positioned to continue that expansion in order to submit its PMTA filing even without the Transaction.

Respondents' assertion that Altria's assistance was invaluable to JLI because "Altria's [regulatory] team was the best in the country" likewise omits one critical detail. Resps.' Post-Trial Br. at 60. Even if Altria's regulatory affairs team was superior to JLI's team, JLI had an alternative path to closing that gap: hiring additional personnel. Indeed, JLI did hire individuals with PMTA experience from other tobacco firms, such as Ryan Wick, a member of the PMI team who had helped prepare the IQOS PMTA. CCFF ¶ 1933. Moreover, JLI was able to hire key members of *the very same regulatory team* that it praised as being the best in the country: Joe Murillo, Elizabeth Copeland, and Dr. Willie McKinney. CCFF ¶¶ 1935-40. To the extent JLI benefited from the addition of these individuals to its regulatory affairs team, the company did not need to agree to a \$12.8 billion investment from Altria in order to secure their services.

Respondents' attempt to highlight certain examples of the regulatory support services that Altria performed for JLI in order to boost this aspect of their efficiencies narrative overstates the level of Altria's overall involvement. Resps.' Post-Trial Br. at 60. The evidence shows that JLI engaged multiple third parties to perform regulatory work and that some of the regulatory work Altria performed for JLI was actually performed by third party contractors with whom JLI could have contracted directly. CCFF ¶¶ 1942-55. Throughout 2019, JLI retained multiple outside consulting firms to assist with everything from testing and behavioral studies to toxicology and clinical research. CCFF ¶¶ 1942-50. For example, Pinney Associates was involved in preparing inputs to the population model and an assessment of the academic literate. CCFF ¶ 1945. CSUR,

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a contract research organization, conducted a number of behavioral studies for JLI's PMTA. CCFE ¶ 1947. Many of the purported regulatory services Altria provided to JLI under the Services Agreement were actually provided by third-party contractors rather than Altria or its own employees. CCFE ¶¶ 1951-55.

#### **XV. Without the Transaction, Altria Would Be Competing Today**

In an effort to direct the Court's attention to an incorrect standard, Respondents focus on a "real world" analysis instead of the appropriate "but-for" world analysis. In doing so, Respondents argue that the e-cigarette industry has become more competitive post-Transaction after Altria's exit, but what matters for the Court's analysis is the but-for world where Altria did not enter into the Transaction and instead continued to compete on price, shelf space, and innovation. Resps.' Post-Trial Br. at 63; CCFE ¶¶ 1413-15. The record evidence is overwhelming that Altria had both the incentives and ability to remain a strong competitor in the closed-system e-cigarette market but for the Transaction. CCFE ¶¶ 409-54, 493-544.

Respondents' misguided emphasis on the price competition from Reynolds, JLI, and NJOY that occurred after the Transaction demonstrates the flaws in their argument. While Reynolds, JLI, and NJOY did continue to compete on price after Altria's sudden exit from the closed-system e-cigarette market, the record evidence shows that Altria *also* would have continued to compete on price but for the Transaction. CCFE ¶¶ 1419-40, 1532-37, 1587, 1842-46. Consumers in the but-for world would have enjoyed the benefits of the price competition from Altria in addition to the price competition from the remaining competitors; the loss of Altria's price competition resulted in competitive harm.

Respondents' myopic focus on post-Transaction price competition also conveniently omits any reference to the other dimensions of competition that the Transaction halted: Altria's collaboration with PMI through the JRDTA, its internal R&D work on next generation e-

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cigarettes, efforts to compete for shelf space, and ongoing work to improve its existing portfolio of products. CCF 503-06, 1442-92, 1538-716. The withdrawal of the entire Nu Mark portfolio of products, which was directly attributable to the Transaction, further harmed consumers by removing products that they preferred from the marketplace. CCF 1493-526.

Respondents also attempt to distort the record by presenting the ongoing decline in the cigalike category as proof of Altria's inevitable competitive irrelevance in the closed-system e-cigarette market. A complete review of the record, however, demonstrates that Altria was well-positioned to continue competing in the closed-system e-cigarette market with both pod-based products and cigalike products. Altria's portfolio of pod-based products had shown promising commercial results and the company had multiple pathways to develop and launch the next generation of pod-based devices. CCF 1500-04, 1538-74, 1690-91. Its cigalike products appealed to consumers and showed promising sales, facts that Altria's own executives acknowledged. CCF 1100-02, 1318-19, 1368, 1499.

## DISCUSSION

Complaint Counsel has met its burden to demonstrate that Respondents' Transaction violates both Section 5 of the FTC Act (by virtue of violating Section 1 of the Sherman Act)<sup>22</sup> and Section 7 of the Clayton Act. The evidence is clear that but for the Transaction, Altria would still be competing in the U.S. closed-system e-cigarette market today. Respondents ask the Court to believe that Altria would have shut down its e-cigarette business even in the absence of a JLI deal, but this version of events is implausible and contrary to the weight of the evidence. As explained below, the loss of Altria—the largest tobacco company in the U.S., with strong incentives and abilities to compete—as an independent competitor in the closed-system e-cigarette market has harmed and continues to harm consumers. The Transaction therefore violates both Section 5 and Section 7.

### **I. The Totality of the Evidence Shows that Altria and JLI Agreed that Altria Would Exit the Closed-System E-Cigarette Market**

Respondents incorrectly assert that Complaint Counsel has failed to prove an agreement between Altria and JLI. Resps.' Post-Trial Br. at 68. To the contrary, the totality of the evidence clearly shows that Altria and JLI agreed that Altria would stop competing in the closed-system e-cigarette market. This agreement had two parts: (1) that Altria would exit its existing e-cigarette business; and (2) that Altria would not compete in e-cigarettes in the future. *See* CC's Post-Trial Br. at 28. Altria fulfilled the agreement by removing its e-cigarette products from the market and entering into a non-compete with JLI. CCFF ¶¶ 987-1015.

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<sup>22</sup> Section 5 of the FTC Act, 15 U.S.C. § 45, prohibits unfair methods of competition, including conduct that violates Section 1 of the Sherman Act, 15 U.S.C. § 1 ("Section 1"). "[T]he analysis under § 5 of the FTC Act is the same . . . as it would be under § 1 of the Sherman Act, 15 U.S.C. § 1 . . ." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005). Hereinafter, Complaint Counsel's references to Section 1 incorporate the fact that a violation of Section 1 is also a violation of Section 5 of the FTC Act.

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The second part of the agreement between Altria and JLI is embodied in a written non-compete in the Transaction documents. CCF ¶¶ 38-40, 995-1001. The existence of the non-compete is not in dispute, so there is no question that there was a “meeting of [the] minds” that Altria would not compete with JLI in the future. *See Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). As discussed below in Discussion Section III, Complaint Counsel should prevail even if the Court considers *only* the written non-compete. With respect to the first part of the agreement, Complaint Counsel has put forward an extensive record of documentary and testimonial evidence that supports a finding that Altria and JLI had an “understanding, or a meeting of [the] minds” that Altria would exit its existing e-cigarette business as a condition of a deal with JLI. *Am. Tobacco Co.*, 328 U.S. at 810.

Despite Respondents’ suggestion otherwise (Resps.’ Post-Trial Br. at 69), the case law is clear that an anticompetitive agreement may be established through either direct or circumstantial evidence, or a combination of the two. *See W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010); *In re Benco Dental Supply Co.*, Docket No. 9379, 2019 WL 5419393, at \*9 (F.T.C. Oct. 15, 2019) (internal citations omitted). Indeed, circumstantial evidence is no less persuasive than direct evidence. *E.g., United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013), *aff’d*, 791 F.3d 290 (2d Cir. 2015). Here, Complaint Counsel has set forth extensive evidence—both circumstantial *and* direct—that shows an agreement between Altria and JLI for Altria to exit e-cigarettes and no longer compete against JLI. Indeed, Respondents’ statement that Complaint Counsel’s case is “based entirely on [] circumstantial evidence” is plainly wrong. Resps.’ Post-Trial Br. at 69 (internal quotations omitted). As discussed above, part of the illegal agreement here (the non-compete) was reduced to writing—a rarity in conspiracy cases. *See In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d

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671, 681 (S.D.N.Y. 2012) (“[C]onspiracies nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators.”) (internal quotations omitted). There is also ample direct evidence supporting a finding that Altria and JLI agreed that Altria would exit its existing e-cigarette business. Indeed, JLI put its demand that Altria exit e-cigarettes in writing (*e.g.*, CCFF ¶¶ 892-97, 914-24), and Altria’s contemporaneous business documents show that it agreed to this demand (*e.g.*, CCFF ¶¶ 945-86). Likewise, JLI’s primary negotiators (Pritzker and Valani) directly testified that they told Altria that in order to do the deal, Altria must only compete in e-cigarettes through JLI, and that Altria agreed to that demand. CCFF ¶¶ 869, 881-88, 946, 956.

Indeed, the federal district court overseeing the ongoing private action based on the same transaction at issue here aptly described the relationship between direct and circumstantial evidence when it denied Altria and JLI’s motions to dismiss plaintiffs’ Sherman Act Section 1 and Clayton Act Section 7 claims. *In re JUUL Labs, Inc., Antitrust Litig.*, 20-cv-02345-WHO, 2021 WL 3675208 (N.D. Cal. Aug. 19, 2021). In doing so, the court found that the written non-compete and evidence regarding the allegations of a “non-written agreement to withdraw in whole from the market need to be considered together[.]” *Id.* at \*18. With respect to plaintiffs’ Sherman Act Section 1 claim, the court found that plaintiffs alleged facts supporting an inference that Altria’s exit from e-cigarettes was a “*key* part of the overall Agreement between JLI and Altria[.]” *Id.* at \*17 (emphasis in original).

**A. The Totality of the Evidence Shows that Altria Removed Its E-Cigarette Products Pursuant to an Agreement with JLI to Stop Competing**

Despite Respondents’ claims to the contrary (Resps.’ Post-Trial Br. at 69), the negotiation history strongly supports Complaint Counsel’s assertion that Altria and JLI agreed that Altria would exit the e-cigarette business and no longer compete against JLI. As discussed

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below, the evidence is overwhelming that Altria could only enter into a transaction with JLI if it agreed to exit its existing e-cigarette business and not compete in the future, and that Altria agreed to these conditions. The evidence also shows that Altria fulfilled that agreement by shutting down its e-cigarette business and entering into a non-compete with JLI. The bottom line is simple: the only way Altria could complete a transaction with JLI was to exit the closed-system e-cigarette market.

**1. The Negotiation History Supports an Inference that Altria and JLI Agreed that Altria Would Exit the E-Cigarette Business**

**i. JLI's July 30, 2018 Term Sheet Contains a Clear Demand that Altria Exit Its E-Cigarette Business**

In support of their position that there was no agreement, Respondents point to the initial July 30, 2018 term sheet (“July 30 term sheet”) that JLI sent to Altria. Resps.’ Post-Trial Br. at 69-70. Far from the corroborating Respondents’ litigation position, the July 30 term sheet actually supports finding that there was an agreement between Altria and JLI.

In the July 30 term sheet, which was the first term sheet exchanged, JLI demanded *in writing* that Altria exit its own e-cigarette business by divesting its e-cigarette assets, “or if divestiture is not reasonably practicable, contribut[ing] at no cost to [JLI] and if such a contribution is not reasonably practicable, then ceas[ing] to operate” the assets. CCFF ¶¶ 680-85. In an email three days prior on July 27, 2018, Peter Gross, the chief investment banker retained by JLI for the Altria transaction wrote to Pritzker that he “under the impression that [Altria] would just shut down Mark 10.” CCFF ¶ 675. Gross had previously met and spoken with Howard Willard of Altria on multiple occasions throughout early 2018. CCFF ¶¶ 642, 664. Respondents’ suggestion that this divest/contribute/cease to operate term was intended only to address what might happen during the antitrust clearance process (Resps.’ Post-Trial Br. at 69-70) is belied by the evidence, which plainly shows that the purpose (and effect) of this term was



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to require Altria to dispose of its existing e-cigarette business in exchange for owning a portion of JLI. JLI's Valani testified that the divest/contribute/cease to operate term "reflect[ed] the intent" of Altria "not being directly competitive in the electronic cigarette space." CCF ¶ 897. Valani explained "there was a question as to how [Altria] would fulfill such obligation to us," and that the divest/contribute/cease to operate term was "meant to give them some ability to handle that." CCF ¶ 899. Referring to the same divest/contribute/cease to operate provision, Pritzker testified that the "goal was for [Altria] not to be competing against Juul if they had a significant interest in Juul, and I didn't care how that would come about." CCF ¶ 898.

Respondents' argument that "cease to operate" was included only as a "last resort" in the event that divestiture or contribution were not possible (Resps.' Post-Trial Br. at 70) is unavailing, as it does not change the fact that the divest/contribute/cease to operate term clearly requires Altria to get rid of its e-cigarette business. Indeed, Valani's testimony that "cease to operate" was included as a "fail-safe" and reflected "JLI's desire to not have any outs in [Altria's] commitment to not be [] competing" simply confirms that the purpose of the divest/contribute/cease to operate term was to ensure that Altria exited the market. CCF ¶¶ 907, 909.

Consistent with the divest/contribute/cease to operate term, JLI's July 30 term sheet also contained a non-compete provision. CCF ¶ 911. The "carve-out" that Respondents point to for MarkTen and MarkTen Elite (Resps.' Post-Trial Br. at 70) is not really a carve-out at all—it still requires Altria to dispose of these products by, at most, nine months post-signing (by divesting them or contributing them to JLI). CCF ¶¶ 894-95. Notably, on August 4, 2018, JLI sent a revised term sheet that added the word "shutdown" to the non-compete provision, to account for JLI's written requirement that Altria take the "cease to operate" pathway to exiting if necessary.

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CCFF ¶¶ 694, 913. As revised, the non-compete provision in JLI’s August 4, 2018 draft provides that as long as Altria owns at least 5 percent of JLI’s shares, it will “refrain from competing anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their divestiture, *shutdown*, or contribution described above).” CCFF ¶¶ 694, 913 (emphasis added).

Respondents assert that the divest/contribute/cease to operate and non-compete terms in the July 30 term sheet reflect that Altria was expected to “leave MarkTen and MarkTen Elite on the market . . . until the FTC t[old] them what to do with the products[s].” Resps.’ Post-Trial Br. at 70 (quoting Pritzker (JLI) Tr. 853). But the testimony is clear that what JLI was concerned with was the “end state” of Altria no longer competing; JLI was “agnostic” as to how that end state was achieved. CCFF ¶¶ 900, 904. In other words, JLI may have been indifferent as to *how* Altria exited e-cigarettes, but it was not indifferent as to *whether* Altria exited. Valani testified that “the prevailing assumption from antitrust counsel at the time was that divestiture was probably the most likely route, and if not, a contribution, and if not, that they would **find the ability to cease to operate.**” CCFF ¶ 908 (emphasis added). That Altria did not exit by the route JLI thought most likely is irrelevant; Altria took a path that JLI itself had placed on the table. The key point is that with the divest/contribute/cease to operate term, JLI made clear in writing what it had already told Altria during negotiations: that a condition of any deal was that Altria exit its e-cigarette business. CCFF ¶¶ 868-69, 881-88.

Notably, as Valani acknowledged, JLI’s divest/contribute/cease to operate provision *required* Altria to “cease to operate” its e-cigarette business in the event that divestiture or contribution were not “reasonably practicable.” CCFF ¶¶ 907-09. This language would make little sense unless there was some reason that Altria could not divest or contribute its e-cigarette

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products.<sup>23</sup> In fact, there was such a reason: Altria’s JRDTA with PMI. The evidence shows that Altria believed that divestiture and contribution were not “practicable” due to Altria’s JRDTA with PMI, *and* that Altria made JLI aware of this concern. CCF ¶¶ 926-32. Therefore, it is logical to infer that the reason JLI included the “cease to operate” requirement to ensure that Altria exited was because of concern that the JRDTA would prevent Altria from divesting its e-cigarettes business or contributing it to JLI. JLI cannot claim to be shocked about Altria ceasing to operate its e-cigarettes business when it was *JLI* who suggested that course of action.

Even the divest or contribute options would have meant that Altria—who, as the largest tobacco company in the U.S., had a uniquely strong incentive and ability to compete in e-cigarettes—would be removed as an independent competitor. Although JLI claims that it thought divestiture or contribution as part of the antitrust clearance process were the most likely means by which Altria would exit, that of course is not what happened. In fact, Altria discontinued all of its e-cigarette products and shut down its e-cigarette business less than two weeks before signing the Transaction, and almost two months prior to submitting an HSR filing. CCF ¶¶ 848, 861, 866. As Altria’s General Counsel Garnick explained to JLI General Counsel Jerry Masoudi in an email dated December 9, 2018:

“I thought while on the plane I would see if we could resolve an issue or two: [ . . . ] Pre-antitrust do not compete – How about if we agree to file within 90 days (we intend to file within 30 days, but I would like a cushion for unforeseen events). Would that resolve this? Alternatively, if the businesses want to start enhanced services right way, the do not compete provision could start running based on when providing enhanced services begins and tied to that. **This is of course a nonissue, since we are not in the market anymore and we can’t get back into the market without getting a PMTA. But do not compete cannot start simply with closing for antitrust reasons – section 1 issue.**” CCF ¶ 851 (emphasis added).

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<sup>23</sup> Altria and JLI negotiators were asked about this language, and no one offered any explanation as to why it might not be “reasonably practicable” for Altria to divest or contribute its e-cigarette assets.

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In effect, Garnick reassured Masoudi that Altria had fulfilled its commitment to JLI to exit the market meaning the parties proceed immediately to closing.

**ii. Negotiations Subsequent to the July 30 Term Sheet Support an Inference that Altria and JLI Agreed that Altria Would Exit E-Cigarettes**

Respondents correctly observe that negotiations continued for some time after the July 30 term sheet. Resps.’ Post-Trial Br. at 70. As discussed in Complaint Counsel’s Post-Trial Brief, however, the evidence shows that Respondents reached agreement on the issue of Altria exiting and no longer competing in e-cigarettes early on, even while other issues continued to be the subject of ongoing negotiations. *See supra* Facts § VII; CCFF ¶¶ 867-986. Not every detail needs to be worked out in order to prove that an agreement exists for purposes of antitrust liability. *See Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *Esco Corp. v. United States*, 340 F.2d 1000, 1008 (9th Cir. 1965). Respondents state that Altria was unhappy with the July 30 term sheet (Resps.’ Post-Trial Br. at 71), but the evidence indicates that this unhappiness stemmed from terms unrelated to the divest/contribute/cease to operate term and the non-compete. *See* Resps.’ Post-Trial Br. at 71 (explaining that Altria was unhappy with JLI’s terms relating to voting power and control). That Altria would exit e-cigarettes and agree to a non-compete was not seen as a point of contention. CCFF ¶¶ 782-86, 956-64. Altria fully understood what JLI wanted, and indicated to JLI that it would comply by exiting its e-cigarette business. CCFF ¶¶ 867-986. For instance, written talking points for Altria CEO Willard to use on an August 6, 2018 call with JLI stated: “If we establish this partnership, then we expect that Altria will: [. . .] potentially exit our own vapor business.” CCFF ¶ 978.

The *one time* there appeared to be any uncertainty about whether Altria would agree to fully exit its own e-cigarette business was when Altria struck the divest/contribute/cease to operate provision from its August 9, 2018 term sheet. CCFF ¶¶ 704-07, 915. In response, JLI

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made it crystal clear in writing that Altria could not retain *any* right to compete in e-cigarettes, including with its existing MarkTen brand products. CCF ¶¶ 914-22.

On August 14, 2018, Pritzker told Altria’s Willard and Gifford via email that JLI “will be sending you our position on a number of specific points to make sure that you understand where we will need to draw the line before finalizing a commitment to [meet on August 18.]” CCF ¶ 978. On August 15, 2018, JLI’s Valani provided that written list to Altria board member Devitre, who immediately forwarded it to others at Altria, including Willard and Gifford. The list consisted of nine bullet points, the second of which read:

We understood that you (and your successors and current and future affiliates) would not compete against us in vapor in the US and that JUUL would be the vehicle for all vapor assets. You have retained the right under certain circumstances to compete not only with existing Mark Ten products, but also with products under development and future products. The commitment to divest Mark Ten has been stricken. This is not acceptable to us. CCF ¶ 918.

Despite Respondents’ suggestion otherwise (Resps.’ Post-Trial Br. at 71-72), this language makes abundantly clear that JLI was requiring Altria to dispose of its *existing* MarkTen e-cigarette products (in addition to products under development), and indeed Altria understood it that way. Willard and Gifford understood this bullet point to be JLI’s response to Altria striking out the divest/contribute/cease to operate commitment in its August 9, 2018 term sheet, and understood the statement “[t]his is not acceptable to us” to refer to Altria’s retention of any rights to compete with its *existing* or future e-cigarette products. CCF ¶¶ 921-22. The message was clear: Altria must exit completely; it could not keep the rights to any of its existing MarkTen e-cigarette products. Given JLI’s well-founded fear of Altria as a dangerous long-term rival in the closed-system e-cigarette market, the forcefulness of that message is easy to understand. *See* CCF ¶¶ 503-06, 1129; CCRRFF ¶¶ 1185, 1193.

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JLI's Valani testified that the purpose of the August 15 list was to "communicate clearly that these were foundational concepts" and that JLI would only go ahead with the planned August 18, 2018 meeting "if the Altria team agreed that they were clear on these points." CCF ¶ 951. During their in-person meeting on August 15, 2018, Valani discussed JLI's list with Devitre to get "some verification from the Altria team that [ ] they were aligned with this prior to us sitting down" for the planned August 18, 2018 meeting. CCF ¶¶ 724, 952. The fact that the August 18 meeting did take place (CCF ¶¶ 728, 953) supports an inference that Altria satisfied JLI that it was aligned with the demand to exit its e-cigarette business and compete in e-cigarettes exclusively through its investment in JLI. In other words, the fact that the August 18 meeting took place supports an inference of the "meeting of [the] minds." *See Am. Tobacco Co.*, 328 U.S. at 810.

Respondents' assertion that "JLI confirmed its indifference to the 'cease to operate' language by excluding it from the August 19 term sheet" (Resps.' Post-Trial Br. at 71) is belied by the evidence. As discussed above, the testimony of JLI's own witnesses, JLI's July 30 term sheet, and JLI's unequivocal rejection of Altria's deletion of the divest/contribute/cease to operate requirement all show that it was critical to JLI that Altria exit its own e-cigarette business if there was to be a deal. CCF ¶¶ 867-924. Indeed, the evidence indicates that at the August 18 meeting, Altria told JLI that it had struck the divest/contribute/cease to operate term because it raised antitrust concerns, but assured JLI that it was willing to commit to the substance of what JLI wanted—which was for Altria exit the market and agree to a non-compete. CCF ¶¶ 729-31, 956-57.

Given that Altria told JLI that inclusion of the "cease to operate" language might lead to antitrust liability (CCF ¶¶ 729-31, 956), one would naturally expect that language to be

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removed future term sheets. *See In re Wholesale Grocery Products Antitrust Litig.*, 752 F.3d 728, 734 (8th Cir. 2014) (“Perhaps there are aspiring monopolists foolish enough to reduce their entire anticompetitive agreement to writing [. . .]. But most would-be monopolists probably can be expected to display a bit more guile, jotting down only a few seemingly common terms while sealing their true anticompetitive agreement with a knowing nod and wink.”). The removal of the “cease to operate” language from the August 19 term sheet does nothing to change the fact that JLI had already clearly communicated its demand that Altria exit—including specifying, *in writing*, that if divestiture or contribution were not practicable, that Altria nonetheless “find the ability to cease to operate”—and that Altria indicated agreement to that demand. CCFE ¶¶ 867-986. Nor does it change the fact that “cease to operate” is exactly what Altria did with its e-cigarette business. *See In re Wholesale Grocery Products*, 752 F.3d at 734 (where “written non-compete agreement permitted [defendants] to compete in each other’s regions,” but “*neither one actually did so*,” and surrounding evidence suggested that the “basis of the deal” was that each company would exit the other’s territory, a reasonable jury could conclude that what competitors “*actually agreed to was a naked division of territory and customers*”) (emphasis in original).

Moreover, the August 19 term sheet is fully consistent with an agreement for Altria to exit, given that it requires Altria to dispose of its existing e-cigarette assets (by divestiture or contribution) and enter a non-compete. CCFE ¶¶ 732-34, 957.<sup>24</sup> Likewise, the August 22 issues list that Respondents point to (Resps.’ Post-Trial Br. at 72) further confirms that Altria would exit its own e-cigarette business. CCFE ¶¶ 958-60; CCRRFF ¶ 836. In fact, a requirement that

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<sup>24</sup> Respondents’ assertion that Complaint Counsel “simply ignored” the August 19 term sheet is incorrect. Complaint Counsel’s Pre-Trial Brief, Post-Trial Brief, and Post-Trial Findings of Fact all include discussion of the August 19 term sheet. CC’s Pre-Trial Br. at 24; CC’s Post-Trial Br. at 35-36; CCFE ¶¶ 732-34, 957. The August 19 term sheet has sometimes been referred to as the August 18 term sheet in this case, and Respondents acknowledge that the terms are used synonymously. RPF ¶ 824.

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Altria exit and enter a non-compete is found in every single term sheet. CC Post-Trial Br. at 36; CCF ¶¶ 733, 798, 826. No term sheet contemplated that Altria could remain in the market indefinitely. That the “cease to operate” language was removed is immaterial, as it had already been agreed that Altria would find a way to exit if the deal was going to happen.

Notably, although the cease to operate language was removed from the August 19 term sheet, the next term sheet, which was sent by Altria to JLI on October 15, 2018, contained a reference to Altria “otherwise exiting” the market. CCF ¶¶ 800, 983. Only 10 days later, on October 25, 2018, Altria took its first major step towards doing just that by announcing that it was pulling its pod-based products MarkTen Elite and Apex by MarkTen, as well as flavored MarkTen cigalikes. CCF ¶¶ 986-88. The October 30, 2018 term sheet, which was the final term sheet, also contained the same reference to Altria “otherwise exiting” the market. CCF ¶ 828; *see also infra* Discussion § I.A.1.v. And Altria did, in fact, announce that it was completely exiting its e-cigarette business on December 7, 2018, less than two weeks before the JLI Transaction. CCF ¶¶ 848, 861.

**iii. Altria’s October 5, 2018 Letter Is Further Evidence of an Agreement**

Altria’s October 5, 2018 letter to JLI provides further evidence that Altria and JLI had reached an agreement that Altria would exit its own e-cigarette business and not compete against JLI. In that letter, Altria’s Willard wrote that, “Altria would agree that it and its current and future subsidiaries will not compete, in a manner *consistent with our previous discussions*, in the U.S. e-vapor market for any period, [ . . . ] during which it provides support services.” CCF ¶¶ 782, 961 (emphasis added). In the same letter, Willard wrote that Altria would begin providing services to JLI at closing, for an initial term of six years. CCF ¶ 781.



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Respondents assert that Willard’s reference to “previous discussions” in the October 5 letter means only the August 19 term sheet (Resps.’ Post-Trial Br. at 72), but that assertion is inconsistent with the text of the letter itself and contrary to witness testimony. JLI’s Pritzker testified that he understood “previous discussions” to refer to “all of the discussions” that the key negotiators had on the non-compete issue, and Willard testified that he was referring to a topic “which it sounds like we had come to prior agreement on [ . . .].” CCFE ¶¶ 785, 962; CRRFF ¶ 986. Furthermore, Valani testified that he viewed Willard’s October 5 letter as reflecting that Altria’s “obligation to us was to not be competitive and that we assumed that they would find the legal means to do so and that we’re prepared to give them [] any flexibility as long as the result was okay.” CCFE ¶ 963. Even setting aside that the evidence shows that Willard’s reference to “previous discussions” was not limited to the August 19 term sheet, as noted above, the August 19 term sheet is consistent with an agreement for Altria to exit and not compete.

**iv. Respondents’ Use of Outside Antitrust Counsel Is Immaterial to Liability**

Respondents repeatedly note that outside antitrust counsel advised them on the Transaction (Resps.’ Post-Trial Br. at 70, 73), but that is not only irrelevant to liability here, it is an improper argument as Respondents are seeking to use privileged information as both a sword and a shield. *See United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d. Cir. 1991). “[A] party who asserts a claim that ‘in fairness requires examination of protected communications’ thereby waives the attorney-client privilege as to those communications.” *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 537 (3d Cir. 1996) (internal citation omitted). When a litigant makes a claim or defense that is “tantamount” to a claim that an attorney’s advice is “relevant to the legal significance of [its] conduct,” it is “unfair to allow [the litigant] to make this claim without permitting the opposing parties to investigate.” *See id.* (internal citation omitted). Nor

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may a party “rely upon the legal advice it received for the purpose of negating its scienter without permitting [the other party] the opportunity to probe the surrounding circumstances and substance of that advice.” *Berkeley Inv. Grp. Ltd. v. Colkitt*, 455 F.3d 195, 221-22 n.24 (3d Cir. 2006). There is no evidence in the record regarding the substance of the advice outside counsel gave to Altria and JLI regarding potential antitrust liability stemming from their actions. Without knowing what advice Altria and JLI received, the involvement of counsel should be given absolutely no weight. As noted in Complaint Counsel’s Post-Trial Brief, when Altria’s Murray Garnick was asked at trial if Altria’s outside counsel ever advised whether Altria’s actions might give rise to antitrust liability, Altria’s counsel objected on privilege grounds and directed Garnick not to answer.<sup>25</sup> CC’s Post-Trial Br. at 38 n.13; CCFF ¶ 994. JLI’s counsel likewise asserted privilege at trial to prevent the development of any evidence relating to the legal advice outside counsel provided. CCRRFF ¶¶ 548-50. Respondents must now live with their decision to claim privilege over these communications and are therefore precluded from relying on the advice of counsel as a defense.

Moreover, the involvement of counsel in drafting deal documents (Resps.’ Post-Trial Br. at 70) does not save an otherwise illegal transaction or agreement under Section 1 of the Sherman Act or Section 7 of the Clayton Act. It is an attorney’s job to draft transaction documents, and the fact that an attorney did in fact draft a transaction agreement does not preclude finding that the transaction is illegal under Section 7 of the Clayton Act. Likewise, the mere involvement of outside counsel in the challenged conduct does not immunize an illegal agreement from Section 1 scrutiny. *See, e.g., Impax Labs. Inc. v. FTC*, 994 F.3d 484, 488-90 (5th

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<sup>25</sup> Over the course of this investigation and subsequent litigation, Altria alone has withheld more than 95,000 documents on the basis of privilege. Declaration of Kimberly D. Harlowe (Altria), ¶¶ 31-33 (Feb. 18, 2021) (attached to Altria’s Opposition to Privilege Waiver Motion, Dkt. 9393, Feb. 18, 2021).

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Cir. 2021) (holding that reverse payment agreement drafted and negotiated by outside counsel violated Section 1); *FTC v. Abbvie, Inc.*, 976 F.3d 327, 369-71 (3d Cir. 2020) (holding that sham litigation filed by outside counsel violated antitrust laws). Further, counsel was not always present for meetings or on phone calls between Altria and JLI principals. CCFF ¶ 617. For example, the August 1, 2018 meeting at the Park Hyatt hotel between Pritzker, Valani, Willard, Crosthwaite and Burns took place without any counsel in attendance. CCFF ¶¶ 689-91. Finally, as discussed in Complaint Counsel’s Post-Trial Brief, here counsel acted at the direction of their respective clients in drafting the terms sheets. CC’s Post-Trial Br. at 38; CCFF ¶¶ 588, 893.

**v. Altria Ceasing to Operate Its E-cigarette Business Benefitted Both Altria and JLI**

Altria ceasing to operate its e-cigarette business benefited both Altria and JLI. *See United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d. Cir. 2015) (“Circumstances that may raise an inference of conspiracy include a common motive to conspire . . . .”) (internal quotations and citation omitted). As discussed above in Facts Section V. and Discussion Section I.A.1.i., Respondents were concerned that Altria’s JRDTA with PMI would prevent Altria from divesting or contributing its e-cigarette assets prior to the July 2020 expiration of the JRDTA. *See* CC’s Post-Trial Br. at 45. Respondents admit that this concern was significant enough to put a delayed deadline for making HSR filings into the October 15 term sheet (requiring HSR filings by “two years after closing”) and the October 30 term sheet (requiring HSR filings by July 2020). Resps.’ Post-Trial Br. at 73-74. The December 5, 2018 draft purchase agreement continued to include this extended July 2020 timeline for HSR filings. CCFF ¶ 941. The effect of this would be that Altria would continue to operate its e-cigarette business until *at least* July 2020, and possibly far longer given the potential for an extended antitrust review. The evidence belies Respondents’ suggestion (Resps.’ Post-Trial Br. at 73-74) that they were fine with the prospect of such a delay.

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See CC’s Post-Trial Br. at 45-47. Indeed, it is curious that Respondents did *not* take this path. If waiting to submit HSR filings until July 2020 was acceptable to both sides, as Respondents claim, then one would expect them to have done so.<sup>26</sup> The fact that Respondents instead closed in December 2018 and submitted HSR filings less than two months later suggests Respondents sought to proceed on a faster timeline. See CCFE ¶¶ 861, 866.

As discussed in Complaint Counsel’s Post-Trial Brief, Respondents determined that Altria could not provide certain enhanced services to JLI while Altria was still competing in e-cigarettes. CC’s Post-Trial Br. at 46. Therefore, the final two term sheets (dated October 15 and October 30, 2018) specified that enhanced services could start *only after* Altria contributed or divested its e-cigarette business, or “otherwise exited the marketing and sale of [e-cigarettes].” CCFE ¶¶ 800-03, 828-29; CC’s Post-Trial Br. at 46. Respondents argue that such a delay “posed no concern to either party.” Resps.’ Post-Trial Br. at 74. But contrary to that assertion, { [REDACTED] } CCFE ¶¶ 984-85; see CC’s Post-Trial Br. at 46-47; CC’s Pre-Trial Br. at 41. Because Altria exited the market, JLI was able to receive enhanced services immediately after closing, instead of having to wait potentially *years* before receiving those services (given the extended HSR filing deadline of July 2020, and additional time after that for antitrust review). See CCFE ¶ 851; CC’s Post-Trial Br. at 46.

Altria exiting the market also benefited JLI by enabling the non-compete to start immediately at closing, and thus be in place when Altria started providing regulatory services. As Respondents note, regulatory services were *not* included in the “enhanced services” that could only start after Altria divested, contributed, or “otherwise exited” the market. Resps.’ Post-

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<sup>26</sup> Indeed, if Altria had maintained Nu Mark as an ongoing business until July 2020, Respondents may have avoided this lawsuit.

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Trial Br. at 74. Instead, Altria could (and did) start providing regulatory services “almost immediately” upon closing. CCRRFF ¶ 1231. But JLI’s witnesses repeatedly testified that one of the reasons they wanted a non-compete was because Altria would have access to JLI’s confidential information through providing regulatory services. CCF ¶ 885; CCRRFF ¶ 1184; *see also* CCF ¶¶ 874-75. Altria’s General Counsel Garnick told JLI’s General Counsel Masoudi that the non-compete could not “start simply with closing for antitrust reasons – section 1 issue,” but that it could “start running based on when providing enhanced services begins and tied to that.” CCF ¶ 851. In the same email, Garnick assured Masoudi that “[t]his is of course a nonissue, since we are not in the market anymore and we cannot get back in the market again without getting a PMTA.” CCF ¶ 851. Since Altria had exited the market, it could immediately start providing enhanced services, and therefore the non-compete could start immediately as well. CCF ¶ 851. In other words, if Altria had not exited the market prior to the Transaction, JLI would have had to choose between waiting to receive regulatory services, or receiving those services without a non-compete in place. Indeed, prior to Altria discontinuing its e-cigarette products, JLI had expressed concern to Altria that the full support services and non-compete “effectively may only last for 3 1/2 years due to antitrust delay” in making HSR filings and then waiting for antitrust review. CCF ¶ 809. Altria exiting the market solved these problems.

In sum, the evidence shows that Altria’s exit clearly benefitted JLI by allowing enhanced services and the non-compete to start immediately at closing. As discussed in Complaint Counsel’s Post-Trial Brief, Altria’s exit also benefitted Altria by accelerating the timeline by which Altria could make its HSR filing and thus potentially take seats on JLI’s board while converting its nonvoting shares to voting shares. CC’s Post-Trial Br. at 45-46. Indeed, after Altria’s December 7, 2018 announcement that it was exiting e-cigarettes altogether, the purchase

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agreement was edited to *require* both parties to make HSR filings within 90 days, thereby significantly accelerating the timeline for seeking antitrust approval. CCF ¶ 943.

**vi. The Terms Sheets Exchanged Between Altria and JLI Form Part of the Total Body of Evidence Supporting a Finding of Agreement**

Respondents incorrectly suggest that Complaint Counsel is asking this Court to find a Section 1 agreement based solely on nonbinding term sheets. Resps.’ Post-Trial Br. at 75. To the contrary, Complaint Counsel’s position is that the *totality of the evidence* supports a finding of an agreement to exit. *See Apple*, 952 F. Supp. 2d at 689. The term sheets form *part* of that total body of evidence<sup>27</sup>—which also includes witness testimony, ordinary course documents, and Altria’s course of conduct in shutting down its e-cigarette business immediately prior to entering the Transaction. *See Am. Tobacco*, 328 U.S. at 809 (conspiracy may be “found in a course of dealing or other circumstances as well as in an exchange of words”) (internal citation omitted).

Respondents’ citation to *Azco Biotech, Inc. v. Qiagen, N.V.*, Dkt. No. 12-CV-2599-BEN, 2015 WL 12516024 (S.D. Cal. July 2, 2015), a breach of contract case decided under California law, is inapposite. Resps.’ Post-Trial Br. at 75. This is not a breach of contract case, and Complaint Counsel does not contend that any term sheet was the final agreement to the overall Transaction.<sup>28</sup> *See In re Wholesale Grocery Products*, 752 F.3d at 734 (Sherman Act Section 1 case “is not a contracts case in which the scope of the alleged anticompetitive agreement is cabined by the four corners of the written document” and a plaintiff may instead use “all manner of extrinsic evidence” to show an illegal agreement). As Judge Orrick noted in the parallel

<sup>27</sup> Respondents citation to *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 217 (E.D.N.Y. 2003) is inapposite. Complaint Counsel is not arguing that “anticompetitive conduct flow[ed] from” term sheets, *In re Ciprofloxacin*, 261 F. Supp. 2d at 217, but instead that the term sheets here provide support for an inference that Altria and JLI agreed that Altria would exit its own e-cigarette business as part of any deal.

<sup>28</sup> Notably, in *Azco Biotech*, the court denied defendant’s motion for summary judgment on the breach of oral contract claim, finding that jury could reasonably infer that the parties had an oral agreement based on the terms in a proposed term sheet. *See Azco Biotech*, 2015 WL 12516024, at \*5-6.

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private litigation, “the intended scope of the express, written non-compete agreements . . . and plaintiffs’ allegations regarding the non-written agreement to withdraw in whole from the market need to be considered together and tested on an evidentiary basis.” *In re JUUL Labs Antitrust Litig.*, 2021 WL 3675208, at \*32. Similarly here, the Court should consider all the relevant evidence together, including the documents Respondents exchanged, when determining whether Respondents entered into an illegal agreement. As explained in Complaint Counsel’s Post-Trial Brief, the evidence shows that well prior to finalizing the overall deal, Altria and JLI had agreed that Altria would exit and not compete as part of a deal. CC’s Post-Trial Br. at 35-36.

## **2. Complaint Counsel Has Met Its Burden to Prove an Agreement**

Contrary to Respondents’ assertion otherwise, Complaint Counsel’s case is not based on simply asking the Court to disbelieve all of Respondents’ witnesses. Resps.’ Post-Trial Br. at 76. Complaint Counsel has put forth extensive documentary and testimonial evidence supporting an inference of agreement. *E.g.*, CCFF ¶¶ 578-1407; CC’s Post-Trial Br. at 31-58; *see supra* Discussion § A.1. Indeed, as noted above, part of the agreement (the non-compete) between Altria and JLI is *in writing*. As discussed below in Discussion Section III, Complaint Counsel should prevail even if the Court considers *only* the written non-compete, the existence of which is not in dispute.

Beyond the written non-compete, the totality of the evidence strongly supports finding that Altria and JLI agreed that Altria would exit the closed-system e-cigarette market. Indeed, the totality of the evidence shows that JLI made clear to Altria that it would have to dispose of its e-cigarette business one way or another as part of any transaction. CCFF ¶¶ 880-924. Likewise, the totality of the evidence demonstrates that Altria communicated to JLI that it would comply with JLI’s demand to dispose of its existing e-vapor business. CCFF ¶¶ 945-86. During negotiations, the parties discussed several options regarding how Altria could comply with JLI’s demand that

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it not compete in e-vapor (CCFF ¶¶ 968-86), including that Altria could meet JLI's demand by ceasing to operate its e-vapor business. CCFF ¶¶ 969-86. And that is what Altria did on October 25 and December 7, 2018. CCFF ¶¶ 987-88, 989-94.

Respondents' reliance on their own witnesses' denials (Resps.' Post-Trial Br. at 76) are unavailing for several reasons. First, self-serving testimony from party witnesses should be given little weight when contemporaneous business documents and other evidence show agreement. *See Gainesville Utils. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 301 n.14 (5th Cir. 1978). As the First Circuit has explained, "[i]t is to be expected that [Respondents'] witnesses would deny that there was an agreement," but that does not offset the "compelling documentary evidence of a planned common course of action or understanding." *Adver. Specialty Nat'l Ass'n. v. FTC*, 238 F.2d 108, 116-17 (1st Cir. 1956) (upholding Commission's findings of an agreement where witnesses denied that an agreement took place and offered a different interpretation of the documentary evidence in the record). Indeed, courts have regularly found the existence of an agreement despite defendants' denials.<sup>29</sup>

Second, much of the testimony from Respondents' witnesses actually *supports* a finding that Altria and JLI agreed that Altria would exit and no longer compete in e-cigarettes. *See, e.g.*, CCFF ¶¶ 867-986. For example, Valani testified that JLI's negotiators *told* Altria's negotiators that "if you were going to work with us, you'd need to be exclusive, because we couldn't have

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<sup>29</sup> *See, e.g., Gainesville Utils. Dep't*, 573 F.2d at 301 n.14 ("The officials of the power companies deny the existence of a territorial agreement, but where such testimony is in conflict with contemporaneous documents we can give it little weight.") (internal quotation omitted); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (overturning summary judgment where plaintiff offered evidence of an agreement and noting that a reasonable trier of fact need not accept testimony "which is self-serving, uncorroborated, implausible [ ], and inconsistent with the overall evidence of conspiracy."); *United States v. Champion Int'l Corp.*, 557 F.2d 1270, 1273 (9th Cir. 1977) (upholding trial court finding of an agreement to eliminate competitive bidding for timber even though defendants asserted that meetings were innocent); *Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1936) (upholding the district court's conspiracy finding even though defendants' executive and manager witnesses testified "that there was no conspiracy or concerted action between the defendants.").



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you selling some product you own 100 percent of competing on the shelf with something that [] you own less percentage of.” CCF ¶ 869. Valani further testified that he thinks Altria realized “pretty early on” in negotiations that JLI was not going to do a transaction unless Altria agreed that it would not market its own e-cigarette products but instead would participate in e-cigarettes exclusively through JLI. CCF ¶¶ 882-84. Referring to the statement in his October 5, 2018 letter to JLI that Altria would “not compete, in a manner consistent with our previous discussions, in the U.S. e-vapor market,” Altria’s Willard testified that this was a topic “which it sounds like we have come to prior agreement on [ . . . ].” CCF ¶ 962. Respondents’ citation to this Court’s decision in *In re McWane, Inc.*, is inapposite here. Resps.’ Post-Trial Br. at 76 (citing *In re McWane, Inc.*, 155 F.T.C. 903, 2013 WL 8364918, at \*267 (F.T.C. May 1, 2013) (Initial Decision)). Unlike in *McWane*, here there is clear evidence showing that Respondents directly communicated about the subject matter of the alleged agreement—Altria exiting its existing e-cigarette business and not competing with JLI. *E.g.*, CCF ¶¶ 867-986.<sup>30</sup>

Third, witness testimony that JLI did not have prior notice of Altria’s October 25, 2018 and December 7, 2018 e-cigarette discontinuation announcements (Resps.’ Post-Trial Br. at 76) is irrelevant for purposes of finding an overall agreement to exit and not compete. There is no requirement that JLI know the exact details of how and when Altria would fulfill this agreement in order for the agreement to be illegal. *See Cont’l Ore Co.*, 370 U.S. at 699; *Esco*, 340 F.2d at 1008. This is especially true given the fact that it was JLI who put the option of Altria ceasing to operate its e-cigarette business as a means of satisfying JLI’s non-compete demand *in writing*.

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<sup>30</sup> After finding that the evidence failed to show that Respondents even discussed the subject matter of the alleged conspiracy, and that the totality of the evidence failed to demonstrate an agreement, this Court held in *McWane* that witness testimony denying an agreement “further weigh[ed] against a finding of an agreement.” *McWane*, 2013 WL 8364918, at \*265-67.

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Fourth, Altria witnesses' testimony that Altria's e-cigarettes were withdrawn for independent business reasons (Resps.' Post-Trial Br. at 76) is inconsistent with the totality of the evidence. CCF ¶¶ 1034-407; *see infra* Discussion § I.B.

The cases that Respondents cite regarding sworn witness denials are inapposite. *See* Resps.' Post-Trial Br. at 76-77. In those cases, the plaintiffs failed to put forward *any* evidence supporting an inference of conspiracy. *See Lamb's Patio Theatre, Inc. v. Universal Film Exchs, Inc.*, 582 F.2d 1068, 1070 (7th Cir. 1978) (noting lack of "any credible evidence" that a conspiracy or agreement existed); *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 131-34 (D.D.C. 2006) (plaintiffs failed to show "evidence of opportunity to conspire, direct evidence of an agreement, or other circumstantial evidence"); *Impro Prods., Inc. v. Herrick*, 715 F. 2d 1267, 1276-77 (8th Cir. 1983) (plaintiff failed to introduce any evidence supporting an inference that defendants conspired to harm plaintiff's business, and uncontradicted testimony established that defendants had never even discussed plaintiff or its products); *Am. Key Corp. v. Cumberland Assocs.*, 579 F. Supp. 1245, 1259 (N.D. Ga. 1983) (plaintiff failed to provide evidence from which a conspiracy could be inferred). As the Commission itself has explained, cases such as *Lamb's Patio Theatre* and *City of Moundridge*, where plaintiffs failed to adduce evidence of conspiracy, are inapposite when Complaint Counsel has put forward "sufficient evidence from which a reasonable trier of fact could infer an agreement." *In re Benco Dental Supply Co.*, Docket No. 9379, 2018 WL 6338485, at \*18 and n.17 (F.T.C. Nov. 26, 2018) (Opinion and Order denying summary judgement) (distinguishing *Lamb's Patio Theatre*, 582 F. 2d 1068 and *City of Moundridge*, 429 F. Supp. 2d 117); *see Trabert & Hoeffler, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 481 (7th Cir. 1980) (observing that in *Lamb's Patio Theatre*, "plaintiff had failed to produce any evidence of a conspiracy apart from the weakness of the

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defendant’s proffered explanation,” in contrast to the case before the *Trabert* court, in which “the record contained a plethora of additional evidence probative of the existence of a conspiracy”). Finally, several of the witnesses whose sworn denials Respondents now rely so heavily on have fatally undermined their credibility after providing materially misleading testimony during the FTC’s investigation. CC’s Post-Trial Br. at 57 n.16. Initially, multiple Altria executives testified under oath that Altria had *not* implemented a new gasket in MarkTen Elite due to regulatory concerns about implementing new features. CCFF ¶ 1225. Almost seven months later, Altria’s counsel finally sent a letter to Complaint Counsel, acknowledging that the new gasket was implemented, correcting the record. CCFF ¶ 1226. The Court is “entitled to consider a party’s dishonesty about a material fact as affirmative evidence of guilt.” *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 147 (2000).

Unlike in the cases cited by Respondents, the record here contains extensive evidence supporting an inference that Altria and JLI agreed that Altria would exit e-cigarettes. CCFF ¶¶ 880-986; *see also In re JUUL Labs Antitrust Litig.*, 2021 WL 3675208, at \*18 (denying motion to dismiss private action alleging *per se* anticompetitive agreement between Altria and JLI under Section 1 of the Sherman Act, and finding that plaintiffs alleged facts “tending to exclude the possibility that the alternative explanation is true”) (citation omitted).<sup>31</sup>

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<sup>31</sup> In denying Altria, JLI, Pritzker, and Valani’s motions to dismiss plaintiffs’ Sherman Act, Section 1 claims, the court in *In re JUUL Labs* found that plaintiffs’ explanation that Altria exited due to an agreement with JLI is plausible, “given Altria’s alleged extensive regulatory expertise that was subsequently put to use on behalf of JLI as well as its other public statements and heavy investment in its own e-vaping products throughout 2018 until it abruptly pulled its products from the market in October 2018.” *In re JUUL Labs, Inc.*, 2021 WL 3675208, at \*18. As Complaint Counsel discusses herein, the full record in the present case shows that Altria exited its own e-cigarette business pursuant to an agreement with JLI.

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Respondents state that simply proving an opportunity to conspire is insufficient (Resps.’ Post-Trial Br. at 77), but Complaint Counsel has done far more than that here.<sup>32</sup> Indeed, Complaint Counsel has put forward an extensive body of “additional evidence of conspiracy” that goes far beyond “the mere fact of meetings or discussions at which a conspiracy might have occurred.” Resps.’ Post-Trial Br. at 77 (quoting Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1417b (4th Ed. 2013-2018)). As discussed above and in Complaint Counsel’s Post-Trial Brief, the totality of the record evidence supports a finding that Altria and JLI agreed that Altria would exit its own e-cigarette business. That evidence includes testimony from Respondents’ own witnesses that Altria’s exit was a requirement of the deal, that Altria and JLI discussed this requirement, contemporaneous documentary evidence of this demand and of Altria’s acquiescence to it, term sheets (all of which required Altria to exit), quantitative and qualitative evidence that Altria’s abrupt exit from the strategically important closed-system e-cigarette market would not have happened but for the Transaction, and a final written Transaction that included a non-compete preventing Altria from marketing any of its existing products other than to complete the wind-down already in progress. *E.g.*, CCFE ¶¶ 867-1015.

Notably, the evidence includes ordinary course documents supporting inferences that JLI’s demand and Altria’s agreement to it were discussed during certain meetings and calls. For example, Willard’s talking points for an August 6, 2018 call with JLI state that “Altria has come a long way to accommodate [JLI] in this process,” including by “[Demonstrating flexibility with our existing vapor business, if necessary, in order to form the partnership.]” CCFE ¶¶ 695-99, 980 (brackets in original). Valani provided JLI’s August 15, 2018 list of “foundational

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<sup>32</sup> Given the numerous meetings, calls, and other communications between Altria and JLI negotiators—many of which did not include outside counsel—Respondents clearly did have ample opportunity to conspire. CCFE ¶¶ 614-24.

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concepts,” which specified that it was “unacceptable” for Altria to compete with existing or future products, to Altria board member Devitre *while* the two of them were meeting in person to “bake the cake” prior to the planned August 18 Altria/JLI meeting. CCFE ¶¶ 709-28, 914-24, 949-52. Valani testified that during their August 15 meeting, he and Devitre discussed the list of “foundational concepts” in order for JLI to get “some verification from the Altria team that [] they were aligned with this prior to us sitting down” for the planned August 18, 2018 meeting. CCFE ¶¶ 721, 724, 951-52. Again, the fact that the August 18 meeting took place (CCFE ¶¶ 728, 953) supports an inference that Altria indicated to JLI that it was aligned with the demand to exit its e-cigarette business. Further supporting this inference is Altria’s outline for the August 18 meeting, which shows that one of the first things Willard planned to tell JLI was that Altria struck the divest/contribute/cease to operate language due to antitrust concerns, but that it was willing to commit to substance of what JLI wanted, which was for Altria exit the market and agree to a non-compete. CCFE ¶¶ 729-31, 956-57.

### **3. The Evidence Is Clear that JLI Demanded that Altria Exit E-Cigarettes and Agree to a Non-Compete**

Respondents argue that JLI’s assessment of Altria’s e-cigarette products somehow “refutes any notion that JLI insisted that Altria cease to operate its e-cigarette business.” Resps.’ Post-Trial Br. at 77-79. But regardless of how JLI viewed Altria’s e-cigarettes, the evidence is abundantly clear that JLI demanded that Altria cease to operate its own e-cigarette business as part of any deal. CCFE ¶¶ 867-924, CC’s Post-Trial Br. at 31-38. JLI’s own witnesses acknowledged this. CCFE ¶¶ 867-91. For example, JLI’s Valani testified that a “general precept for [] what it would take for Altria to ever have any involvement with JUUL would be that they [] couldn’t have a directly competitive offering of their own.” CCFE ¶ 869. Consistent with this, JLI’s response to Altria striking the “divest/contribute/cease to operate” clause (in Altria’s

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August 9 term sheet) made crystal clear that it was “not acceptable” for Altria to retain any right to compete with its “existing” products (or any products under development or future products). CCFE ¶¶ 722, 918. And, as noted above, every single term sheet exchanged after August 9, 2018 required Altria to exit its existing e-cigarette business. *See supra* Facts § VII.; CC’s Post-Trial Br. at 36 (citing CCFE ¶¶ 733, 798, 826). Therefore, it is irrelevant how JLI viewed Altria’s existing e-cigarettes; what matters is that JLI demanded that Altria exit—a point on which the evidence is clear.

Moreover, the record evidence refutes the notion that JLI did not view Altria as a significant long-term competitor in the closed-system e-cigarette market. JLI understood that Altria was “definitely well-equipped to do well in the [e-vapor] space,” given Altria’s “huge distribution, huge expertise in the category, a huge customer database . . . and [] huge skills,” CCFE ¶ 497; *see* CCFE ¶¶ 504-06 (discussing PX2005 (JLI) at 003, 004, 016 (“Altria Threat Competitive Response, May 2018”)). In other words, JLI recognized that as the largest competitor in the tobacco space, Altria itself was a formidable competitor in e-cigarettes, regardless of whether or not its current products were market leaders. Notably, the evidence does not indicate that JLI viewed Altria’s products as uniquely flawed; instead, the evidence indicates that JLI viewed Altria’s e-cigarette products similarly to those of JLI’s other major competitors, all of which trailed far behind JUUL in sales. As JLI’s Pritzker explained, “JLI was gaining revenue very quickly and beginning to dominate market share, and numerous other brands, including [MarkTen and MarkTen Elite], were all kind of in a pack.” CCRRFF ¶ 478. JLI’s Valani explained that MarkTen Elite was “the most directly [] similar product to JUUL, similar to many other products that were on the market from the same contract manufacturer [Smooore].” CCRRFF ¶ 478; CCFE ¶¶ 1516-22. But, again, JLI’s assessment of Altria’s existing products is

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beside the point, given that the evidence is clear that JLI demanded that Altria exit its existing business and not compete in e-vapor in the future.

Respondents point to testimony that JLI did not “expect” Altria’s October 25, 2018 announcement pulling pods and flavored e-cigarettes. Resps.’ Post-Trial Br. at 78. But the agreement here was for Altria to exit e-cigarettes and no longer compete, which is exactly what Altria did. As discussed above, JLI did not care *how* Altria exited, just that it exited. CCFF ¶¶ 898-905. That Altria may have exited before JLI expected or in a manner different than what JLI expected does nothing to undermine the extensive evidence establishing that Altria and JLI agreed that Altria would exit and no longer compete—evidence which includes a written non-compete. That agreement to exit and no longer compete is the “agreement” to which there was “mutual consent” here. *See Esco*, 340 F.2d at 1007. As noted above, there is no requirement that JLI know the details of how and when Altria would fulfill this agreement in order for the agreement to be illegal. *See Cont’l Ore Co.*, 370 U.S. at 699; *Esco*, 340 F.2d at 1008.

Moreover, JLI cannot claim surprise that Altria ceased to operate its e-cigarette business, when it was JLI who first put the “cease to operate” option in writing as one of the ways that Altria could comply with its non-compete obligation. CCFF ¶¶ 684, 894, 899. Also, as discussed above, Altria’s October 15, 2018 term sheet—dated a mere 10 days before Altria announced it was pulling its pod products and flavored cigalikes—referred to Altria “otherwise exiting” e-cigarettes, further undermining JLI’s ability to claim surprise by Altria’s exit. CCFF ¶¶ 800, 983-84, 986-88.

Respondents assert that Altria’s December 7, 2018 decision to withdraw its remaining cigalike products was of “no consequence” to JLI because JLI did not view the products as

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“particularly competitive to Juul.” Resps. Post-Tr. Br. at 79.<sup>33</sup> But JLI’s demand that Altria exit its existing e-cigarette business clearly applied to both Altria’s pod *and* cigalike products. CCF ¶¶ 323-24. Moreover, Respondents’ assertion that the December 7 withdrawal of Altria’s remaining cigalike products “barely registered” with JLI (Resps.’ Post-Trial Br. at 79) is belied by evidence that within days of that announcement, Altria assured JLI that *because* it had completely exited e-cigarettes, both the enhanced services and the non-compete could start at closing. *See supra*, Discussion § I.A.1.v.; CC’s Post-Trial Br. at 45-47; CCF ¶ 851.

In sum, the evidence shows JLI demanded that Altria exit e-cigarettes and not compete against JLI as part of any deal, and that Altria agreed to—and ultimately fulfilled—this request. That is the agreement, or “common scheme,” at issue here. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). As discussed in Complaint Counsel’s Post-Trial Brief and below in Section II, that agreement is illegal under a rule of reason analysis.

**B. Altria’s Stated Reasons for Removing Its E-Cigarette Products Are Pretextual and Inconsistent with the Evidence**

By claiming Altria’s decision to discontinue its e-cigarette products was unrelated to the deal with JLI, Respondents ask the Court to believe a story uniformly rejected by market analysts, regulators, industry participants, and contrary to the qualitative and quantitative evidence in the record. Respondents have provided the Court a list of shifting rationales for Altria’s market exit, including youth vaping, lack of adult smoker conversion, and dire financial straits. Resps.’ Post-Trial Br. at 79-88. But none of these purported alternative justifications are supported by the record. “[P]retextual excuses are circumstantial evidence that can disprove the

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<sup>33</sup> Respondents point to Valani’s trial testimony that he “did not learn that Altria had discontinued its cig-a-like products until Complaint Counsel brought it to his attention at his deposition.” Resps.’ Post-Trial Br. at 79. But at his investigational hearing, Valani testified that it was “very possible” that he heard about Altria’s discontinuation of MarkTen cigalikes around the time it occurred. CCRRFF ¶ 1154.



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likelihood of independent action.” *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 478 (3d Cir. 1998); *see also Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir. 1985) (“evidence of pretext, if believed by the [fact finder], would disprove the likelihood of independent action on the part of [Respondent].”). Indeed, evidence of pretext can “strengthen an inference of joint action that is otherwise in evidence.” *White v. R.M. Packer Co.*, 635 F.3d 571, 585 (1st Cir. 2011). Accordingly, the Court should consider Respondents’ unsupported and implausible pretextual justifications as additional evidence supporting an inference of an illegal agreement.<sup>34</sup>

### **1. Altria’s Stated Reasons for Pulling Elite and Its Pod-Based Products Are Pretextual and Inconsistent with the Evidence**

Respondents claim Altria discontinued Elite and its other pod-based products on October 25, 2018 for a variety of shifting and pretextual reasons including purported concerns about youth vaping, purported commercial challenges, the lack of nicotine salts, and Elite’s purported inability to receive a PMTA. Resps.’ Post-Trial Br. at 79-84. First, Respondents claim that Altria pulled its pod-based products “in direct response to the FDA’s September 12, 2018 letter demanding that Altria take ‘bold action’ in response to the youth vaping crisis.” Resps.’ Post-Trial Br. at 80. In so doing, Respondents ask the Court to ignore the fact that a mere four days later, on October 29, 2018, Altria and JLI “reached agreement on terms.” CCF ¶ 821.

Essentially, Altria disclaimed its pod-based products only to immediately turn around and invest

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<sup>34</sup> The cases cited by Respondents are easily distinguishable. Unlike the cases cited by Respondents, the record in this case supports an inference of a conspiracy, *see supra* Discussion § I.A, and does not support Respondents’ alleged alternative justifications. *Cf. In re Baby Food Antitrust Litig.*, 166 F.3d 112, 134 (3d Cir. 1999) (finding defendants’ independent business justifications were more plausible than the alleged price-fixing scheme). For example, in *Rickards v. Canine Eye Registration Found., Inc.*, the Ninth Circuit upheld dismissal of a Section 1 claim noting that one party to the alleged agreement had “voiced their disapproval,” among other factors. *See* 704 F.2d 1449, 1453 (9th Cir. 1983). But in this case, JLI never communicated its disapproval to Altria. To the contrary, JLI continued to move forward with the deal even after Altria pulled its e-cigarette products, and even after the deal did not go to the FTC for preapproval of a divestiture.

in the market leader and public face of the youth-vaping crisis. CCFF ¶¶ 812-19. FDA Commissioner Scott Gottlieb noticed this logical inconsistency, writing in a February 6, 2019 letter that Altria’s plans for an investment in JLI “contradict” the commitments that Altria had made to the FDA concerning its obligation to address the youth-vaping epidemic. CCFF ¶¶ 1240-41. Kevin Burns, then-CEO of JLI, noticed this contradiction as well, testifying that “it seemed in conflict” that Altria would remove its pod-based products and “still want to have discussions about investing in a company whose primary product was a pod-based e-vapor product.” CCFF ¶ 1243. Further, while Altria acknowledges that the FDA had begun expressing concern about the youth vaping epidemic as early as April 2018 (Resps.’ Post-Trial Br. at 80), Altria made no steps to remove any of its products until October 25, less than two months before the deal was signed.<sup>35</sup>

Altria’s own documents indicate that the youth vaping issue was pretextual and that the removal of Elite was linked to the Transaction. CCFF ¶¶ 1244-47. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] CCFF ¶ 1245. { [REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶ 1246.

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<sup>35</sup> Respondents act incredulous at the suggestion that Altria “acted in bad-faith to mislead its regulator,” Resps.’ Post-Trial Br. at 83, but it would not be the first time the company made glaring misrepresentations for its own economic benefit. *See, e.g.*, Philip J. Hilts, *Tobacco Chiefs Say Cigarettes Aren’t Addictive*, N.Y. TIMES, Apr. 15, 1994, available at <https://www.nytimes.com/1994/04/15/us/tobacco-chiefs-say-cigarettes-aren-t-addictive.html>.

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Respondents describe Elite as a “commercial failure,” Resps.’ Post-Trial Br. at 81, but this characterization is unsupported by the record.<sup>36</sup> Altria executives consistently testified that Elite’s sales were growing in 2018. CCFF ¶ 1112. Furthermore, in a July 26, 2018 public statement to investors—which are required to be truthful—Altria’s then-CEO Howard Willard stated that “Nu Mark grew volume by approximately 16% in the quarter and 23% for the first half, primarily driven by expanded distribution” and that MarkTen Elite and MarkTen Bold were “getting traction with consumers.” CCFF ¶ 1113. Elite’s average sales per store also grew from May to July 2018 in major retail chains including Walgreens, 7-Eleven, Wawa, Speedway, and Sheetz. CCFF ¶ 1117. According to IRI data, from the week of May 20, 2018, to the week of June 24, 2018, MarkTen Elite’s sales increased from \$135K to \$445K (or by 230 percent), and in one week alone in June 2018, MarkTen Elite’s sales increased by 77.9 percent. CCFF ¶ 1118. As of July 2018, Elite had a 38 percent year-to-date positive marginal contribution, excluding one-time marketing costs. CCFF ¶ 1121. Joseph O’Hara, JLI’s competitive intelligence expert, concluded that Elite was one of only a very few products with “long-term viability.” CCFF ¶ 1129; PX2289 (JLI) at 021 (showing only five products with “Long-Term Viability”). An Altria presentation from August 27, 2018, projected positive and growing margins and sales volume for MarkTen Elite for 2019 and 2020, as well as declining promotional spending. CCFF ¶ 1130. Altria’s own research showed that Elite performed well against JUUL on multiple dimensions and was “consistently preferred over . . . JUUL.” CCFF ¶ 1131.

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<sup>36</sup> Notably, Respondents have not raised a failing firm defense to the Section 7 claim nor could they satisfy the defense’s demanding requirements. *See United States v. Energy Sols. Inc.*, 265 F. Supp. 3d 415, 44 (D. Del. 2017) (Respondents “have the burden of showing (1) that the resources of [one firm] were so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure and (2) that there was no other prospective purchaser for it.”) (citing *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 459, 555 (1971) (internal quotations omitted).

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Altria took Elite from zero to 25,000 retail stores from February to October 2018, but Altria pulled the product before it had the opportunity to succeed. CCFE ¶¶ 1124, 1144-62. As of September 28, 2018, Altria was planning new waves of Elite expansion for October 8, October 29, and November 19, 2018, as well as two additional waves for Q1 2019. CCFE ¶ 1147. Quigley testified that Altria planned to expand MarkTen Elite to 37,000 stores by the end of 2018, and that Altria would have been able to do so if not for the discontinuation of the product. CCFE ¶ 1148. When Quigley first learned that Altria executives were considering discontinuing Elite, he was surprised because he found it unusual that Altria would launch a product, see it grow, and then withdraw it several months later. CCFE ¶ 1151. Paul Crozier, Sheetz’s category manager for cigarettes and tobacco, testified that it was uncommon for a vendor to Sheetz to remove a new product only eight months after its launch. CCFE ¶ 1157. In Crozier’s view, Altria did not give Elite “enough time . . . to prove itself out” before discontinuing the product in October 2018. CCFE ¶ 1158. Jeff Eldridge, ITG Brand’s Vice President, Area Central, similarly testified that he was surprised when Altria withdrew MarkTen Elite from the market and that he thought it was unusual for Altria to introduce a product and then announce they were pulling it off the market less than a year later. CCFE ¶ 1160.

Respondents claim that Elite was doomed to fail due to its lack of nicotine salts. Resps.’ Post-Trial Br. at 81-82. But other manufacturers continue to market e-cigarette products without nicotine salts, such as ITG’s *myblu* freebase pods. CCFE ¶¶ 1166-68. As Farrell of NJOY explained, {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED] } CCFE ¶ 1170.

Moreover, Altria was planning improvements to Elite—under the moniker Elite 2.0—which would include nicotine salts, along with “material changes, electronic upgrades, and additional flavor offerings.” CCFE ¶ 1283. As of August 2018, Altria was planning three studies in September 2018 to support Elite 2.0 development, all of which involved qualitatively assessing the performance of MarkTen Elite 2.0 prototypes by having adult tobacco consumers sample the product. CCFE ¶ 1286. Altria’s August 2018 test results indicated that Elite 2.0’s nicotine-by-weight and salt formulation achieved results similar to JUUL. CCFE ¶ 1287. In an October 2018 consumer research study, participants described one Elite 2.0 prototype as having a “smooth but not too smooth draw,” with a “full and consistent volume of vapor upon inhale and exhale that was reminiscent of a cigarette experience,” and “immediate nicotine satisfaction achieved within 3-4 puffs.” CCFE ¶ 1292. Altria expected design for Elite 2.0 to be locked by the second quarter of 2020. CCFE ¶ 1294.

Next, Respondents ask the Court to simply assume that Elite would not receive a PMTA (Resps.’ Post-Trial Br. at 81), but this conclusion is highly speculative and contrary to the weight of the evidence. First, as Joe Murillo testified, it is “difficult for anybody” to predict whether a PMTA will be successful. CCFE ¶ 1898. Regarding the PMTA process, Kevin Burns testified that, “given, frankly, the lack of clarity, [JLI] had to interpret the PMTA requirement and design a program which we hoped would satisfy the PMTA. But the company was in uncharted territory. And frankly, outside of the IQOS product, which is a slightly different product, there was no certainty about what the requirements were going to be.” CCFE ¶ 1900. Altria’s PMTA plans were well advanced by the time of the Transaction. CCFE ¶¶ 1258-66. Jody Begley

testified that in 2017 Nu Mark { [REDACTED] } CCFE ¶ 1259. On February 21, 2018, Willard stated at an Altria investor conference that Altria was planning “to file PMTAs for MarkTen [in 2018].” CCFE ¶ 1262 (“We plan to file PMTAs for MarkTen this year, with MRTP applications to follow. In those applications, we expect to submit robust scientific evidence to demonstrate MarkTen’s harm reduction potential compared to cigarettes.”). An August 10, 2018 Altria presentation stated that the “MarkTen PMTA application is 75% complete.” CCFE ¶ 1264. { [REDACTED] } [REDACTED] } CCFE ¶ 1266 (emphasis in original).

As for Elite, Altria believed the product could obtain a PMTA. CCFE ¶¶ 1267-74. As of August 30, 2018, Altria planned to submit a PMTA for Elite. CCFE ¶ 1268. By that time, Altria had assessed that Elite “achieved overall satisfaction primarily due to perceptions of ‘fullness’ throughout the overall inhale/exhale experience.” CCFE ¶ 1269. Quigley testified that in 2018, Altria was “doing ‘work planning’ for a PMTA for Elite,” meaning that Altria was “[d]etermining what studies needed to be done, how long it would take, how many people.” CCFE ¶ 1270. Quigley further testified that while Elite had certain design issues, Altria “had the PMTA plan to try to solve those.” CCFE ¶ 1272. Furthermore, as of 2018, Altria would not have needed to submit any PMTAs until August 2022—a date almost *four years* away. CCFE ¶ 1257.

Respondents claim that Altria’s products lacked the potential to convert adult smokers and that this failure would prevent any Altria product from obtaining PMTA approval. Resps.’ Post-Trial Br. at 83-84. But Respondents lack support for this claim, and in fact Altria had

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evidence that its products *did* have conversion potential. CCFF ¶¶ 1301-22. Dr. Gardner testified that he was “not aware of the [e-cigarette] industry getting a consensus together on e-vapor conversion” and that he did not think Altria “understood what drove conversion to e-vapor products.” CCFF ¶ 1302. As of September 19, 2018, Altria had not “measured conversion potential of any of [its] products to effectively know what is working, what isn’t and why.” CCFF ¶ 1304. Moreover, a January 19, 2018 Altria presentation indicated that “[b]y 3 weeks of testing, Elite begins to demonstrate its propensity to replace cigarette occasions among” adult users of both cigarettes and e-cigarettes. CCFF ¶ 1311. According to an email written by Craig Schwartz on May 1, 2018, Altria home-use tests “confirm[ed] [Altria had] a good horse in the race that truly merits incenting Trial at all levels/channels.” CCFF ¶ 1312.

Respondents also ignore that Altria’s products presented less downside risk because, unlike with JUUL, there is little evidence of youth initiation with any of Altria’s offerings. CCFF ¶¶ 1323-52. In particular, cigalikes, products with low nicotine, products without nicotine salts, and non-flavored products are believed to present less youth appeal, and Altria had products with each of those features in its portfolio. CCFF ¶¶ 1328-44. Further, Altria executives uniformly testified that there was no evidence of youth use or initiation with any of Nu Mark’s products. CCFF ¶¶ 1345-52.

Additionally, the evidence shows that consumers appreciate having e-vapor products with different levels of nicotine on the market. CCFF ¶¶ 1177-88. As Kevin Burns, former CEO of JLI, testified regarding JLI’s decision to offer e-cigarettes at different nicotine strengths, some e-cigarette consumers “might have thought that a 5 percent, for example, was too strong, but they would have an alternative that was lower nicotine strength.” CCFF ¶ 1182. Further, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } CCFF. ¶ 1187. Therefore, the record does not support Respondents’ speculative claim that Altria’s products would be unable to obtain a PMTA.

**2. Altria’s Stated Reasons for Pulling Its Remaining E-Cigarette Products Are Pretextual and Inconsistent with the Evidence**

Respondents claim that Altria’s decision to remove its remaining e-cigarette products and to shut down Nu Mark on December 7, 2018 was motivated by the “current and expected financial performance” of Altria’s e-cigarette products and the presence of regulatory hurdles. Resps.’ Post-Trial Br. at 84. Once again, Respondents’ claim belies the weight of the evidence. Sophisticated market analysts immediately linked Nu Mark’s exit to the rumored Altria/JLI deal. The very day that Altria announced it was shutting down Nu Mark, Merrill Lynch released a report stating that they “see this move as clearing the decks for [Altria’s] next possible investment in” JLI. CCFF ¶ 1023. Financial advisory firm Cenkos Securities similarly described the discontinuation as a “clearing of the decks of the old attempts at e-vapour,” which “seem[ed] to be a fairly clear pointer” towards Altria buying a stake in JLI. CCFF ¶ 1024. Deutsche Bank wrote that the discontinuation of Altria’s e-cigarette products was [REDACTED]

[REDACTED] } CCFF ¶ 1022. Barclays commented that the discontinuation of MarkTen “suggest[s] that Altria might be exploring strategic opportunities in its e-cig business . . . there has recently been heightened speculation around Altria potentially investing in JUUL.” CCFF ¶ 1025.



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Morgan Stanley was “surprised to see the company forgo this business altogether, given the amount of investment it has already put into the category, shifting consumer preferences towards [reduced-risk products] over the long-term, and a regulatory backdrop that aims to encourage a shift down ‘the continuum of risk.’” CCF ¶ 1020. And Wells Fargo described the discontinuation of MarkTen as a “surprise move,” but noted that it “wouldn’t be surprised if an announcement to acquire JUUL is imminent.” CCF ¶ 1021. These market observers recognized that Altria’s decision to exit the U.S. closed-system e-cigarette market was peculiarly unique among the giants of the tobacco industry and could only be explained by Altria’s investment in JLI. The overwhelming evidence in this case further support this view. CCF ¶¶ 1132-43.

Altria’s customers and competitors expressed similar surprise at Altria’s abandonment of its e-cigarette business. CCF ¶¶ 1017-19, 1026-27. William Kloss, Category Manager for Tobacco and Alcohol products at Wawa, Inc., stated that he was surprised that Altria discontinued MarkTen because of the substantial investments in marketing and displaying MarkTen products that Altria had made. CCF ¶ 1026. When Paul Crozier of Sheetz first heard about Altria’s market exit, he was “surprised they were exiting the category” because Altria had a leadership position in the other tobacco categories, such as combustible cigarettes, smokeless tobacco, and cigars, and because Altria’s e-cigarettes were still the second biggest seller at Sheetz. CCF ¶ 1027. Martin King of PMI testified that Altria’s decision to exit the market did not make sense to him:

[I]nvestors and others were adamant that companies like PMI and Altria address the e-cigarette space and have some way to compete and make sure that they’re not being disrupted, and it would have been, I think, unusual for a major tobacco company at the time not to have some initiative or way to deal with the growth of e-cigarettes. CCF ¶ 1017.

Huckabee of Reynolds testified that he was “very surprised” by Altria’s announcement that it would withdraw its MarkTen products because “Altria had committed a great deal of resources

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to the marketing and distribution of MarkTen products, and the brand features very prominently in its activities certainly from a marketing standpoint, throughout the industry, and at retail. So the removal of the products comprised a substantial strategic shift.” CCFF ¶ 1018. Eldridge of ITG testified that he was “surprised” by Altria’s announcement that it would withdraw its MarkTen products because he “heard it was a good product and felt that they had marketing power to drive the business in [the e-cigarette] space.” CCFF ¶ 1019. Indeed, as of August 2018, the MarkTen cigalike platform was the second fastest growing e-cigarette brand in the U.S. behind only JUUL. CCRRFF ¶ 1502. The qualitative evidence of the industry’s surprise at Altria’s sudden exit is consistent with Complaint Counsel’s expert Dr. Dov Rothman’s analysis, which showed that Altria had a strong incentive to participate in the growing and strategically important closed-system e-cigarette market. CCFF ¶¶ 1410-11, 1528.

Respondents’ claims that Altria’s remaining products could not obtain PMTA approval are equally dubious. As discussed above,<sup>37</sup> it is “difficult for anybody” to predict which products would receive FDA approval under the novel PMTA regime, and Altria’s work on the cigalike PMTA was already “75% complete” in August 2018. CCFF ¶¶ 1264, 1898. Altria executives repeatedly made statements, both public and internally, expressing their full intention to seek PMTA approval for Altria’s MarkTen cigalike in 2018. CCFF ¶¶ 1258-66. While Altria claims to have experienced a “Eureka” moment concerning the viability of its products in June 2018 (Resps.’ Post-Trial Br. at 2, 27), Altria made no steps to remove these products until October and then December, suspiciously close to the period in time when the deal was on a glide path to closing.<sup>38</sup>

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<sup>37</sup> See *supra* Discussion § I.B.1.

<sup>38</sup> See *supra* Discussion § I.A.1.

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In sum, Respondents’ purported alternative justifications for Altria’s market exit lack business sense. They run contrary to Altria’s stated goals of achieving long-term leadership in the e-cigarette category and developing a diverse pipeline of e-cigarette products, by “hav[ing] a lot of different bets.” CCF ¶¶ 102-03, 1560-61. Indeed, Altria’s complete market exit only makes business sense in the context of Altria’s investment in JUUL. Therefore, Respondents’ attempts to craft pretextual justifications are further support for finding that Respondents’ entered into an illegal agreement. *See Standard Roofing*, 156 F.3d at 478 (“pretextual excuses are circumstantial evidence that can disprove the likelihood of independent action.”); *R.M. Packer Co.*, 635 F.3d at 585 (evidence of pretext can “strengthen an inference of joint action that is otherwise in evidence.”).

**C. Complaint Counsel’s Section 7 Claim Stands Independently from Its Section 1 Claim**

Respondents’ assertion that Complaint Counsel’s Section 7 claim would fail if Complaint Counsel “fail[s] to prove a secret agreement or pretext” (Resps.’ Post-Trial Br. at 88) is wrong and should be disregarded. Of course, if the Court finds that Complaint Counsel met its burden to prove its Section 1 claim, Complaint Counsel would also prevail on its Section 7 claim. CC’s Post-Trial Br. at 72-77; Discussion §§ II.C-D, *infra*. However, even if the Court finds that Complaint Counsel did not prove the existence of an illegal agreement under Section 1, Complaint Counsel’s Section 7 claim is still valid if the Court finds that, but for the Transaction, Altria would not have exited the closed-system e-cigarette market.<sup>39</sup> In that scenario, the Court would treat Altria as an actual competitor and the Transaction’s competitive effects would encompass everything resulting from Altria’s complete exit from the closed-system e-cigarette

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<sup>39</sup> *See supra* Discussion § I.B.

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market, which amounts to a substantial lessening of competition.<sup>40</sup> Second, even if the Court credits Altria's dubious claim that it would have shut down its Nu Mark subsidiary and exited the market even without the Transaction, Complaint Counsel would still prevail on its Section 7 claim based on an actual potential competition theory, as explained below in Discussion Section II.D.3.

## **II. There Is Ample Evidence of Actual and Likely Competitive Harm Under Both Section 1 and Section 7**

Under the rule of reason framework for Section 1 of the Sherman Act, which can establish liability under Section 5 of the FTC Act, Complaint Counsel has met its initial burden to show anticompetitive effects as shown in Complaint Counsel's Post-Trial Brief. CC's Post-Trial Br. at 58-65; *Impax Labs.*, 994 F.3d at 492 (citing *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("The initial burden is on the FTC to show anticompetitive effects.")). Then the burden shifts to Respondents to "demonstrate that the restraint produced procompetitive benefits," which they completely failed to do. *Id.*; CC's Post-Trial Br. at 65-66; Discussion Section II.F-G, *infra*. Because the anticompetitive harm vastly outweighs any speculative procompetitive benefits, the agreement is illegal under Section 1 of the Sherman Act, thus violating Section 5 of the FTC Act. CC's Post-Trial Br. at 67-68; *Impax*, 994 F.3d at 492 ("If the anticompetitive harms outweigh the procompetitive benefits, then the agreement is illegal."). For Sherman Act Section 1 analysis, this framework "do[es] not represent a rote checklist, nor may [it] be employed as an inflexible substitute for careful analysis." *NCAA v. Alston*,—U.S.—, 141 S. Ct. 2141, 2160 (2021).

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<sup>40</sup> See *infra* Discussion § II.C.

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Under Section 7 of the Clayton Act, acquisitions that create a reasonable probability of anticompetitive effects are illegal. *See, e.g., FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991). Under the *Baker Hughes* burdening-shifting framework, Complaint Counsel established a presumption of anticompetitive harm by showing undue concentration. CC's Post-Trial Br. at 72-77; Discussion § II.C, *infra*; *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990); *In re Polypore Int'l, Inc.*, Docket No. 9327, 2010 WL 9434806, at \*165-66 (F.T.C. Mar. 1, 2010) (Initial Decision). Complaint Counsel bolstered the presumption by showing ample evidence of competitive harm caused by the Transaction. CC's Post-Trial Br. at 77-83. Facing the government's strong *prima facie* case, Respondents utterly failed to rebut the presumption. CC's Post-Trial Br. at 83-94.

Despite the two different statutory frameworks and distinct lines of case law, however, Respondents try to obfuscate the relevant legal standards for Complaint Counsel's separate Section 1 and Section 7 claims by lumping two different standards together and making misleading claims about what Complaint Counsel's burdens are for Count I (FTC Act Section 5 under Sherman Act Section 1 principles) and Count II (Clayton Act Section 7). Resps.' Post-Trial Br. at 88-89. Right after citing the legal standard for a Section 7 of the Clayton Act claim, including a cite to the statute itself, 15 U.S.C. § 18, Respondents make a misleading claim by citing a single Section 1 case to mischaracterize a Section 7 plaintiff's burden. Resps.' Post-Trial Br. at 89 (citing *Alston*, 141 S. Ct. at 2160, right after stating the Section 7 legal standard). While Complaint Counsel firmly maintains its position that it has met the burden to prove *both* its Section 1 and Section 7 claims, and that Respondents have failed to rebut Complaint Counsel's *prima facie* cases, the Court should apply the correct legal standards for analyzing each claim

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appropriately despite Respondents' ill-conceived efforts to conflate Section 1 and Section 7 jurisprudence.

As Complaint Counsel previewed in its opening statement, the Section 7 case before the Court is compelling: Altria was a significant competitor in the U.S. closed-system e-cigarette market before the Transaction and had the ability and incentive to continue competing vigorously along a number of dimensions against JLI and other competitors. CC's Post-Trial Br. at 77-83; Discussion § II.D, *infra*. Testimony, contemporaneous business documents and communications, and expert analysis support this conclusion while detailing the significant consumer harm that resulted from Altria's exit. CCFF ¶¶ 1408-730. Crediting Respondents' claim that the leading U.S. tobacco firm was somehow not a significant competitor in the closed-system e-cigarette market would require the Court to ignore the overwhelming evidence of Altria's efforts to compete on price, product innovation, and shelf space. CCFF ¶¶ 1418-92. It is clear from the record that with Altria's exit, consumers lost the benefits of Altria's price, innovation, and shelf space competition. CCFF ¶¶ 1527-87. For example, Altria's products were among the lowest priced e-cigarettes on the market, and Altria's MarkTen Elite product was priced below JUUL. CCFF ¶ 1824. Altria was also continuously innovating and improving its products. CCFF ¶¶ 1463-92.

Respondents likewise ask this Court to entertain the fanciful notion that Altria was not well positioned to compete in the future against its e-cigarette rivals, when in reality, the firm maintained an impressive arsenal of competitive weapons matched by an unwavering commitment to lead the e-cigarette category that it frequently touted publicly. CCFF ¶¶ 92-108, 409-544. As Complaint Counsel showed during the evidentiary hearing and summarized in its post-trial findings and briefs, Altria's exit from the market due to the Transaction has already

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caused significant competitive harm by completely removing an important competitive force from the market, and will continue to harm consumers until this Court redresses it by granting the requested relief. CCFF ¶¶ 1408-730; CC's Post-Trial Br. at 77-83, 98-99; Discussion § VI, *infra*.

Complaint Counsel has also refuted Respondents' claims addressing Altria's competitive significance, by showing that: (1) Altria was not unique in losing share to JUUL in 2018, yet was the only firm to completely exit (CCFF ¶¶ 1132-43); (2) Altria's e-cigarette sales volume was actually growing before its executives decided to shut down its entire e-cigarette business (CCFF ¶¶ 1097, 1099); (3) right up to the shutdown, Altria's researchers were working hard to improve its e-liquid, including adding formulations with nicotine salts, and were making progress toward PMTA milestones (CCFF ¶¶ 1463-92, 1538-87); and (4) but for the Transaction, Altria would not only have been able to continue competing with its existing products but also had more than enough time to prepare PMTA submissions with newly developed, licensed, or acquired products, [REDACTED] (CCFF ¶¶ 1588-730; *see also* Discussion § II.D, *infra*). Therefore, Complaint Counsel has met its initial burden to show anticompetitive effects under Section 1 of the Sherman Act and has also bolstered the presumption of anticompetitive harm under Section 7 of the Clayton Act. And, as shown below, Respondents have failed to rebut either claim and should be held liable under both Counts. Discussion §§ II.F-G, *infra*.

**A. Respondents' Post-Transaction Competitive Environment Story Is Misleading and Myopic and Not the Right Comparison**

The effects question central to this case is how Altria's complete exit from the U.S. closed-system e-cigarette market—a decision inextricably linked to its Transaction with JLI (CCFF ¶¶ 1390-407)—has affected and will likely affect competition and innovation in the relevant market. And this question can only be answered by comparing two states of the

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marketplace in the post-Transaction period: (1) the market with the Transaction (the actual world, which played out without Altria competing) and (2) the market without the Transaction (the but-for world, in which Altria would have been competing, holding all else equal). CC’s Post-Trial Br. at 77; CCF ¶¶ 1757-61. Rather than facing this fundamental question head-on and rebutting it, Respondents attempt to lead this Court astray by offering their economic expert’s misleading and fatally flawed comparison of the before-and-after “real world.” Resps.’ Post-Trial Br. at 90-91. This is not the appropriate analysis. CCF ¶¶ 2094-122. Rather, the fundamental antitrust question for assessing the competitive effects in this case is: What would the competitive environment look like today if Altria continued to compete in the closed-system e-cigarette market instead of withdrawing from it completely? Respondents’ before-and-after comparison does nothing to answer this question. But the quantitative and qualitative evidence presented in this case show that the answer to the question is clear: but for the Transaction, Altria would have competed vigorously on price, innovation, and shelf space in the closed-system e-cigarette market, and that competition, which benefitted and would have continued to benefit consumers, has been completely lost because of the Transaction. CC’s Post-Trial Br. at 60-65; CCF ¶¶ 409-544, 1527-730. While the evolving market environment in the post-Transaction period is relevant for the analysis of entry and efficiencies, discussed in Discussion Sections II.F-G, ultimately, Respondents’ before-and-after comparison poses the wrong question and the Court should decline their invitation to waste time answering it.

**1. Respondents’ Arguments Regarding the Proper Role of Post-Acquisition Evidence in the Section 7 Analysis of This Case Are Misleading**

Respondents’ simplistic comparison of the post-Transaction period with the pre-Transaction period is misleading because it restricts Altria’s overall competitive impact to its



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2018 on-market e-cigarette product portfolio.<sup>41</sup> The evidence clearly shows, however, that when Altria exited the closed-system e-cigarette market at the end of 2018, Altria had far more at its disposal than just the existing MarkTen suite of products that were on market at the time. CCFF ¶¶ 515-31, 1538-730.

Respondents also fail to apply the proper framework and appropriate analysis under the U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (“*Merger Guidelines*”). See *Merger Guidelines* § 1 (“Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”). Respondents ignore evidence demonstrating that Altria would have continued to compete in the closed-system e-cigarette market but for the Transaction. CCFF ¶¶ 493-544, 1034-407. As Dr. Rothman testified, the appropriate way to evaluate the competitive effects of the Transaction is to analyze “the difference between competition in the actual world and competition in the but-for-world. . . . In the actual world, Altria and JLI enter into the transaction. . . . In the but-for-world, the transaction doesn’t happen.” CCFF ¶ 1759.

While Respondents cite several consummated merger (or pre-HSR-regime merger) cases to put a facade of legal support on their misguided before-and-after comparison (Resps.’ Post-Trial Br. at 90-91), the cited cases are ultimately unavailing. Importantly, none of the cited cases involved a situation where one of the merging companies *stopped competing and withdrew from*

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<sup>41</sup> This also runs counter to the forward-looking nature of the competitive effects analysis. See, e.g., Gregory J. Werden & Kristen C. Limarzi, *Forward-Looking Merger Analysis and the Superfluous Potential Competition Doctrine*, 77 Antitrust L.J. 109, 142–43 (2010); Deborah L. Feinstein, Director, Bureau of Competition, Federal Trade Comm’n, *The Forward-Looking Nature of Merger Analysis*, Remarks at Advanced Antitrust U.S. – San Francisco Conference (Feb. 6, 2014), available at [https://www.ftc.gov/system/files/documents/public\\_statements/forward-looking-nature-merger-analysis/140206mergeranalysis-dlf.pdf](https://www.ftc.gov/system/files/documents/public_statements/forward-looking-nature-merger-analysis/140206mergeranalysis-dlf.pdf).

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*the market* in anticipation of a pending merger.<sup>42</sup> Thus, Respondents' reliance on those cases is inapposite and they do not cite any relevant case law that provides support to their false claim that a before-and-after comparison could show competitive effects of a transaction like the instant case. In reality, the Commission and courts have acknowledged that a showing of actual post-transaction harm is not required under Section 7. Indeed, the Supreme Court in *General Dynamics* explained that the absence of "concrete anticompetitive symptoms . . . does not itself imply that competition has not already been affected." 415 U.S. at 505. "Even in a consummated merger, the ultimate issue under Section 7 is whether anticompetitive effects are reasonably probable in the future, not whether such effects have occurred as of the time of trial." *Polypore Int'l, Inc.*, Docket No. 9327, 2010 WL 9549988, at \*8 (F.T.C. Nov. 5, 2010)<sup>8</sup> (citing *General Dynamics*, 415 U.S. at 505-06). "And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before [Section 7] can be called into play. If the enforcement of [Section 7] turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated." *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

Further, Respondents' reliance on *General Dynamics*, *Lektro-Vend Corp.*, and *Chicago Bridge and Iron*, for the proposition that post-acquisition evidence should be automatically treated as reliable absent a showing of potential manipulation is misplaced. *See* Resps.' Post-Trial Br. at 90. As an initial matter, Respondents have been aware that the Transaction has been under federal antitrust scrutiny for over two years now, which raises the possibility that at least some of Respondents' actions taken after the Transaction was announced, such as JLI's decision

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<sup>42</sup> Respondents cite *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981), *United States v. Bazaarvoice, Inc.*, No. 13-cv-133, 2014 WL 203966, at \*74 (N.D. Cal. Jan. 8, 2014), *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 506 (1974), *In re AMR Corp.*, 625 B.R. 215, 250 (Bankr. S.D.N.Y. 2021), and *United States v. Int'l Harvester Co.*, 564 F.2d 769, 780 (7th Cir. 1977).

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to pull its mint-flavored products from the market in November 2019, could have been subject to manipulation.<sup>43</sup> CCRRFF ¶ 998. More importantly, even if post-Transaction evidence is not subject to manipulation, it can still be distorted by external factors that render it less reliable. Indeed, the federal district court handling the private antitrust actions against Altria and JLI recently held that the potential impact of JLI's withdrawal of its fruit flavors in response to public pressure meant that Altria and JLI could not prevail on their motion to dismiss the case simply by citing evidence that absolute prices declined after the deal. *In re JUUL Labs, Inc., Antitrust Litig.*, 2021 WL 3675208 at \*16-17. Respondents repeat that failed argument before this Court despite substantial evidence in the record that the youth-vaping and vaping-related health crises negatively affected JLI's market performance more than any other e-cigarette company. CCF ¶¶ 1248-53, 1462, 1912-17; CCRRFF ¶ 1715.

While Respondents attempt to insulate their post-acquisition evidence from similar judicial scrutiny by arguing that much of it flows from the competitive actions of third parties beyond the control of Respondents, that argument is likewise misleading. {

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } CCF ¶¶ 1532-37; CCRRFF ¶¶ 1304, 1307.

Respondents' reliance on *Bazaarvoice* is equally misplaced, as new entry has not offset the competitive harm caused by the Transaction, as discussed in Section II.F. *See* CCF ¶¶ 1765-870. In the *Bazaarvoice* discussion cited by Respondents, the court explained that "the probative

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<sup>43</sup> At a minimum, JLI's voluntary pulling of its most popular flavor—mint at the time—ahead of the FDA's flavor ban had a significant negative impact on JLI's pod sales. CCRRFF ¶ 998.

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value of [post-merger] evidence is *extremely limited*.” 2014 WL 203966 at \*73 (citations and quotation omitted) (emphasis added). And as the Supreme Court has explained: “The need for such a limitation is obvious. If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a [Section] 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.” *General Dynamics*, 415 U.S. at 504-05. Thus, “the essential question remains whether the probability of such *future* impact exists at the time of trial.” *Id.* at 505 (emphasis added). Further, in the case cited by Respondents, the court explained that “[t]his is especially true when the parties are aware of the government’s scrutiny and the potential for a court challenge.” *Bazaarvoice*, 2014 WL 203966 at \*73.

## **2. Respondents’ Arguments Regarding the Proper Role of Post-Acquisition Evidence in the Section 1 Analysis of This Case Are Misleading**

Respondents’ citation of *Alston* for the proposition that post-transaction evidence is critical for a Section 1 rule of reason analysis is also misleading. Resps.’ Post-Trial Br. at 90. While Complaint Counsel does not disagree that rule of reason analysis “generally requires a court to conduct a fact-specific assessment of market power and market structure to assess a challenged restraint’s actual effect on competition,” *Alston*, 141 S. Ct. at 2151 (internal citation and quotation marks omitted), the Supreme Court did not state that assessing “actual effects” requires courts to consider post-transaction (or post-agreement) evidence under Section 1. In fact, courts have found the opposite. “[I]t is a basic antitrust principle that the impact of an agreement on competition is assessed as of ‘the time it was adopted.’” *Impax*, 994 F.3d at 496 (quoting *Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.)). Thus, the court in *Impax* rejected the defendant’s argument that a challenged agreement “[did] not look anticompetitive in hindsight.” *Id.*; see also *U.S. Department of Justice and Federal*

*Trade Commission, Antitrust Guidelines for Collaborations Among Competitors* § 2.4 (2000)

(stating that the agencies “assess the competitive effects of a relevant agreement as of the time of possible harm to competition”). Here, application of that principle clearly establishes that the Transaction has caused actual and likely competitive harm without any offsetting benefits. CC’s Post-Trial Br. Section III.B; CCF ¶¶ 1408-734.

### **3. Respondents’ Analysis Ignores Critical Competitive Harms Under Both Section 1 and Section 7**

In addition to failing to conduct a proper analysis of the but-for world, Respondents also conveniently overlook several important anticompetitive effects arising from the Transaction. Resps.’ Post-Trial Br. at 91-95. In their brief, Respondents myopically focus only on the Transaction’s supposed lack of adverse effects on price, output, and concentration while asking the Court to turn a blind eye to the Transaction’s substantial anticompetitive effects on innovation and product variety, which may be more important than the traditional measures of market performance for dynamically evolving markets (such as the closed-system e-cigarette market). *See, e.g.*, William J. Baer & David A. Balto, *Antitrust Enforcement and High-Technology Markets*, 5 MICH. TELECOMM. & TECH. L. REV. 73, 74 (1999) (“[C]ompetition plays an important role in spurring innovation and in spreading the benefits of that innovation to consumers.”); Richard J. Gilbert, *Innovation Matters: Competition Policy for the High-Technology Economy* 83 (2020) (“The 2010 Horizontal Merger Guidelines are notable in a number of respects, one of which is their emphasis on innovation.”).<sup>44</sup>

The loss of innovation competition resulting from an anticompetitive merger is a significant form of competitive harm. *See Merger Guidelines* § 6.4 (“Competition often spurs

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<sup>44</sup> The book chapter is available at <https://direct.mit.edu/books/book/4844/chapter/625380/Merger-Policy-for-Innovation>.

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firms to innovate. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.”); *see also* *FTC v. Hackensack Meridian Health, Inc.*, No. CV 20-18140, 2021 WL 4145062, at \*24 (D.N.J. Aug. 4, 2021) (“If [the merging parties] were no longer competitors, it would remove an incentive for both entities to continue to improve quality metrics and offer innovative medical technology.”) (citing *Merger Guidelines* § 6.4). In their brief, Respondents do not even make any mention of the significant product research and development work that Altria was conducting, which is a telling sign that Respondents’ limited analysis ignores the innovation issue. *See* CCFE ¶¶ 1566-68, 1574.

Similarly, the loss of product variety and choice resulting from Altria’s complete exit from the market has harmed consumers who preferred Altria’s products. CCFE ¶¶ 1493-526; *see also* *In re McWane, Inc.*, Docket No. 9351, 2014 WL 556261, at \*28 (F.T.C. Jan. 30, 2014) (explaining that “den[ying] its customers the ability to make a meaningful choice” is “another adverse impact on competition”) (citations omitted); *see also* Neil W. Averitt & Robert H. Lande, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007). In fact, Altria’s closed-system e-cigarette products (CCFE ¶¶ 1493-526), including MarkTen cigalikes and MarkTen Elite—which were “getting traction with consumers” as Altria’s Willard told investors on July 26, 2018 (CCFE ¶ 1499)—were the second-fastest growing e-cigarette products behind JUUL in 2018 (CCFE ¶¶ 1507-08), and had the third-highest overall share in the U.S. closed-system e-cigarette market in 2018 up until Altria’s complete exit (CCFE ¶ 1510).

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Contrary to Respondents' assertion, changes in prices are only one of the possible competitive effects considered under Section 1 and Section 7 case law. As the Supreme Court clearly explained: "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that *all elements of a bargain*—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *Nat'l Soc. of Pro. Engineers v. United States*, 435 U.S. 679, 695 (1978) (emphasis added); *see also In re Hosp. Corp. of Am.*, Docket No. 9161, 1985 WL 668927, at \*93 (F.T.C. Oct. 25, 1985) (explaining that hospitals compete in a variety of ways, including "non-price and price competition" with respect to "the range and quality of services, equipment offerings and the quality of hospital personnel they provide"), *aff'd*, 807 F.2d 1381 (7th Cir. 1986).

#### **4. Respondents' Arguments as to the Transaction's Lack of Adverse Effects on Price, Quantity, and Output Are Flawed**

Many of Respondents' assertions regarding prices, output, and market concentration are incomplete, misleading, or simply wrong. First, Respondents attempt to impose far too high a burden on what Complaint Counsel is required to prove in order to prevail on its Section 7 claim. As Judge Posner has observed, "Section 7 [of the Clayton Act] does not require proof that a merger . . . caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable . . . is called for." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) (Posner, J.).

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But even accepting Respondents' erroneous contention that Complaint Counsel is required to prove that the Transaction actually resulted in higher prices, Respondents gloss over the fact that pod prices have remained relatively stable despite all the negative publicity created by the 2019 vaping-related health crisis and the FDA's flavor ban. CRRFF ¶¶ 1476-79. This relative stability is the evidence of persistent pricing power by the market-leading e-cigarette companies like JLI. CRRFF ¶ 1479; *see also Merger Guidelines* § 5.3 ("If a firm has retained its market share even after its price has increased *relative to* those of its rivals, that firm already faces limited competitive constraints, making it less likely that its remaining rivals will replace the competition lost if one of that firm's important rivals is eliminated due to a merger.") (emphasis added).

Respondents' arguments about the absolute changes to device and cartridge prices in the post-Transaction world also omit a critical fact: those metrics can be influenced by a number of exogenous factors, several of which Respondents' expert failed to control for in his analysis. CFF ¶¶ 1830-31. For example, the more widespread adoption of the so-called "razor-and-blades" business model for e-cigarettes<sup>45</sup> could well account for the increasing divergence between pod prices, which dropped by only about fifteen percent in two years, and device prices, which fell by a little over seventy percent during the same period. *See* Resps.' Post-Trial Br. at 92. Moreover, the recent youth vaping and health crises may have further contributed to this divide by discouraging new users from purchasing devices while existing users, who are presumably addicted to nicotine, continued to purchase pods. CRRFF ¶¶ 1476-79. The FDA's flavor ban, along with JLI's earlier pull of its popular flavors from the market, presents a particularly strong risk of generating a distorted picture of the post-Transaction world because its

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<sup>45</sup> *See, e.g.,* Randal C. Picker, *The Razors-and-Blades Myth(s)*, 78 U. CHI. L.R. 225 (2011).



impact was not uniform across competitors. CCRRFF ¶¶ 13, 1458, 1470-74. Dr. Rothman correctly identified this fatal flaw in Respondents' expert Dr. Kevin Murphy's analysis, which fails to control for these confounding variables. CCF ¶¶ 1758-59.<sup>46</sup>

Additionally, Respondents' citation of *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986), is inapposite and misleading. Resps.' Post-Trial Br. at 93. *Matsushita* involved an alleged conspiracy among Japanese television set manufacturers to lower prices in the American market in order to drive out American competitors. *Matsushita*, 475 U.S. at 577-78. There, the Supreme Court noted that the district court had found that "the evidence that bore directly on the alleged *price-cutting conspiracy* did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it." *Id.* at 579 (emphasis added). Here, by contrast, Complaint Counsel does not allege any price-cutting conspiracy, but has demonstrated that Altria's shutdown of its e-cigarette business due to an agreement not to compete harmed consumers by completely eliminating all forms of current and future competition from Altria, including price competition, innovation competition, and competition for shelf space. *See* CCF ¶¶ 944-94, 1408-730. Actually, if Altria had not exited and had continued to compete in the closed-system e-cigarette market, Altria would also have competed by "cutting prices in order to increase business" against the market leader JLI and other competitors. *Matsushita*, 475 U.S. at 594. Because of the Transaction, the closed-system e-cigarette market completely lost this "very essence of competition" from Altria against JLI, NJOY, and Reynolds. *Id.*<sup>47</sup>

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<sup>46</sup> *See also* CCRRFF ¶¶ 1312-14, 1321, 1338, 1342, 1346, 1349, 1351, 1363, 1377-82.

<sup>47</sup> Similarly, Respondents' citation to *United States v. Int'l Harvester Co.*, 1976 WL 1298, at \*18-19 (N.D. Ill. Aug. 17, 1976) (Resps.' Post-Trial Br. at 93) is inapposite. In *Int'l Harvester*, the district court relied on "the expanding nature of the markets" and "evidence that a number of other firms are likely to enter the industry in the future" when it stated that "[t]he evidence in this record furnishes no reason to believe that the intensely competitive situation which presently exists . . . will diminish in the future." 1976 WL 1298, at \*18. However, it is undisputed here that barriers to entry in the closed-system e-cigarette market are high due to the FDA's regulatory framework and the

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Respondents' arguments as to concentration and output in the post-Transaction world fail for the same fatal flaw of failing to control for the confounding variables. *See* Resps.' Post-Trial Br. at 93-95. The relatively small changes in output and market concentration show that the U.S. closed-system e-cigarette market remains highly concentrated.<sup>48</sup> CCRRFF ¶¶ 1356-76.

Furthermore, any decline in JLI's post-Transaction market share coupled with gains by other large competitors, such as Reynolds and NJOY, is likewise subject to the same distorting influence of confounding variables as post-Transaction e-cigarette prices. CCFF ¶¶ 1825-31.

Finally, the FDA's recent actions denying marketing orders to over 90 percent of the submitted PMTAs threatens to usher in an even more concentrated market with only a select few competitors permitted to continue selling e-cigarettes.<sup>49</sup>

In the end, Respondents' assertion that current market conditions are "competitive" (without ever explaining what that means) does not reveal anything about *the competitive effects of this Transaction*. Respondents have utterly failed to address the core question of whether the but-for world, in which Altria would be continuing to compete alongside the existing competitors, would be more competitive than the current, post-Transaction environment. Rather than address this question, Respondents proceed to answer a different question that is more to their liking. By engaging in this misdirection, however, Respondents have left Complaint

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existing competition is expected to shrink because of the FDA's PMTA decisions. *See* CCFF ¶¶ 1765-804. Moreover, in *Int'l Harvester*, "both Steiger and Harvester have become stronger competitors in the four-wheel drive tractor market as a result of the Harvester stock purchase [of 39 percent in Steiger]," 1976 WL 1298 at \*19 (emphasis added), whereas here Altria fully exited the market with the acquisition of 35 percent of JLI, completely eliminating all forms of current and future competition from Altria, including price competition, innovation competition, and competition for shelf space. *See* CCFF §§ VIII.M, X.A-D.

<sup>48</sup> Additionally, Respondents and their expert engage in further misleading exercises by focusing on device-based market shares and not on cartridge-based shares, which reflect competitive significance more accurately. CCFF ¶¶ 1762-63; CCRRFF ¶ 1368.

<sup>49</sup> "FDA Makes Significant Progress in Science-Based Public Health Application Review, Taking Action on Over 90% of More Than 6.5 Million 'Deemed' New Tobacco Products Submitted." (*available at* <https://www.fda.gov/news-events/press-announcements/fda-makes-significant-progress-science-based-public-health-application-review-taking-action-over-90>).

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Counsel's strong *prima facie* case wholly un rebutted. CC's Post-Trial Br. at 75-83; Discussion § II.C, *infra*.

**B. Complaint Counsel Proved that the Sale of Closed-System E-Cigarettes Is the Relevant Product Market**

Respondents' principal criticism is that a closed-system e-cigarette market is too broad and that pod-based products and cigalikes should not be "lumped together" into a single market. Resps.' Post-Trial Br. at 96. This argument is meritless. First, Respondents ignore the considerable body of evidence demonstrating that the *Brown Shoe* practical indicia point to a distinct relevant product market consisting of closed-system e-cigarettes. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962). Second, Respondents' criticisms of Dr. Rothman's application of the hypothetical monopolist test are unavailing. Although Respondents insist that Dr. Rothman violated the "smallest market principle," they offer no evidence—none—that a market more narrow than closed-system e-cigarettes passes the hypothetical monopolist test. Indeed, Respondents' expert, Dr. Murphy, offered no opinion on whether there are separate relevant markets for cigalikes and pod-based products. CCF ¶ 2087.<sup>50</sup>

**1. The *Brown Shoe* Practical Indicia Establish that Closed-System E-Cigarettes Are a Relevant Product Market**

Despite Respondents' assertion that cigalikes and pod-based products cannot be included in the same market (Resps.' Post-Trial Br. at 96-100), Complaint Counsel has shown with ample evidence that closed-system e-cigarettes are a relevant product market based on the *Brown Shoe* "practical indicia" factors. CC's Post-Trial Br. at 18-26; CCF ¶¶ 218-394.

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<sup>50</sup> While market definition is necessary for analyzing the Section 7 claim, the Court does not need to precisely define the relevant market for deciding the Section 1 claim: As this Court stated "[w]hen 'horizontal restraints involve agreements between competitors not to compete in some way, [the Supreme Court] concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive.'" *In re Benco Dental Supply Co.*, Docket No. 9379, 2019 WL 5419393, at \*70 (F.T.C. Oct. 15, 2019) (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 n.7 (2018)).

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Respondents' contrary contention flies in the face of ordinary course business documents and testimony from Respondents' own executives and third-party witnesses who agree that both cigalikes and pod-based products are closed-system e-cigarettes and compete against each other in the same retail marketplace. CCFF ¶¶ 238-67, 299-350; CCRRFF ¶¶ 1407, 1409, 1411-12. Respondents' made-for-litigation claim is also inconsistent with their own ordinary course business documents, which consistently show that both Altria and JLI tracked market shares, sales volumes, and other key competitive metrics in an overall closed-system e-cigarette market that included both cigalikes and pod-based products. CCFF ¶¶ 299-340. Under well-established case law, industry recognition of a product or service as a "separate economic entity" is powerful evidence of the relevant product market. *Brown Shoe*, 370 U.S. at 325; *see also FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 30 (D.D.C. 2015); *United States v. H&R Block*, 833 F. Supp. 2d 36, 52-53 (D.D.C. 2011). In particular, courts pay "close attention to the defendants' ordinary course of business documents" because they "reveal the contours of competition from the perspective of the parties," who "may be presumed to have accurate perceptions of economic realities." *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 21 (D.D.C. 2017) (internal citations and quotation marks omitted); *see also H&R Block*, 833 F. Supp. 2d at 52-53 (concluding that the merging parties' documents were "strong evidence" of the relevant product market); *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986) (observing that market definition "is a matter of business reality—a matter of how the market is perceived by those who strive for profit in it"). When e-cigarette manufacturers tracked their products' performance against their rivals, they tracked both pod products and cigalikes in the overall closed-system e-cigarette market.<sup>51</sup> CCFF ¶¶ 240-

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<sup>51</sup> In fact, Respondents do not cite to ordinary course business documents that provide market shares in a hypothetical "cigalikes only" market and a hypothetical "pod-only" market. And that is not surprising, because e-cigarette companies (including Respondents) do not measure their products' performance in that way.

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43, 246, 248, 252, 256-59, 304-05, 309, 314-16, 319, 331, 334-36, 339; CCRRFF ¶¶ 1407-08. It is particularly noteworthy that JLI and Altria monitored each other's performance in the closed-system e-cigarette market before Altria had even launched the MarkTen Elite pod-based product. CCFF ¶¶ 299-310, 327-35. Moreover, after Altria launched MarkTen Elite, JLI continued to monitor Altria's performance for both Elite and MarkTen cigalikes. CCFF ¶¶ 311-22. Accepting Respondents' arguments would require this Court to entertain the rather absurd notion that both Altria and JLI wasted significant resources gathering competitive intelligence on each other when they did not actually compete in the same market.

As the record evidence demonstrates, the distinction between cigalikes and pod-based products is minimal at most and centers on the shape of the products. CCFF ¶¶ 278-79, 285. Cigalikes and pod-based products share a number of common features: cigalikes and pod-based products both use factory-sealed e-liquid containers (called pods or cartridges) (CCFF ¶¶ 286-87); both use e-liquids that have similar chemical characteristics and may, or may not, contain nicotine salts (CCFF ¶ 288); and both cigalikes and pod-based products offer similar ease of use and convenience (CCFF ¶ 291). Faced with these broad similarities, Respondents offer no coherent means of classifying a closed-system e-cigarette product into their proposed categories.<sup>52</sup> Likewise, Respondents' claims about the size and battery performance of cigalikes versus pod-based products are contradicted by the evidence in the record: some cigalike products (such as Vuse Vibe) are even larger than pod-based products and have more powerful batteries. CCRRFF ¶¶ 1391, 1396.

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<sup>52</sup> Respondents appear to suggest a somewhat tautological definition that cigalikes are the products that look like traditional cigarettes and carry a "stigma." Resps.' Post-Trial Br. 96-97. However, under this definition, it is unclear how Vuse Vibe or Logic Pro are classified, as these are round (cylindrical) cartridge-based closed-system e-cigarettes, but do not look like traditional cigarettes (they are mostly black and longer than traditional cigarettes). In fact, Respondents' economic expert's classifications of these products were contradicted by the third-party witnesses and ordinary course business documents. CCRRFF ¶¶ 1386-96, 1407.

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In a half-hearted attempt to argue that cigalikes and pod-based products appeal to distinct groups of consumers, Respondents rely almost entirely on anecdotal evidence from the self-serving testimony of Altria's executives, and provide no quantitative analysis or any ordinary course documents whatsoever to support their claims. *See* Resps.' Post-Trial Br. at 98. Simply put, Respondents' cherry-picked collection of anecdotes about consumer purchasing patterns, without any supporting quantitative analysis or ordinary course documents, should be given little weight by the Court. *See, e.g., United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 211 n.16 (D.D.C. 2017) (rejecting defendants' claim that certain market participants are significant competitors because none of the "industry witnesses . . . supplied evidence of anything other than anecdotal evidence . . ."), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).

Respondents' claim that cigalikes and pod-based products show distinct prices and promotion patterns (Resps.' Post-Trial Br. at 98-99) is flatly contradicted by the record evidence. As noted above, Altria vigorously competed against JLI on price and product promotions even before launching its first pod-based product, Elite. CCFF ¶¶ 327-35. Moreover, when Altria set the initial price of Elite, it considered the prices of *all* closed-system e-cigarette products, i.e., cigalikes as well as pods-based products. CCRRFF ¶ 1404. For its part, JLI viewed itself as competing against the major closed-system e-cigarette producers, including Altria, Reynolds, ITG, and NJOY, even *before* any of them launched a pod-based product. CCFF ¶¶ 299-307. Indeed, JLI went so far as {

[REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶¶ 301, 318, 406-07, 1435-37; CCRRFF ¶¶ 1407, 1412, 1418, 1421-26. Respondents once again ask this

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Court to turn a blind eye to this record evidence and adopt a market definition that defies reality.

See CCRRFF ¶¶ 1404-06.

Finally, Respondents make one last attempt to grasp at straws by arguing that there is industrywide recognition of cigalikes and pod-based products as belonging in separate markets. Resps.’ Post-Trial Br. at 99-100. The weight of the evidence overwhelmingly points to the opposite conclusion: the tobacco industry recognizes an overall closed-system e-cigarette market. CCFF ¶¶ 238-67; CCRRFF ¶¶ 1407-14. For example, NJOY’s Farrell testified that

[REDACTED]

[REDACTED]. CCRRFF ¶¶ 1395, 1406. Reynolds’

Huckabee testified that for Reynolds’ cigalikes, “[w]e regard our competitive set as all products that are sold and available in our channels. So products that compete for consumer purchase, very primarily in the convenience store channel, as I mentioned, these are -- these are almost without exception closed-system products . . . [including] [p]ods and cigalike products.”

CCRRFF ¶¶ 1395, 1406, 1413. Furthermore, industry data sources such as Nielsen and IRI, which nearly all industry participants (including Respondents) rely on for market share and other sales data, do not distinguish between cigalikes and pod-based products sold in the retail channels they cover; instead they report combined metrics for the entire closed-system e-cigarette market.<sup>53</sup> CCFF ¶ 275. The treatment of pod-based products and cigalikes at the hands of the FDA tells a similar story: in early 2020, the FDA made no distinction between cigalikes and pod-based products when it imposed its nontraditional flavor ban on e-cigarettes, applying the measure equally to all “cartridge-based e-cigarettes.” CCFF ¶¶ 207, 294. These are only a

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<sup>53</sup> In fact, industry sales data published by Nielsen and IRI do not systematically distinguish between cigalikes and pod-based products, as neither data set includes an indicator variable for this purpose. CCRRFF ¶ 1407 (citing PX5001 at 026-27 (¶ 38 & n.112) (Rothman Rebuttal Report)).

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few examples of the large body of evidence that the industry recognizes a closed-system e-cigarette product market. *See* CCFE ¶¶ 211-15, 223, 238-67, 341-50. In light of the widely held industry views regarding the closed-system e-cigarette market, it is hardly surprising that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } CCFE ¶ 251.

## 2. The Hypothetical Monopolist Test Shows that Closed-System E-Cigarettes Are a Relevant Product Market

Without their expert presenting an affirmative case as to what the relevant market is in this case,<sup>54</sup> Respondents assert that cigalikes and pod-based products cannot be included in the same market. Resps.' Post-Trial Br. at 96, 100-01. In addition to the *Brown Shoe* factors, however, robust economic evidence supports the conclusion that the sale of closed-system e-cigarettes is the appropriate relevant market in which to analyze the competitive effects of the Transaction. Complaint Counsel's economic expert conducted an extensive analysis applying the *Merger Guidelines* and using the hypothetical monopolist test. CC's Post-Trial Br. at 26-27; CCFE ¶¶ 397-407. This stands in stark contrast to the approach of Respondents' expert, who did not even bother conducting his own hypothetical monopolist test and did not provide any alternative product market definition. CCFE ¶¶ 2086-93. Ultimately, Respondents' arguments (Resps.' Post-Trial Br. at 100-01) amount to little more than quibbling with Dr. Rothman's data sources and attempting to misapply the *Merger Guidelines*' smallest-market principle. Both of these arguments are misleading and omit critical details about the data Dr. Rothman relied on

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<sup>54</sup> Unlike Complaint Counsel's economic expert, Dr. Rothman, who conducted a hypothetical monopolist test and showed that the closed-system e-cigarette market passed the test (CCFE ¶¶ 395-407), Respondents' expert, Dr. Murphy, did not express any opinion on what the appropriate relevant product market is in this case (CCFE ¶ 2086). Moreover, Dr. Murphy did not reach an opinion on whether there are separate relevant markets for cigalikes and pod-based products (CCFE ¶ 2087), nor test whether a market consisting of only cigalikes or only pod-based products passed the hypothetical monopolist test (CCFE ¶¶ 2089-90).



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and the correct approach to market definition explained in the *Merger Guidelines*. See *Merger Guidelines* § 4.1.

Respondents' critiques of the data that Dr. Rothman relied on to perform his hypothetical monopolist test amount to very little. Contrary to Respondents' accusation (Resps.' Post-Trial Br. at 100-01), Dr. Rothman did not rely exclusively on academic studies that predate the rise of pod-products for his elasticities. In fact, Dr. Rothman expressly relied on [REDACTED] [REDACTED] } CCFF ¶¶ 405-07; CCRRFF ¶¶ 1418, 1421-26. [REDACTED] [REDACTED] } CCFF ¶ 406; CCRRFF ¶¶ 1418, 1421-26. [REDACTED] [REDACTED] } CCFF ¶ 406; CCRRFF ¶¶ 1418, 1421-26. Respondents' failure to even acknowledge Dr. Rothman's reliance on the [REDACTED] is fatal to their criticism of Dr. Rothman's data sources. See CCRRFF ¶¶ 1418, 1421-26.

In a vain effort to compensate for their expert's failure to conduct his own hypothetical monopolist test, Respondents attempt to distort the *Merger Guidelines*' smallest-market principle into a criticism of Dr. Rothman's sound approach to market definition in this case. The *Merger Guidelines* make clear that the market definition exercise based on the hypothetical monopolist test does not lead to a single market. See *Merger Guidelines* § 4.1.1 ("The hypothetical monopolist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market. The Agencies may evaluate a merger in *any relevant market satisfying the test*, guided by the overarching principle that the purpose of defining the market and measuring

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market shares is to illuminate the evaluation of competitive effects.”) (emphasis added). Dr. Rothman conducted an extensive analysis of the qualitative and quantitative evidence in this case to conclude that the market for closed-system e-cigarettes was an appropriate candidate market in which to analyze the effects of the Transaction. CC’s Post-Trial Br. at 23-24; CCF ¶¶ 399-400. Dr. Rothman then correctly applied the hypothetical monopolist test, which established that a market consisting of closed-system e-cigarettes is a properly defined relevant product market. CCF ¶¶ 401-07.

Other courts have endorsed Dr. Rothman’s approach and evaluated competitive effects in markets broader than the smallest ones possible when appropriate. *E.g., In re Otto Bock*, Docket No. 9378, 2019 WL 2118886, at \*17 (F.T.C. May 6, 2019) (“[O]nce a candidate set of products passes the test, the analysis can stop.”) (emphasis added) (internal citation omitted); *FTC v. Advocate Health Care Network*, 841 F.3d 460, 465-69, 473 (7th Cir. 2016) (“[I]n fact, the candidate market offers a hypothetical answer to that question; the hypothetical monopolist analysis then tests the hypothesis and adjusts the market definition if the results require it.”).

As quoted above, the purpose of the *Merger Guideline*’s approach to market definition is to illuminate competitive effects. *Merger Guidelines* § 4.1.1. Dr. Rothman’s analysis does this. In contrast, Respondents’ suggestion that the market should be narrowed to include only pod-based products (or cigalikes) is entirely inconsistent with the competitive interaction that takes place between all closed-system e-cigarette products on not only price, but also innovation and shelf space. CCF ¶¶ 1417-92. In addition, the non-compete between Altria and JLI, a primary source of the competitive effects flowing from the Transaction, required Altria to stop competing with *any* e-cigarette (not just any pod-based product). CC’s Post-Trial Br. at 22-23; CCF ¶ 324. This further bolsters the argument that the correct market in which to analyze the Transaction’s

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effects is the overall closed-system e-cigarette market. Respondents' ordinary course documents also make this clear—they show that Respondents viewed pod-based products and cigalikes together when analyzing the market. CC's Post-Trial Br. at 21-22; CCFE ¶¶ 299-340.

Despite these facts, Respondents ask this Court to ignore the evidence and conclude that the only relevant competitive interaction between Altria and JLI was the eight-month period between February 2018 and October 2018 when MarkTen Elite was on the market. But the record shows that competition between Respondents was much more than the limited time during which MarkTen Elite and JUUL competed head-to-head. CCFE ¶¶ 299-340. Therefore, for all the reasons described above, Respondents' unfounded criticism of Complaint Counsel's market definition should be disregarded.

**C. Complaint Counsel Established that the Transaction Is Presumptively Unlawful Under Section 7 of the Clayton Act**

Contrary to Respondents' claims (Resps.' Post-Trial Br. at 101), Complaint Counsel has shown that the Transaction presumptively violates Section 7 of the Clayton Act because it significantly increased concentration in the already highly concentrated market for the sale of closed-system e-cigarettes in the United States. CC's Post-Trial Br. at 75-77; CCFE ¶¶ 1749-61. Respondents' arguments that Complaint Counsel improperly analyzed market shares and concentration levels using Altria's pre-exit share are wholly unsupported: the quantitative and qualitative evidence is consistent, establishing that Altria's exit from the market was orchestrated *because of* the Transaction and that, absent the Transaction, Altria would have competed in 2019, 2020, and today. CC's Post-Trial Br. at 47-50; CCFE ¶¶ 493-544, 1034-407.

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**1. Respondents' Argument that Altria's Exit Is Not a Source of Competitive Effects Arising from the Transaction Runs Contrary to Judicial Precedent**

The fundamental flaw in Respondents' arguments was aptly summarized by the federal district judge overseeing the private antitrust action against Altria and JLI in his order denying Respondents' motion to dismiss, where he ruled that "Altria and JLI were *actual competitors* at the time the alleged antitrust Agreement was made. It does not alter Altria's actual competitor status that, as part of the alleged antitrust Agreement, Altria left the market by the time the Agreement was fully effectuated and publicly disclosed." *In re Juul Labs, Inc. Antitrust Litig.*, 2021 WL 3675208, at \*21 (emphasis added); *see also In re The Vons Cos., Inc.*, 1992 FTC LEXIS 140, at \*23-24 (F.T.C. Feb. 14, 1992) (FTC complaint, alleging Section 7 and Section 5 violations, and consent order where market exit and merger agreement were "inextricably intertwined" and parties to agreement were "actual competitors in the relevant market"). Although Respondents attempt to compare the facts of this case with those from other litigated merger cases such as *FTC v. Atl. Richfield Co.*, the district court rightly dismissed those comparisons, observing that those cases "did not involve *agreements* that reduced the number of competitors in the market or otherwise altered concentration levels." *In re Juul Labs, Inc. Antitrust Litig.*, 2021 WL 3675208, at \*21 n.21 (emphasis in original).

Indeed, as explained in Discussion Section I.B, the record evidence establishes that Altria's stated reasons for removing its e-cigarette products are pretextual. Moreover, the quantitative and qualitative evidence in the record shows that it was against Altria's interest to suddenly exit a growing and strategically important market. CC's Post-Trial Br. at 47-50; CCF ¶¶ 493-544. Ultimately, Altria's removal of its e-cigarette products and its complete exit from the closed-system e-cigarette market were driven by the Transaction. CCF ¶¶ 1037-407. Therefore, Altria must be treated as an actual competitor for the purposes of Section 7 and the

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competitive effects from the Transaction should encompass the full range of effects resulting from Altria's discontinuation of all closed-system e-cigarette products and its complete exit from the closed-system e-cigarette market. CC's Post-Trial Br. at 77-83; CCFE ¶¶ 1408-730.

Respondents' argument that "Complaint Counsel must take the market as it existed at time of the investment—*i.e.* December 20, 2018," is wrong on the facts and wrong on the law, which is why the district court rejected this very argument. *See In re Juul Labs, Inc. Antitrust Litig.*, 2021 WL 3675208, at \*21. On the facts, Respondents' position stands against the weight of overwhelming record evidence—and defies common sense—that Altria's exit was inextricably linked to the Transaction. CCFE ¶¶ 578-1407. Under these circumstances, the proper legal analysis is to evaluate the market before Altria's exit as the baseline and decide whether the Transaction "create[d] an appreciable danger of [anticompetitive] consequences in the future." *Hospital Corp. of America*, 807 F.2d at 1389 (citing *Philadelphia Nat'l Bank*, 374 U.S. at 362).

## **2. Dr. Rothman's Method for Calculating Pre-Transaction Shares Is Entirely Proper**

Despite Respondents' claims to the contrary, Complaint Counsel's economic expert properly treated Altria as an existing competitor by analyzing the market that existed prior to when Altria began to take steps to shut down its product lines in anticipation of the deal with JLI: October 25, 2018. CC's Post-Trial Br. at 75-77; CCFE ¶¶ 1749-51. With this proper baseline for calculating the market shares established, Dr. Rothman then proceeded to analyze how Altria's complete exit from the market affected competition in the closed-system e-cigarette market using concentration measures and additional evidence of likely competitive effects. CCFE ¶¶ 1752-63; CCRRFF ¶ 1445. Given the circumstances of this case, Dr. Rothman's economic analysis using "the closest available approximation" of market shares from the most recent 12-month period before Altria's exit to calculate concentration levels (using the HHI) is economically sound and

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consistent with the *Merger Guidelines*.<sup>55</sup> *FTC v. PPG Indus.*, 798 F. 2d 1500, 1505 (D.C. Cir. 1986); *Sysco*, 113 F. Supp. 3d at 54 (“The FTC need not present market shares and HHI estimates with the precision of a NASA scientist. The ‘closest available approximation’ often will do.”) (citations omitted); *Bazaarvoice, Inc.*, 2014 WL 203966, at \*32 (N.D. Cal Jan. 8, 2014) (shares are imperfect but reveal the basic market structure); *see also* CCRFF ¶¶ 1685-86.

Respondents argue that the district court’s decision in *Aetna* supports their assertion regarding Complaint Counsel’s Section 7 analysis. Resps.’ Post-Trial Br. at 103-104. Respondents’ reliance on *Aetna* is particularly misleading as they omitted key details of the *Aetna* court’s analysis of the competitive effects in the 17 counties cited in their brief. Resps.’ Post-Trial Br. at 103-04. First, the discussion of Aetna health insurance plans’ availability for 2017 in those counties should be understood in the context of that particular industry and the timing of the case.<sup>56</sup> Second, Respondents also avoid addressing a key ruling from the *Aetna* case by omitting any discussion of the fact that even after finding that Aetna was not offering plans in the 17 counties in 2017, the district judge ruled that Aetna was an *actual competitor* for the Section 7 analysis of the competitive effects in 2018, 2019, and 2020 in those 17 counties. *Aetna*, 240 F. Supp. 3d at 78-79, 93 (“The Court analyzes Aetna as an actual competitor, not an

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<sup>55</sup> The *Merger Guidelines* state that “[t]he Agencies measure market shares based on the best available indicator of firms’ future competitive significance in the relevant market. This may depend upon the type of competitive effect being considered, and on the availability of data. Typically, *annual data* are used, but where individual transactions are large and infrequent so annual data may be unrepresentative, the Agencies may measure market shares over a longer period of time.” *Merger Guidelines* § 5.2 (emphasis added).

<sup>56</sup> The *Aetna* case was tried in December 2016 and the district court’s decision was issued in January 2017. Because of the nature of health insurance enrollments, which are done *annually*, the *Aetna* court correctly ruled that because of Aetna’s decision to pull its 2017 plans from the 17 counties before the trial, the consumers in those markets could not buy any Aetna plan for their 2017 health coverage. *Aetna*, 240 F. Supp. 3d at 79–80. However, the district judge then proceeded to further analyze the competitive effects in those 17 counties for “2018, 2019, and 2020,” *id.* at 79 (“But the Court is not limited to looking just at 2017.”) and found that the proposed merger would substantially lessen the competition in three counties in Florida. *Id.* at 90-93.

‘actual potential competitor,’ in the public exchanges because of its active participation in those markets even if it is not offering plans for 2017.”) (citations omitted).

Respondents’ attack on Dr. Rothman’s selection of the market shares he used for his pre-Transaction HHI calculation (Resps.’ Post-Trial Br. at 104-05) is without merit. Respondents maintain that Altria’s market share at the end of 2018 is the proper baseline for measuring Altria’s competitive significance. But this extremely narrow snapshot of Altria’s share is misguided and not supported by any precedent or economic literature.<sup>57</sup> Dr. Rothman’s approach, however, finds ample support in the case law. For example, in *Aetna*, the district court accepted the government’s market concentration analysis to show that “the proposed merger leads to presumptively anticompetitive levels of market concentration in the three complaint counties in Florida [in 2018, 2019, and 2020].” *Aetna*, 240 F. Supp. 3d at 79, 90. In that case, the government’s economic expert used “the most recent 2016 market-share data available,” which is from the period *before* Aetna’s decision to pull its plans from those counties, to calculate the HHI levels and the district judge cited those HHI numbers approvingly in the opinion. *Id.*

### **3. Dr. Rothman’s Method for Calculating Post-Transaction Market Shares Is Entirely Proper**

Respondents’ critique of Dr. Rothman’s calculation of post-Transaction market shares is also flawed and shows a fundamental misunderstanding of Dr. Rothman’s approach. Resps.’ Post-Trial Br. at 105-06. As Dr. Rothman carefully explained during his trial deposition and in his rebuttal expert report, his calculation of the post-Transaction market shares is the best available method to capture the “effect of Altria’s exit on competition,” which is “the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal.” CCRRFF ¶ 1444. Moreover, Dr. Rothman showed that the Transaction

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<sup>57</sup> See Resps.’ Post-Trial Br. § II.C.2.i (where Respondents did not cite any cases or economics papers).

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increases market concentration under any number of assumptions about where Altria's sales divert as a consequence of its exit—a fact that Respondents simply ignore. CCFE ¶ 1760. For example, if all of Altria's sales were to be captured by Reynolds instead of being reallocated proportionally, the post-Transaction HHI would still be at a highly concentrated level and the change in HHI would be 460, which satisfies the presumption. CCFE ¶ 1760. Further, although Respondents appear to assert that post-Transaction market shares could be calculated using “post-transaction data and document productions of various market participants,” Resps.' Post-Trial Br. at 105-06, and Respondents' expert, Dr. Murphy, purports to do so with before-and-after comparisons of market concentration (*see* RPF ¶¶ 1451-52), as noted in Section II.A.3, Dr. Murphy's approach is fatally flawed because it does not control for confounding factors. CCFE ¶¶ 1758-59, 2100-11; CCRRFF ¶¶ 1368, 1444, 1715.<sup>58</sup>

#### **4. Dr. Rothman's HHI Calculations Are Reliable and Consistent with the Other Record Evidence Showing the Transaction Has Resulted in Anticompetitive Effects**

Respondents attempt to avoid the well-established precedent<sup>59</sup> regarding the structural presumption under Section 7 by asserting that Dr. Rothman's market concentration analysis does not accurately reflect the competitive effects in this case. Resps.' Post-Trial Br. at 107-08. The totality of the record evidence demonstrates that the opposite is true: the market concentration analysis *understates* the full anticompetitive effects of this case because it does not reflect the dynamic harm caused by Altria's exit including, but not limited to, the loss of innovation

<sup>58</sup> *See also* CCRRFF ¶¶ 1312-14, 1321, 1338, 1342, 1346, 1349, 1351, 1363, 1377-82.

<sup>59</sup> *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) (“Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive.”); *FTC v. Staples, Inc. (“Staples II”)*, 190 F. Supp. 3d 100, 128 (D.D.C. 2016) (same). An acquisition is “presumptively anticompetitive” if it increases the HHI by more than 200 points and results in a “highly concentrated market” with a post-acquisition HHI exceeding 2,500. *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 207 (D.D.C. 2018); *Staples II*, 190 F. Supp. 3d at 128; *see also Merger Guidelines* § 5.3. Here, Complaint Counsel showed that the Transaction results in an HHI over 3,900 and an increase in HHI by over 650, well above the threshold for presumed harm. CCFE ¶¶ 1754-56.



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competition. Discussion § II.A.4, *supra*; CCFF ¶¶ 1463-92, 1538-730; CCRRFF ¶¶ 1492, 1601, 1649, 1666. Furthermore, the strong presumption in this case is bolstered by the extensive evidence in the record detailing the competitive harm that the Transaction has caused and will continue to cause. CC's Post-Trial Br. § IV.C; CCFF ¶¶ 1408-730. In seeking to avoid this inconvenient truth, Respondents go so far as to conspicuously omit the word “understates” in the following quote from the *Merger Guidelines*: “recent or ongoing changes in market conditions may indicate that the current market share of a particular firm *either understates or overstates* the firm’s future competitive significance.” *Compare* Resps.’ Post-Trial Br. at 107 with *Merger Guidelines* § 5.2. (emphasis added). Unfortunately for Respondents, they cannot simply omit the evidentiary record in this case.

Respondents’ identify “four reasons” that purportedly undercut the reliability of Dr. Rothman’s HHI analysis. Resps.’ Post-Trial Br. at 107-08. But each of these are misleading and do not accurately and fully describe the relevant facts of this case. First, Altria’s market share from 2017 to 2018 does not overstate its competitive significance. Rather, pure share calculations understate Altria’s competitive positioning as they cannot capture Altria’s numerous long-term strengths, such as the JRDTA with PMI and its unmatched distribution and marketing capabilities. CCFF ¶¶ 493-544, 1697-710; CCRRFF ¶¶ 1551, 1620-22, 1627, 1630.

Second, the market’s shift towards pod-based products does not undermine Dr. Rothman’s HHI calculations: Altria’s collaboration with PMI put it in a strong position { [REDACTED] } CC’s Post-Trial Br. at 81-82; CCFF ¶¶ 1644-46. { [REDACTED] }

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██████████ } CCRRFF ¶¶ 1625, 1627, 1630. Moreover, Altria was actively working on MarkTen Elite 2.0, which likewise had nicotine salts. CCFF ¶¶ 1555, 1564-68.

Third, Respondents claim that the FDA flavor ban renders Dr. Rothman's HHIs unreliable is likewise unavailing. Resps.' Post-Trial Br. at 108. There is no evidence in the record showing that the negative impact from the FDA's flavor ban would have uniquely hampered Altria's future competitiveness. Respondents' unsupported speculation about the ban's impact on the then-existing flavor portfolio of MarkTen Elite falls far short of proving the assertion and unreasonably freezes Altria's future product offerings to those offered in 2018, even as Altria boasted several pathways to launching new and improved e-cigarette products after receiving PMTA approval. CCFF ¶¶ 1256-300; CCRRFF ¶¶ 1551, 1620-22, 1627, 1630.

Fourth, Respondents' cherry-picked citations to the portions of the *Merger Guidelines* that deal with a dynamic market also fail. Resps.' Post-Trial Br. at 108. The facts of this case do not support Respondents' assertion about the market exhibiting a particularly high degree of volatility. On a cartridge basis, JUUL still retains over 60 percent of the closed-system e-cigarette market, and the top four brands still command over 90 percent of the market. CCRRFF ¶ 1479; CCFF ¶ 1748. Indeed, JLI's continued leadership of the closed-system e-cigarette market, despite negative press, multiple lawsuits, and enhanced regulatory scrutiny, suggests that the closed-system e-cigarette market is not as dynamic as Respondents would have the Court believe. CCRRFF ¶¶ 1338-44. Furthermore, the FDA's recent order removing more than five million e-cigarette products from the market<sup>60</sup> cast further doubt on Respondents attempt to

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<sup>60</sup> Press Release, FDA, "FDA Makes Significant Progress in Science-Based Public Health Application Review, Taking Action on Over 90% of more than 6.5 Million 'Deemed' New Tobacco Products Submitted." (*available at* <https://www.fda.gov/news-events/press-announcements/fda-makes-significant-progress-science-based-public-health-application-review-taking-action-over-90>).

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portray this market as one in which dynamic market conditions will self-correct any loss of competition from the Transaction.

In the end, none of the reasons that Respondents cite to in their post-trial brief provide any basis for the Court to discredit Dr. Rothman's market concentration analysis. Complaint Counsel has met its burden to establish a prima facie case that the Transaction is presumptively unlawful under Section 7 of the Clayton Act. *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) ("Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive.").

**D. Altria Would Have Been a Significant Competitor in the Absence of the Merger, and Evidence of Competitive Effects Strengthens the Presumption of Harm**

Respondents argue that any presumption of harm can be rebutted because "Altria would not have been a significant competitor in the but-for world." Resps.' Post-Trial Br. at 108. The evidentiary record does not support this claim. The weight of the evidence demonstrates that, but for the Transaction, Altria would be competing aggressively in the U.S. closed-system e-cigarette market today. CCF ¶¶ 409-544. As the number one tobacco company in the U.S., Altria had every incentive and all of the necessary resources to compete successfully both now and in the future. CCF ¶¶ 409-531, 1041-63. Indeed, prior to the deal with JLI, Altria repeatedly and consistently expressed its intention to compete in the long term. CCF ¶¶ 532-44, 1034-87. On November 2, 2017, Marty Barrington, then Altria's Chairman and CEO, stated publicly to investors: "So we'll be clear: We aspire to be the U.S. leader in authorized, non-combustible, reduced risk products." CCF ¶ 533. Barrington further explained how Altria was committed and prepared to compete in the category:

Winning long term in this dynamic axis of competition will require the financial firepower and flexibility to invest in products, capabilities and market-building actions as may be appropriate. With the free cash flow we generate and a strong

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balance sheet, we have plenty of both firepower and flexibility . . . to make the necessary investments. We've been investing for years and now, with the FDA's new direction on innovative products, we're prepared to make any further investments we need to win. CCF ¶ 535.

In a July 2018 earnings call, Howard Willard told investors that Altria continued to make strategic investments in pursuit of long-term leadership in innovative tobacco products:

And we continue to make strategic investments to support long-term strength in our core tobacco businesses and our pursuit of leadership in innovative products.... And just as we lead in traditional tobacco products, we intend to lead in offering adult smokers more choices with innovative reduced-risk products. In May, we announced a new corporate structure to maximize our core tobacco businesses and accelerate our innovation pipeline. CCF ¶ 541.

While around June 2018 Willard began telling certain Altria executives that a deal with JLI was “Plan A,” Altria’s “Plan B” was always to continue competing in the closed-system e-cigarette business on its own. CCF ¶ 1718.

Moreover, the clear evidence of anticompetitive effects stemming from Altria’s exit further strengthens the presumption of harm. *See Heinz*, 246 F.3d at 717 (“[T]he FTC’s market concentration statistics are bolstered by the indisputable fact that the merger will eliminate competition between the two merging parties. . . .”). The Transaction denies consumers the benefit of present and future competition from Altria across price, innovation, and shelf-space dimensions. CCF ¶¶ 1408-730.

**1. All Firms Were Subject to the FDA’s Regulatory Regime, but Only Altria Exited the Market**

In an attempt to hide the anticompetitive effects of the Transaction behind a smoke screen, Respondents ask the Court to conclude that Altria was uniquely incapable of succeeding in the closed-system e-cigarette market due to the FDA’s regulatory regime while its smaller tobacco rivals, such as Reynolds and ITG, were not. Resps.’ Post-Trial Br. at 109-10. This argument strains credulity and lacks support in the factual record. While the FDA’s PMTA

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requirements certainly present barriers to *de novo* entry,<sup>61</sup> Altria's regulatory team, as Respondents' acknowledge, was "the best in the country" with "dozens of experts" and "deep experience with the PMTA process specifically." Resps.' Post-Trial Br. at 130. Indeed, Respondents apparently see no inherent contradiction between citing Altria's purported FDA assistance to JLI as the crux of their efficiencies defense while simultaneously portraying Altria as hopelessly inept at getting its own e-cigarettes to pass FDA muster. *Compare* Resps.' Post-Trial Br. at 111 *with* Resps.' Post-Trial Br. at 127, 128-31.

Respondents' claim that the FDA's Deeming Rule "effectively fr[oze] the e-vapor category in place as of August 8, 2016, and thereby prevent[ed] Altria from commercializing any new products absent PMTA approval" (Resps.' Post-Trial Br. at 110), is also misleading and contradicted by the record. Despite the Deeming Rule, other companies launched new products and implemented product improvements after the date of the rule. CCFF ¶¶ 1198-205. In fact, even Altria successfully designed and implemented product e-cigarette product improvements after the Deeming Rule, including a new gasket for Elite that prevented leaking and formaldehyde formation. CCFF ¶¶ 1206-36. Moreover, Respondents' argument rests on the flawed premise that the only relevant dimension of competition for this Court to examine is the narrow snapshot of the head-to-head competition between Altria's on-market products and JLI's on-market products in 2018. Such a myopic approach ignores the critical importance of innovation competition in this market and the significant harm to consumers that resulted when Altria halted all R&D work on future e-cigarette products as a result of the Transaction. *See infra* Discussion § II.D.2.

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<sup>61</sup> *See infra* Discussion § II.F.

In short, the FDA's PMTA requirements, while certainly relevant, do not support Respondents' claim that Altria would not have been a significant competitor in the absence of the Transaction.

**2. Absent the Transaction, Both Nu Mark's Existing Products and Altria's Potential Future Products Would Have Contributed to Competition in the U.S. Closed-System E-Cigarette Market**

Respondents further argue that none of Nu Mark's existing products were "meaningful competitors" in the U.S. closed-system e-cigarette market. Resps.' Post-Trial Br. at 110. Once again, Respondents overstate the problems with Altria's existing portfolio of products and undersell those products' potential to receive PMTA approval. CCFE ¶¶ 1163-91, 1254-352. Furthermore, Respondents' argument completely disregards the competitive constraints Altria would have continued to place on the closed-system e-cigarette market in the future through organic product development efforts and improvements to existing products, as well as potential third-party collaborations or acquisitions. CCFE ¶¶ 1538-730.

Respondents claim that Altria's cigalike offerings, MarkTen and MarkTen Bold, were not significant competitors in the U.S. closed-system e-cigarette market due to their inability to compete with pod products or convert smokers. Resps.' Post-Trial Br. at 110-11.<sup>62</sup> But the record shows that Altria's own executives believed that the MarkTen cigalikes had a role to play in Altria's portfolio and that it did not make sense to abandon that business segment. CCFE ¶¶ 842, 1097, 1319. As Brian Quigley testified: "the cig-a-like platform was growing. Not declining. And that was the point that I thought I had convinced Howard [Willard] of why we should keep the cig-a-like business, that we were actually growing 3-1/2 million units, and there was an

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<sup>62</sup> Respondents also argue these products are competitively insignificant due to their inability to convert adult smokers or receive a PMTA, but as discussed above, this argument is not supported by the evidence. *See supra* Discussion § I.B. There is no industry consensus on what causes smoker conversion and any predictions about which products will or will not receive PMTA approval are highly speculative. CCFE ¶¶ 1301-22, 1898-911.

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opportunity to compete with [Reynolds’] Vuse in that space.” CCFF ¶ 1097. Another executive testified that because “MarkTen cigalikes [were] meeting the needs of a small niche of consumers,” she “didn’t see any reason why [Altria] should stop selling them.” CCFF ¶ 1319. The record also shows that, prior to being pulled from the market, MarkTen Bold was one of the primary drivers of MarkTen’s growth. CCFF ¶¶ 476, 1113. In addition, many of Altria’s competitors continue to market cigalike products, even after the advent of pod-based products, including NJOY’s NJOY Daily; Reynolds’ Vuse Ciro, Vuse Solo, and Vuse Vibe; and ITG’s blu PLUS. CCFF ¶¶ 1173-76. [REDACTED]

[REDACTED] } CCFF ¶ 1174. Once again, Respondents are left to explain away the rather odd coincidence of the leading U.S. tobacco firm being the only e-cigarette competitor that suddenly lost all faith in the cigalike platform, conveniently while negotiating to take an equity stake in JLI. Respondents’ claim that cigalikes were not converting smokers is also contradicted by the record evidence. CCFF ¶¶ 1321-22.

Respondents’ argument that MarkTen Elite was doomed to fail due to the lack of nicotine salts (Resps.’ Post-Trial Br. at 111-12) likewise asks the Court to ignore the numerous products on the market today without nicotine salts as well as products on the market today with low nicotine strengths. CCFF ¶¶ 1166-72, 1177-88. As Dr. Gardner testified, some consumers prefer an e-cigarette product with a lower level of nicotine. CCFF ¶ 1177. Moreover, Elite was hardly the commercial failure that Respondents claim; in fact, Elite’s sales were growing in 2018. CCFF ¶¶ 1112-31. As Altria’s Schwartz wrote, “Elite can hunt . . . so again, best yet to come.” CCFF ¶ 1500. Further, Joseph O’Hara, JLI’s competitive intelligence expert, concluded that MarkTen

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Elite was one of only a few closed-system e-cigarette products with “long-term viability.” CCF ¶ 1129.

But crucially, Respondents’ argument about Altria’s existing portfolio once again attempts to misdirect the Court away from the powerful competitive constraint Altria would have continued to provide in the U.S. closed-system e-cigarette market in the future. CCF ¶¶ 1538-730. In the nearly three years since Altria’s exit, while this matter has been investigated and litigated, Altria could have made—and indeed record evidence shows *would* have made—improvements to its existing products and progress towards developing new products to submit for PMTA approval. CCF ¶¶ 1527-31, 1538-87. These efforts included work on Elite 2.0, a pod-based product with nicotine salts, for which Altria planned to submit a PMTA and [REDACTED]

[REDACTED] CCF ¶¶ 519-22, 1282-94. Altria also could have competed in the future by acquiring additional products. CCF ¶¶ 1717-30. In addition to losing the competitive benefits of Altria’s existing portfolio, consumers also lost the benefit of Altria’s competitive contributions in the future.

### **3. Even Under the “Actual Potential Competition” Doctrine the Transaction Is Illegal Under Section 7**

As discussed in Section II.C, Respondents should be considered actual competitors for purposes of the Section 7 analysis. *See In re Juul Labs, Inc. Antitrust Litig.*, 2021 WL 3675208, at \*21 (“Altria and JLI were actual competitors at the time the alleged antitrust Agreement was made. It does not alter Altria’s actual competitor status that, as part of the alleged antitrust Agreement, Altria left the market by the time the Agreement was fully effectuated and publicly disclosed.”); *Aetna*, 240 F. Supp. 3d at 78, 93 (“The Court analyzes Aetna as an actual



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competitor, not an ‘actual potential competitor,’ in the public exchanges because of its active participation in those markets even if it is not offering plans for 2017.”) (citations omitted).

But even if one were to assume that Altria removed its e-cigarette products and exited the closed-system e-cigarette market for legitimate reasons wholly unrelated to the Transaction,<sup>63</sup> the Transaction still violates Section 7 of the Clayton Act under the actual potential competition doctrine. “Actual potential competition rests on the theory that the merger eliminated a firm that was on the verge of entering the market de novo or through a toehold acquisition.” *In re Polypore Int’l, Inc.*, Docket No. 9327, 2010 WL 9549988, at \*23 n.41 (F.T.C. Nov. 5, 2010) (citations omitted). “Although the Supreme Court has yet to rule specifically on the validity of the actual-potential-entrant doctrine, it has delineated two preconditions that must be present, prior to any resolution of the issue. First, it must be shown that the alleged potential entrant had ‘available feasible means’ for entering the relevant market, and second, ‘that those means offer(ed) a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects.’” *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-78 (8th Cir. 1981) (footnote omitted) (quoting *United States v. Marine Bancorporation.*, 418 U.S. 602, 633 (1974)). Complaint Counsel has easily met these two requirements. CCFE ¶¶ 409-544, 1527-730; CCRRFF ¶¶ 1539-632.

Although Respondents assert that *B.A.T. Industries* is the applicable standard for an actual potential competition case (Resps.’ Post-Trial Br. at 113), their reliance on that case is misplaced. CC’s Post-Trial Br. at 96 n.38. In the Commission’s more recent application of the actual potential competition doctrine, the Commission has applied a “reasonable probability” standard. *See In re McWane, Inc.*, Docket No. 9351, 2014 WL 556261, at \*32-35 (F.T.C. Jan. 30,

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<sup>63</sup> For the avoidance of doubt, it is Complaint Counsel’s position that Altria’s stated justifications for exiting the market are pretextual. *See supra* Discussion § I.B.

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2014). In *McWane*, the Commission stated that the “ultimate issue” in determining whether a firm is an actual potential competitor hinges on whether the firm’s “entry was reasonably probable.” *Id.* (citations omitted). Notably, the Commission cited the Eighth Circuit’s decision in *Yamaha Motor* as support for the “reasonably probable” standard. *Id.* But even assuming *arguendo* that the “clear proof” standard is the correct standard of proof, the evidence proffered by Complaint Counsel clearly meets even this more stringent standard as shown below. CCFF ¶¶ 409-544, 1527-730; CCRRFF ¶¶ 1539-632.

Again, Respondents try to set up a straw man by asserting that Altria did not have any future product that it could have developed and commercialized in the near future. Resps.’ Post-Trial Br. at 114-16. However, the record evidence *clearly* shows that Altria { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶¶ 1638-93, 1708-10; CCRRFF ¶¶ 1627, 1630. [REDACTED]

[REDACTED] } CCRRFF ¶¶ 1551, 1620-22; CCFF ¶ 1709. This is not wild speculation by Complaint Counsel { [REDACTED]

[REDACTED]

[REDACTED] }<sup>64</sup> CCFF ¶¶ 1677-81, 1697, 1704-10; CCRRFF ¶¶ 1551, 1620-22, 1625, 1627, 1630. In fact, [REDACTED]

[REDACTED]

[REDACTED]

<sup>64</sup> [REDACTED] See CCFF ¶ 1711.

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[REDACTED]

[REDACTED] } CCFF ¶¶ 1698-710.

[REDACTED]

[REDACTED] }.<sup>65</sup>

In addition to [REDACTED]<sup>66</sup> Altria also had internal pipeline projects in place—including Elite 2.0 and 3.0 (also with nicotine salts)—and other “Plan B” contingency plans that were prepared in case the JLI transaction did not happen. CCFF ¶¶ 1281-300, 1538-87, 1717-30. Moreover, Altria has the unrivaled “ability (unlike other potential entrants) to reenter the market given its extensive background, regulatory experience, and ample funds.” *In re Juul Labs, Inc. Antitrust Litigation*, 2021 WL 3675208, at \*21 (N.D. Cal. Aug. 19, 2021). Therefore, the evidence provides more than enough support to Complaint Counsel’s case even under the actual potential competition theory.

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<sup>65</sup> See CCFF ¶¶ 1684-86 [REDACTED]

<sup>66</sup> To be clear, [REDACTED]

[REDACTED] } CCFF ¶¶ 1644-46; CCRRFF ¶ 1629.

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#### 4. The Record Demonstrates Current and Future Harm to Price, Innovation, and Shelf-Space Competition

Contrary to Respondents' assertions (Resps.' Post-Trial Br. at 120-21), the record is replete with examples of how Altria's exit harmed, and will continue to harm, competition on price, innovation, and shelf-space dimensions. Under Section 7, "mergers that eliminate head-to-head competition between close competitors often result in a lessening of competition." *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 216 (D.D.C. 2017); *Aetna*, 240 F. Supp. 3d at 43; *FTC v. Staples, Inc.* ("*Staples II*"), 190 F. Supp. 3d 100, 131 (D.D.C. 2016).<sup>67</sup> Further, Section 7 asks the court to look for the "but-for" world "determin[ing] the [transaction]'s likely effect on competition compared to the but-for world in which the [Transaction] is not allowed." *FTC v. Peabody Energy, Inc.*, 492 F. Supp. 3d 865, 917 (E.D. Mo. 2020) (internal citation omitted).<sup>68</sup>

The record is clear that consumers lost the benefit of price competition from Altria when Altria exited the market. CCF ¶¶ 1419-40. As JUUL became increasingly dominant in the closed-system e-cigarette market, Altria engaged in aggressive price promotions in order to compete with JLI and gain market share. CCF ¶¶ 1419-31. Altria executives testified that JLI "certainly influenced how [Altria] priced MarkTen in the marketplace," and that Altria purposely priced Elite at a discount to JUUL. CCF ¶¶ 1421-24. Shortly after one Altria promotion in February 2018, JLI implemented its own price promotion on JUUL kits. CCF ¶¶ 1433-34. But

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<sup>67</sup> See *Merger Guidelines* § 6.2. ("A merger between two competing sellers prevents buyers from playing those sellers off against each other in negotiations. This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the buyer, than the merging firms would have offered separately absent the merger.")

<sup>68</sup> Competitive effects are also relevant to Complaint Counsel's Section 1 claim. Under a Section 1 rule of reason analysis, plaintiffs may meet their initial burden by demonstrating (1) direct evidence of anticompetitive effects, or (2) Respondents' market power along with the likely effect of the challenged conduct. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825, 831 (6th Cir. 2011). Where the plaintiff can show actual anticompetitive effects, a "full blown market analysis is not necessary." *Intel Corp. v. Fortress Invest. Group LLC*, 511 F. Supp. 3d 1006, 1014 (N.D. Cal. 2021) (quoting *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)). Complaint Counsel has also met this burden. See *infra* Discussion § III.B.

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for the Transaction, this intense price competition between Altria and JLI would have continued benefitting consumers. CCFE ¶¶ 1532-87.

As noted above, competition in the closed-system e-cigarette market is about more than just price effects; consumers also lost the benefit of innovation competition between the Respondents when Altria exited the market. After JLI's early success with a pod-based system, Altria introduced Elite, one of the first pod-based systems in the U.S. market. CCFE ¶¶ 138-39, 468-79, 1195, 1464. And after seeing JLI's success with nicotine salts, Altria introduced the MarkTen Bold cigalike product containing nicotine salts, and planned to add nicotine salts to future versions of Elite. CCFE ¶¶ 135, 461-67, 1196-97, 1463, 1542-48. Altria was looking to develop "JUUL fighters" and conducted "research to look at potential products to compete with JUUL and potentially hamper their momentum." CCFE ¶ 1464. Altria and JLI further competed by offering different nicotine strengths in response to consumer preferences. CCFE ¶¶ 1179, 1317, 1473. In 2018, Bob Robbins told JLI's CEO that "[a]ll viable competitors . . . offer variable Nicotine Strengths . . . We should too." CCFE ¶ 1474. JLI ultimately did release products in 5 percent, 3 percent, and 1.5 percent nicotine strengths in order to respond to consumers who wanted a lower nicotine strength or to taper down their usage. CCFE ¶¶ 1181-82, 1476. Additionally, after Altria introduced a magnetic pod insertion in its MarkTen Elite, JLI explored magnetic pods for its next generation JUUL devices. CCFE ¶¶ 1477, 1481.

As for shelf-space competition, Altria was an aggressive competitor that JLI viewed as a serious threat prior to Altria's exit. CCFE ¶¶ 1442-62. In 2018, Altria established its Innovative Tobacco Products ("ITP") program with its retail partners. CCFE ¶ 1445. Altria committed approximately \$100 million to this program over a three-year period. CCFE ¶ 1448. According to Jody Begley, Altria launched the ITP program because it wanted shelf space to display its e-

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cigarette products to generate both trial awareness and repeat purchases. CCF ¶ 1447. Through the ITP program, Nu Mark hoped to gain better visibility for its brands and the promotions they were offering. CCF ¶ 1447. During this period, JLI was also competing aggressively for shelf space at convenience stores. CCF ¶ 1449. In April 2018, for example, JLI considered it “a huge opportunity for JUUL to replace JUUL/MarkTen shelf space with a higher-margin/higher-margin product that is far easier for a retailer to understand.” CCF ¶ 1449 (emphasis in original). In fact, JLI was so concerned about the competitive threat from Altria’s ITP program that Bob Robbins opined that “[i]f [JLI] can’t find a strategy around this, [JLI] will be severely restricted on shelf in a considerable part of the c[onvenience]-store universe for the next 3 years.” CCF ¶ 1450. And respond JLI did—by “immediately committing to a 2019 \$2 [million] investment in ampm and Kum & Go for incremental shelf-space” to compete with Altria’s shelf-space offers. CCF ¶ 1451. Consumers lost the benefit of this shelf-space competition when Altria exited the market.

In addition to the loss of existing competition, the Transaction has significantly harmed consumers by depriving them of the benefits flowing from the likely future competition that would have occurred had Altria not exited the closed-system e-cigarette market. CCF ¶¶ 1527-730. Between 2012 and 2017, Altria’s annual spend on e-cigarette product development grew more than ten-fold over a five-year period, from \$7 million in 2012 to a projected \$90 million in 2017. CCF ¶ 413. In November 2017, Altria’s former Chairman and CEO aptly described how the company’s enormous financial resources would confer advantages for competing in innovative, reduced-risk products like e-cigarettes and its intent to use those advantages to compete in the closed-system e-cigarette market over the long term:

Winning long term in this dynamic axis of competition will require the financial firepower and flexibility to invest in products, capabilities and market-building

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actions as may be appropriate. With the free cash flow we generate and a strong balance sheet, we have plenty of both firepower and flexibility . . . to make the necessary investments. We’ve been investing for years and now, with the FDA’s new direction on innovative products, we’re prepared to make any further investments we need to win. CCF ¶ 535.

Until shortly before the Transaction, Altria was actively working to develop and commercialize new products, including an improved version of Elite with nicotine salts, and [REDACTED] [REDACTED] 1281-94, 1374, 1377, 1555-86, 1644-46, 1690-91.

In addition, by requiring that JLI be the only vehicle through which Altria could compete in e-cigarettes, the Transaction foreclosed Altria from other avenues through which it would have competed, in particular through collaboration with PMI. CCF ¶¶ 1588-716. As discussed above,<sup>69</sup> as part of its Transaction with JLI, Altria removed—and per the non-compete could not reintroduce—the e-cigarette products it already had on the market. Under its partnership with PMI, Altria would have the right to introduce PMI’s VEEV e-cigarette in the United States. CCF ¶¶ 1644-46. PMI’s Martin King testified that, under the JRDTA, Altria “would have been able to launch VEEV on their own with the technology shared in that agreement” in the United States. CCF ¶ 1646. Instead of competing with an innovative new product, however, { [REDACTED]

[REDACTED]

[REDACTED] } CCF ¶¶ 1714-16. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } CCF ¶¶ 1864-70. In addition

to ending Altria’s collaboration with PMI, the Transaction (specifically the non-compete) also

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<sup>69</sup> See *supra* Facts § XIII.

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foreclosed all of the potential avenues for Altria to acquire additional e-cigarette products or pursue additional e-cigarette development partnerships. CCF ¶¶ 1717-30.

In sum, the anticompetitive effects are clear. By requiring Altria to completely exit the market in exchange for a cut of its profits, the Transaction has eliminated all forms of competition from one of the leading firms in the closed-system e-cigarette market, “the ‘*bête noir*’ of antitrust law.” *Impax Labs, Inc. v. FTC*, 994 F.3d 484, 493 (5th Cir. 2021) (citations omitted). Complaint Counsel has demonstrated that the Transaction is likely to reduce competition substantially under Section 7.

**E. The Conclusions of Complaint Counsel’s Expert Are Consistent with the Record**

Despite Respondents’ baseless assertions to the contrary, Complaint Counsel’s Section 1 and Section 7 cases are based on the factual evidence presented at the evidentiary hearing that included live and deposition testimony, ordinary course documents and data from Respondents and third parties. To be clear, Complaint Counsel’s case does *not* rest solely on its expert’s analysis as Respondents claim. Dr. Rothman’s analysis is entirely consistent with the other record evidence in this case, including contemporaneous business documents, testimony, and data. CCF ¶¶ 210-394, 409-1407, 1417-748, 1767-995. This substantial body of evidence points to the inescapable conclusion that, absent the Transaction, Altria would be competing vigorously in the closed-system e-cigarette market today, fighting to gain shares against the market leader, JLI. CCF ¶¶ 409-54, 493-544, 1419-40, 1500-04, 1532-74, 1690-91. Unable to marshal evidence sufficient to rebut Complaint Counsel’s strong case, Respondents resort to launching yet another series of baseless attacks against Dr. Rothman’s sound economic analysis. Resps.’ Post-Trial Br. at 121.



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As a well-qualified economic expert,<sup>70</sup> Dr. Rothman reached his conclusion that but for the Transaction Altria would have been a significant competitor only after analyzing Altria’s “incentive and ability” to compete in the relevant market based on the quantitative and qualitative evidence that any capable economist would have considered and analyzed. CCF ¶¶ 1408-16; CRRFF ¶¶ 1482-98. As Dr. Rothman explained in his trial deposition, it is a quintessential task for an economist to study an economic actor’s abilities and economic incentives to make reasonable inferences and predictions based on ordinary course business documents, data, testimony, and public statements. CRRFF ¶¶ 1490, 1498. Unlike Respondents’ expert, Dr. Murphy, who only performed a misguided before-and-after comparison, Dr. Rothman conducted a proper economic analysis to answer the key economic question of this case: whether Altria would have been a significant competitor in the but-for world as a threshold matter before trying to quantify anticompetitive effects.<sup>71</sup> CCF ¶¶ 1410-15. After carefully examining the available information, Dr. Rothman concluded that Altria would have been a significant competitor. CCF ¶ 1414. This conclusion is entirely consistent with the qualitative and quantitative evidence in this case. CCF ¶¶ 409-544, 1527-730.

Although Respondents’ Post-Trial Brief appears to include an eleventh-hour *Daubert*-style attack on Dr. Rothman’s expert analysis by citing *SEC v. Tourre* and two other *Daubert*-challenge decisions,<sup>72</sup> these cases are wholly inapposite to the current case and asserting the

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<sup>70</sup> When given the opportunities, Respondents did not challenge Dr. Rothman’s qualification to serve as an economic expert for Complaint Counsel nor did they file any motion in limine to exclude Dr. Rothman’s testimony or expert reports.

<sup>71</sup> Contrary to Respondents’ misleading claim otherwise, Dr. Rothman considered “both products that Altria ha[d] on the market at a particular point in time, as well as the development initiatives that Altria [was] working on that don’t have products on the market at that point in time” when he assessed whether Altria would have been a significant competitor in the marketplace. CRRFF ¶ 1491.

<sup>72</sup> See Resps.’ Post-Trial Brief at 121-22 (citing *SEC v. Tourre*, 950 F. Supp. 2d 666 (S.D.N.Y. 2013), *Highland Cap. Mgmt., L.P. v. Schneider*, 551 F. Supp. 2d 173 (S.D.N.Y. 2008), *Wolfe v. McNeil-PPC, Inc.*, 881 F. Supp. 2d 650 (E.D. Pa. 2012)). However, all of these cases are trial court rulings on *Daubert* motions, which involve the particular framework and standard laid out by the trilogy of the Supreme Court’s cases—*Daubert v. Merrell Dow*

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argument now is wholly inconsistent with the Court’s scheduling order.<sup>73</sup> *SEC v. Tourre* held only that “mere narration” that is not “traceable to a reliable methodology” fails to fulfill *Daubert*’s requirements for expert testimony. *See* 950 F. Supp. 2d at 675 (citation omitted). Dr. Rothman’s rigorous economic analysis hardly qualifies as “mere narration.” In addition to analyzing the qualitative evidence, Dr. Rothman employed the Antitrust Logit Model (“ALM”), which is a well-accepted tool frequently used by antitrust economists,<sup>74</sup> to analyze two sources of harm from the Transaction—higher prices and loss of consumer choice. CCFF ¶¶ 1416; CCRRFF ¶¶ 1672-73. As Dr. Rothman explained during his trial deposition, one harm is not more important than the other, and the ALM takes into account both sources of harm. CCFF ¶ 1416; CCRRFF ¶ 1367. Moreover, the calculated competitive harm is a conservative estimate for the full anticompetitive effects arising out of the Transaction because there are additional dynamic anticompetitive effects on innovation competition that are more difficult to quantify with the existing economic models. CCFF ¶ 1416; CCRRFF ¶¶ 1647-50, 1666.

Respondents’ remaining criticisms of Dr. Rothman’s methodology are also misplaced. Resps.’ Post-Trial Br. at 123-26. First, while Respondents assert that Dr. Rothman assumed harm from the removal of a product, this harm from removing a product is a feature of the ALM and

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*Pharm., Inc.*, 509 U.S. 579 (1993), *Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)—which are not applicable here.

<sup>73</sup> Docket No. 9393, Second Revised Scheduling Order (Mar. 4, 2021), at 3.

<sup>74</sup> Although the ALM does not account for individual product characteristics, it is a workhorse model in antitrust and provides an approximation of price effects. *See* Gregory J. Werden & Luke M. Froeb, *The Effects of Mergers in Differentiated Products Industries: Logit Demand and Merger Policy*, J. OF L., ECON., & ORG. 10, 407–26 (1994); CCRRFF ¶¶ 1672-73. Respondents’ attack on the ALM model by relying on the so-called “red bus/blue bus” problem is deeply flawed because the “red bus/blue bus” problem is not applicable to the current e-cigarette competition model, which analyzes a market with differentiated products (e.g., MarkTen Elite and JUUL are not like a red bus and a blue bus, which are exactly the same except their exterior colors). CCRRFF ¶¶ 1674-75. And the fact that consumers are harmed when a product is removed is a feature, not a bug of the ALM model. The consumers who purchased Altria’s closed-system e-cigarette products did that precisely because doing so was better than purchasing the other products available on the market (called “revealed preference” in the economic literature) and thus forcing those consumers to purchase their next-best choices harms them and reduces total consumer surplus. CCRRFF ¶ 1666.

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virtually all standard economic models. CRRFF ¶¶ 1672-73. The harm comes from the basic economic idea of revealed preference, which states that given a set of available products, rational consumers will choose the product that is best for them. CRRFF ¶¶ 1674-75. Further, Respondents mischaracterize Dr. Rothman's explanation provided during his trial deposition because he did not agree with Respondents' hypothetical as they claim. CRRFF ¶ 1676. Respondents claim that consumers are better off with their second choice, which is essentially claiming that Respondents understand consumers' preferences better than consumers themselves. *See* CRRFF ¶ 1676; Resps.' Post-Trial Br. at 124. Respondents further claim that the ALM only depends on the identity of the product as an additional reason that the model overstates harm. This is factually incorrect. The ALM also depends on product prices as can be seen in Appendix E of Dr. Rothman's initial expert report. CRRFF ¶ 1699 (citing PX5000 at 147-49 (Appendix E) (Rothman Expert Report)).

Second, both Respondents' second and fourth claims about Respondents' belief regarding substitution between MarkTen and JUUL are misleading and assume that cigalikes and pod-based e-cigarettes are separate markets—a hypothesis never analyzed nor proved by Respondents' expert. *See supra* Discussion § II.B. For these claims, Respondents rely on Dr. Murphy's regression only; however, Dr. Rothman demonstrated that Dr. Murphy's regression does not support Respondents' conclusion. CRRFF ¶ 1683 (citing PX5001 at 029 (¶ 44) (Rothman Rebuttal Report)). Even accepting the incorrect assumption that there are two separate product markets, Dr. Rothman demonstrates that the harm from the transaction would still be \$29.7 million per year. CRRFF ¶ 1697 (PX5001 at 030-31 (¶ 48) (Rothman Rebuttal Report)).

Third, Respondents' claim that the market shares used by Dr. Rothman overstate Altria's competitive significance is misleading. Using a year's worth of data rather than a specific month

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is important to avoid cherry-picking the inputs to the model. CCRRFF ¶ 1685. Further, using the 12 months preceding a transaction is standard practice for calculating market share. *See Merger Guidelines* § 5.2 (“The Agencies measure market shares based on the best available indicator of firms’ future competitive significance in the relevant market. This may depend upon the type of competitive effect being considered, and on the availability of data. Typically, *annual data* are used, but where individual transactions are large and infrequent so annual data may be unrepresentative, the Agencies may measure market shares over a longer period of time.”) (emphasis added).

Fourth, while Respondents claim that the MarkTen margin Dr. Rothman uses for the ALM is too high, Dr. Rothman correctly noted that Altria’s observed 2 percent margin likely underestimates Altria’s competitive significance as it includes aggressive price discounting, and because Altria’s margins increased over time. CCRRFF ¶ 1699 (citing PX5001 at 048-49 (¶ 91) (Rothman Rebuttal Report)). Further, as Dr. Rothman demonstrates, using only Altria’s margin, as done by Dr. Murphy, produces an implied average industry margin of 2.3 percent, far below the actual average industry margin of 19.4 percent. CCRRFF ¶ 1699 (citing PX5000 at 114 (Ex. 7) (Rothman Expert Report)); PX5001 at 049 (¶ 93) (Rothman Rebuttal Report)). In contrast, Dr. Rothman’s model, using all the margin information, produces an implied average industry margin of 24.6 percent. CCRRFF ¶ 1699 (citing PX5001 at 049 (¶ 93 & n.217) (Rothman Rebuttal Report)). Finally, even the actual average industry margin likely underestimates the competitive significance of Altria and other firms given the discounts provided by all firms. *See* CCRRFF ¶¶ 1701-02.

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**F. Respondents Failed to Prove that New Entry and Expansion Have Offset the Harmful Effects of the Transaction**

Respondents claim, as a defense to Section 7 liability, that any anticompetitive effects stemming from the Transaction are offset by the expansion of existing firms such as NJOY and Reynolds. Resps.' Post-Trial Br. at 126. But once again, Respondents miss the requirement that the Court look to the but-for world. *See Peabody Energy*, 492 F. Supp. 3d at 883, 917 (citation omitted). The proper analysis is to compare the world in which Altria exited the market with the hypothetical world in which Altria did not exit, i.e., the but-for world. *Id.* Clearly, the but-for world where Altria continued to compete in the U.S. closed-system e-cigarette market is more competitive than the world where Altria exited. CCFF ¶¶ 1842-46. Moreover, the record reflects that Altria's actions { [REDACTED] [REDACTED] } CCFF ¶¶ 1847-70. Furthermore, the regulatory moat protecting large firms from smaller rivals recently expanded: the FDA recently reviewed 93 percent of pending PMTA submissions and has thus far denied every single application, except one from Reynolds, a large tobacco company similarly situated to Altria, for a cigalike product.<sup>75</sup> As one commentator observed:

The vaping industry at an inflection point. The FDA was supposed to determine which e-cigarette products would remain on the market by September 9, a court-imposed deadline. It has already rendered decisions for many smaller companies, yet it's requesting more time to evaluate Juul Labs, the biggest e-cigarette manufacturer in the United States. **As this regulatory judgment day drags on, it**

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<sup>75</sup> Statement of FDA Commissioner Janet Woodcock, *FDA Makes Significant Progress in Science-Based Public Health Application Review, Taking Action on Over 90% of More than 6.5 Million 'Deemed' New Tobacco Products Submitted* (Aug. 9, 2021), available at <https://www.fda.gov/news-events/press-announcements/fda-makes-significant-progress-science-based-public-health-application-review-taking-action-over-90>; U.S. FDA, *Premarket Tobacco Marketing Orders*, available at <https://www.fda.gov/tobacco-products/premarket-tobacco-product-applications/premarket-tobacco-product-marketing-orders>; Press Release, FDA, *FDA Permits Marketing of E-Cigarette Products, Marking First Authorization of Its Kind by the Agency*, (Oct. 12, 2012), available at <https://www.fda.gov/news-events/press-announcements/fda-permits-marketing-e-cigarette-products-marking-first-authorization-its-kind-agency>.

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**seems to be a tale of two businesses: those with resources and capital, and those without.** (emphasis added)<sup>76</sup>

An another market observer noted: “The FDA has stated it needs more time to go over the corresponding science, an excuse that has met with vitriol from all sides: **Small- and medium-sized vape producers have essentially concluded that the industry will transform into an oligopoly of well-financed brands**; prohibitionists aren’t thrilled that the agency has yet to target the most influential players.”<sup>77</sup> Altria, as a well-resourced and well-capitalized tobacco company, was likely one of a few firms who could have succeeded in this regulatory landscape. Given these facts, Respondents have come nowhere close to proving new entry or expansion capable of offsetting the anticompetitive effects of Altria’s exit. *See Staples II*, 190 F. Supp. 3d at 133.

**G. Respondents Failed to Prove that Altria’s PMTA Assistance to JLI Has Offset the Harmful Effects of the Transaction**

Respondents claim that any harm stemming from the Transaction will be offset by the “consumer benefit that derives from Altria’s regulatory assistance of JLI.” Resps.’ Post-Trial Br. at 127. But these purported regulatory benefits are not cognizable efficiencies because they are unverifiable and not merger-specific. CCF ¶¶ 1891-955. Respondents “bear the burden of showing that . . . their claimed efficiencies are: (1) merger-specific; and (2) reasonably verifiable by an independent party.” *Staples II*, 190 F. Supp. 3d at 137 n.15 citing *H&R Block*, 838 F. Supp. 2d at 89); *Merger Guidelines* § 10. Respondents have failed to meet that burden here.

First, Respondents have not substantiated their claim that Altria helping JLI with its PMTA enabled JLI to submit its application earlier. CCF ¶ 1891. Efficiencies are only

<sup>76</sup> Rachel Chiu, *The FDA’s Anti-competitive E-Cigarette Restrictions Are a Small Business Killer*, THE NATIONAL INTEREST (Sept. 12, 2021), available at <https://nationalinterest.org/blog/buzz/fda%E2%80%99s-anti-competitive-e-cigarette-restrictions-are-small-business-killer-193510>.

<sup>77</sup> Alex Norcia, *Vape Advocates and Prohibitionists Temporarily Unite to Slam the FDA*, FILTER (Sept. 29, 2021), available at <https://filtermag.org/vape-advocates-prohibitionists-slam-fda/>.

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cognizable where “it is possible to ‘verify by reasonable means’ the likelihood and magnitude of each efficiency.” *H&R Block*, 833 F. Supp. 2d at 89 (quoting *Merger Guidelines* § 10).

Moreover, because “[e]fficiencies are inherently difficult to verify and quantify . . . it is incumbent upon the merging firms to substantiate efficiency claims.” *Id.* (internal quotation marks omitted); *see also FTC v. Staples, Inc. (“Staples I”)*, 970 F. Supp. 1066, 1089 (D.D.C. 1997) (finding “defendants failed to produce the necessary documentation for verification” of efficiencies). The document Respondents cite as the source of its purported { [REDACTED]

[REDACTED] } CCFF ¶ 1892. This estimate “preceded a lot of the PMTA work with Altria,” and { [REDACTED] } CCFF ¶ 1892. In an April 2018 presentation, Altria also estimated that a partnership between Altria and JLI would improve JLI’s PMTA chances by 20 percent, but this estimate predates any due diligence related to the Transaction by at least six months, and was based on the judgment of Altria executives, who “didn’t have a detailed assessment of [JLI’s] regulatory capability.”

CCFF ¶ 1897. Further, predictions about JLI’s likelihood of PMTA success are highly speculative given that Respondents have little insight into FDA deliberations and face a range of potential outcomes. CCFF ¶¶ 1898-911. { [REDACTED]

[REDACTED] } CCFF ¶ 1901. { [REDACTED]

[REDACTED] } CCFF ¶ 1901. As O’Hara testified, it would be speculative to attach a dollar value to a qualitative performance indicator, such as an improvement in lab testing due to Altria’s regulatory services. CCFF ¶ 1903. Finally, the prevalence of youth e-cigarette use poses a particular risk to JLI’s PMTA submission. CCFF ¶¶ 1912-17. Murillo testified that he

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sees youth vaping “as a very significant risk” to JLI receiving PMTA approval, and noted that

[REDACTED]

[REDACTED]

[REDACTED] } CCFF ¶ 1916. In view of the highly speculative nature of any potential consumer benefit present here, Respondents’ purported regulatory efficiencies are not verifiable.

Second, in addition to not being verifiable, Respondents’ purported regulatory efficiencies are not merger-specific because JLI could have received the PMTA assistance it required through means other than the Transaction. CCFF ¶¶ 1918-55. “[E]fficiencies, no matter how great, should not be considered if they could be accomplished without a merger.” *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 62 (D.D.C. 1998). As courts have repeatedly explained, a cognizable efficiency must “represent a type of cost saving that could not be achieved without the merger.” *H&R Block*, 833 F. Supp. 2d at 89; *see also Sysco*, 113 F. Supp. 3d at 82-83. Here, the record is clear that JLI was committed to submitting a PMTA and taking steps to improve and accelerate its submission *on its own*. CCFF ¶¶ 1929-41. During Kevin Burns’ tenure, JLI “hired a lot of people” and expanded its scientific affairs department from three to 100 people. CCFF ¶ 1929. JLI could have achieved any additional PMTA support it required through hiring additional personnel and retaining third-party contractors. CCFF ¶¶ 1933-55. In fact, JLI *did* hire employees, including Joe Murillo from Altria and Ryan Wick from PMI, and retained various third-party contractors to assist in preparing its PMTA. CCFF ¶¶ 1933, 1935, 1942-55. Moreover, many of the services “Altria provided” (Resps.’ Post-Trial Br. at 127) in relation to JLI’s PMTA submission were actually provided by third-party contractors with whom JLI could have contracted directly. CCFF ¶¶ 1951-55. Finally, by Respondents’ own admission, JLI “did



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not formally analyze alternatives to using Altria’s [regulatory] services.” CCFF ¶ 1918. Given JLI’s ability to obtain PMTA expertise in the absence of the Transaction, the purported regulatory efficiencies are not merger-specific.

In sum, Respondents have not carried their burden to show procompetitive efficiencies capable of offsetting the clear evidence of anticompetitive harm.<sup>78</sup>

### III. The Written Non-Compete Violates Section 1 of the Sherman Act

As discussed above, the written non-compete, which prohibits Altria from any selling or developing any e-cigarettes for a period of at least six years, is an integral part of Respondents’ overall anticompetitive agreement.<sup>79</sup> But even setting aside Altria’s discontinuation of its existing on-market products, the record demonstrates that the written non-compete is unlawful because its anticompetitive effects outweigh any procompetitive benefits, and because any procompetitive benefits could have been accomplished through less restrictive means.

#### A. The Written Non-Compete Is Not Ancillary to a Legitimate Business Integration

As a preliminary matter, the Court should reject Respondents’ characterization of the written non-compete as an “ancillary” restraint. *See* Resps.’ Post-Trial Br. at 128. A restraint is only ancillary where it is “subordinate and collateral to a separate, *legitimate* transaction.” *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (emphasis added). “[E]ven restraints ancillary in form are illegal if they are part of a general plan” to violate the antitrust laws. *Id.* (citing *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-83 (6th Cir. 1898), *aff’d* 175 U.S. 211 (1899)). Accordingly, if the Court finds that the entire Transaction violates either Section 1 of the Sherman Act *or* Section 7 of the Clayton Act,

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<sup>78</sup> The failings apparent in Respondents’ efficiencies claim also support a finding that the Transaction had no competitive benefits under a Section 1 rule of reason analysis. *See infra* Discussion § III.B.

<sup>79</sup> *See supra* Discussion § I.

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then the ancillary restraints doctrine does not apply. Indeed, Respondents concede that if Complaint Counsel proves a Section 1 or Section 7 violation, then “analyzing whether the actual non-compete is ancillary would be academic.” Resps.’ Post-Trial Br. at 128. In short, Respondents cannot rely on the ancillary restraints doctrine to save this otherwise illegitimate Transaction.

### **B. The Written Non-Compete Violates the Rule of Reason**

Even if the Court agrees with Respondents that the non-compete is ancillary to a legitimate transaction, the written non-compete violates Section 1 under the rule of reason. *See Eichorn v. AT&T Corp.*, 248 F.3d 131, 144-45 (3d Cir. 2001) (holding that ancillary restraints are subject to the rule of reason); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265 (7th Cir. 1981) (same). The written non-compete prohibits Altria from selling e-cigarettes or from engaging in any R&D for a minimum period of six years. CCFE ¶ 38. The initial term of six years is indefinitely extendable by three-year increments if not terminated by either party. CCFE ¶ 38.

In arguing that Complaint Counsel has failed to demonstrate anticompetitive effects and that any alleged harm is speculative, Resps.’ Post-Trial Br. at 129, Respondents once again ask the Court to ignore the fundamental truth that, but for the Transaction, Altria would have been a significant competitor in the U.S. market for closed-system e-cigarettes.<sup>80</sup> And that fundamental truth highlights the myriad anticompetitive effects that flowed directly from the non-compete, including:

- a complete halt to Altria’s ongoing collaboration with PMI under the JRDTA;<sup>81</sup>

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<sup>80</sup> *See supra* Discussion § II.D.

<sup>81</sup> *See* CCFE ¶¶ 1588-716.

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- the end of Altria’s collaborations with other third parties and pursuit of other potential acquisitions in the closed-system e-cigarette market;<sup>82</sup>
- the loss of Altria’s work to improve its existing e-cigarette portfolio;<sup>83</sup>
- the end of Altria’s R&D efforts on next-generation e-cigarettes;<sup>84</sup> and
- the guarantee to JLI that it would not face any future price or shelf-space competition from a dangerous rival for a period of at least six years.<sup>85</sup>

The consumer harm arising from this loss of competition is both concrete and substantial. Simply put, the written non-compete “replaced the possibility of competition with the certainty of none.” *Impax*, 994 F.3d at 495 (internal citations omitted).

Respondents’ argument that Altria’s regulatory assistance to JLI is a procompetitive benefit that is capable of offsetting the consumer harm stemming from the Transaction is unavailing. *See Resps.’ Post-Trial Br.* at 129. Unlike the clear evidence of extensive consumer harm detailed above, Respondents’ purported procompetitive benefit is highly speculative. As of the date of this filing, the FDA has not made a decision as to JLI’s PMTA submission and therefore, it is unclear whether Altria’s regulatory assistance will result in any procompetitive benefit at all. Furthermore, Respondents’ assertions that Altria “accelerated” and improved the “quality” of JLI’s PMTA submission are based on the self-serving testimony of Respondents’ executives and find no support in the rest of the record. *See Resps.’ Post-Trial Br.* at 130-31. Respondents have therefore failed to carry their burden to demonstrate the procompetitive benefits of the written non-compete.

But even assuming Altria’s regulatory assistance to JLI could somehow offset the harm to competition, the non-compete still violates the rule of reason because it is more restrictive than

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<sup>82</sup> *See* CCFE ¶¶ 1719-30.

<sup>83</sup> *See* CCFE ¶¶ 1538-52.

<sup>84</sup> *See* CCFE ¶¶ 1553-87.

<sup>85</sup> *See* CCFE ¶¶ 1442-62, 1532-37.

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necessary to achieve its purported benefits. *See Impax*, 994 F.3d at 497; *N. Am. Soccer League, LLC v. U.S. Soccer Fed’n, Inc.*, 883 F.3d 32, 45 (2d Cir. 2018). First, while Complaint Counsel agrees with Respondents that obtaining a PMTA is crucial for participation in the U.S. closed-system e-cigarette market, JLI did not require the assistance of Altria to prepare its application. CCF ¶¶ 1918-55. In fact, the record is replete with examples of JLI taking efforts on its own to accelerate and improve its PMTA submission, including hiring outside personnel (including several former Altria employees), retaining third-party contractors, and conducting relevant studies. CCF ¶¶ 1918-55. Second, even if JLI required the assistance of Altria specifically (which the record does not support), the six-year minimum term of the non-compete is longer than necessary to achieve its purported benefit. *See Perceptron, Inc. v. Sensor Adaptive Machs., Inc.*, 221 F.3d 913, 920 (6th Cir. 2000) (“The durational scope of a covenant not to compete must be reasonably calculated to protect the legitimate interest” of the covenantee.) (internal citation omitted). The six-year minimum term of the non-compete is far longer than the average amount of time it takes to prepare a PMTA submission. CCF ¶ 1791 (preparation of PMTA submission can take between 18 months and three years). CCF As such, the non-compete is more restrictive in duration than necessary to achieve its purported benefits.

In sum, the written non-compete, standing alone, violates Section 1 under the rule of reason because its anticompetitive effects clearly outweigh any procompetitive benefits and because the non-compete is more restrictive than necessary to achieve its purported benefits.<sup>86</sup>

#### **IV. The Commission’s Section 7 Claim Is Properly Asserted Against JLI**

Contrary to Respondents’ assertion, the Commission’s Section 7 claim is properly asserted against JLI. Citing to *United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d

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<sup>86</sup> As outlined in Discussion Section II.G, *supra*, Respondents’ claims regarding Altria’s regulatory support services likewise fail as a Section 7 defense because they are not verifiable or merger specific.

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222, 227 (9th Cir. 1978), Respondents argue that Complaint Counsel’s Section 7 claim against JLI is without merit because JLI is a “seller” and the section only applies to “acquirers.” Resps.’ Post-Trial Br. at 132. First, Respondents’ argument has already been rejected by the federal district court overseeing the parallel private litigation *In re Juul Labs, Inc. Antitrust Litig.*, Case No. 20-cv-02345-WHO, 2021 WL 3675208, at \*22 (N.D. Cal. Aug. 19, 2021) (concluding JLI is appropriately named as a defendant for purposes of the Section 7 claim brought against the Transaction). Furthermore, Respondents’ reference to *Coca-Cola Bottling* is incomplete and misleading. In fact, the decision acknowledges that sellers can be proper Section 7 defendants where their “presence would be necessary in order to fashion complete relief.” *Coca-Cola Bottling*, 575 F.2d at 228. As the court observed, “the fact that sellers are not violators of [section] 7 does not force courts to close their eyes to the fact that the sellers are parties to an acquisition which is prohibited by law,” and further, “the necessity of broad equity powers to enforce the antitrust laws has often been declared.” *Id.* at 227-28, 229; *see also Fricke-Parks Press, Inc. v. Fang*, 149 F. Supp. 2d 1175, 1185 (N.D. Cal. 2001) (“sellers may be joined in a section 7 action against a purchaser when the plaintiff seeks rescission or divestiture and the court needs jurisdiction over both the buying and selling company to fashion such equitable relief.”) (citation omitted); *Palmer News, Inc. v. ARA Servs., Inc.*, 476 F. Supp. 1176, 1193 (D. Kan. 1979) (“[A] court can maintain as a Clayton [section] 7 defendant any party whose presence is necessary to effectuate relief.”).

Here, Complaint Counsel is seeking equitable relief in the form of a divestiture, and jurisdiction over both Altria and JLI is necessary to fashion that relief. *See Fricke-Parks Press*, 149 F. Supp. 2d at 1185 (noting that while a seller’s liability for damages under Section 7 “may be open to question,” the authority to join a seller for purposes of obtaining equitable relief is

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clear). The remainder of the cases cited by Respondents concern liability for monetary damages and are therefore inapplicable. *See Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 852 (N.D. Cal. 2004) (“a [S]ection 7 claim *for monetary damages*, as a matter of law, does not exist against the person or entity selling the assets but rather must be brought against the acquiring person or entity.”) (emphasis added)(citation omitted); *Tim W. Koerner & Assocs., Inc. v. Aspen Labs, Inc.*, 492 F. Supp. 294, 300 (S.D. Tex. 1980), *aff’d*, 683 F.2d 416 (5th Cir. 1982); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484, 485, 488 (5th Cir. 1967). Accordingly, JLI is a proper respondent to Complaint Counsel’s Section 7 claim.

## V. FTC Administrative Proceedings Are Constitutional

Respondents state that they do not intend to litigate their constitutional claims here—deeming “this Court [as] unlikely to pass on these arguments”—and so merely recite their position “for the sake of preservation.” Resps.’ Post-Trial Br. at 133. In fact, Respondents cannot challenge the constitutionality of the FTC’s structure or administrative process in federal court until Respondents are subject to final agency action. *Axon Enter., Inc., v. FTC*, 986 F.3d 1173, 1176-77 (9th Cir. 2021). Rather, Respondents must first make their case to this Court, which can apply clear precedent that squarely forecloses their claims.

### A. The Supreme Court Directly Addressed and Upheld the Constitutionality of For-Cause Limitations on the Removal of FTC Commissioners

As Respondents concede, the constitutionality of the for-cause removal provisions in place at the FTC has been settled law for over 85 years. Resps.’ Post-Trial Br. at 134 (admitting that *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), “upheld for-cause removal restrictions on FTC Commissioners”). Respondents pin their hopes on dicta from *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), which plainly affords this Court no basis on which to overturn *Humphrey’s Executor*—something the Supreme Court itself expressly declined to do in *Seila*

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*Law. Id.* at 2192. The Commission has also directly addressed *Seila Law*, highlighting the distinctions that the *Seila Law* Court drew between the structure of the CFPB—with a single director who might be appointed by a prior president and not removable by a current president—and the multimember bipartisan commission that heads the FTC, to which the concerns articulated in *Seila Law* do not apply. *In re CID to Beam Fin'l, Inc.*, “Order Denying in Part and Granting in Part Petition to Quash or Modify Civil Investigative Demand,” FTC, File No. 182-3177, at 3-4 (Aug. 17, 2020).<sup>87</sup> The same distinction renders *Collins v. Yellen* inapposite: “A straightforward application of our reasoning in *Seila Law* dictates the result here. The FHFA (like the CFPB) is an agency led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President’s removal power.” 141 S. Ct. 1761, 1784 (2021).

#### **B. The Structure and Process of This Court Are Constitutional**

No court has found that an administrative law judge (“ALJ”) with the appointment and removal mechanisms in place at the FTC is unconstitutional. And for good reason. As recent case law confirms, the structure of this Court is constitutional because it is appointed by the Commission and its decisions are reviewable by the Commission, which is composed of officers nominated by the President and confirmed by the Senate.

The Supreme Court recently explained, in holding that the decisions of administrative patent judges (“APJs”) must be reviewable by the Director of the U.S. Patent and Trademark Office, that “restrictions on review relieve the Director of responsibility for the final decisions rendered by APJs purportedly under his charge.” *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1981 (2021). Rejecting the idea that stripping the APJs of tenure would be an appropriate remedy, *id.* at 1978, 1982, 1987, the Supreme Court stated: “It certainly is the norm for principal

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<sup>87</sup> The Order is available at [https://www.ftc.gov/system/files/documents/petitions-quash/beam-financial/1823177beamfinancial\\_commdorderptq.pdf](https://www.ftc.gov/system/files/documents/petitions-quash/beam-financial/1823177beamfinancial_commdorderptq.pdf).

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officers to have the capacity to review decisions made by inferior adjudicative officers. . . . To take one example recently discussed by this Court in *Free Enterprise Fund*, the Public Company Accounting Oversight Board can issue sanctions in disciplinary proceedings, but such sanctions are reviewable by its superior, the Securities and Exchange Commission.” *Id.* at 1984 (internal citations and quotation marks omitted). Accordingly, the remedy in *Arthrex* was to make the decisions of the Patent Trial and Appeal Board (“PTAB”), on which APJs sit, reviewable by the Director. *Id.* at 1986-87. The decisions of this Court are already reviewable by the Commission, so the Court’s administrative structure comports with the teachings of *Arthrex*. *See id.* at 1988.

This Court’s structure also aligns with the teachings of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), because the Commission appoints FTC ALJs. In *Lucia*, the Supreme Court held that Securities and Exchange Commission (“SEC”) ALJs were principal officers subject to the Appointments Clause. *Id.* at 2049. Accordingly, only the President, Courts of Law, or Heads of Departments could appoint ALJs. *Id.* at 2050. The constitutional defect in *Lucia* was that the appointment of ALJs was left to SEC staff. *Id.* That problem does not exist here. Because the Commission appoints FTC ALJs, and “the Commission itself counts as a Head of Department,” *Lucia* further confirms the constitutionality of this Court’s structure. *Id.* (internal quotation marks and brackets omitted).

Respondents also invoke *Free Enterprise Fund* to no avail, because its holding was expressly limited to the Public Company Accounting Oversight Board (“PCAOB”). *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 508 (2010) (“The only issue in this case is whether Congress may deprive the President of adequate control over the Board . . .”). The Supreme Court held that members of the Board, which is supervised by the SEC, were unconstitutionally insulated by two layers of tenure protection and so the SEC needed to be able to remove Board members at



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will. *Id.* at 509, 513. Importantly, the Supreme Court made clear that the PCAOB was unusual if not unique in being itself an independent agency, unlike this Court: “The parties have identified only a handful of isolated positions in which inferior officers might be protected by two levels of good-cause tenure. . . . They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency.” *Id.* at 505-06 (internal citations and quotation marks omitted).

Respondents here claim that their challenge to the constitutionality of this Court is “[j]ust as in *Free Enterprise Fund*.” Resps.’ Post-Trial Br. at 136. The Court, however, in *Free Enterprise* expressly rejected the assertion in the dissent (*see id.* 561 U.S. at 542-43 (Breyer, J., dissenting)) that the decision would apply to ALJs: “The dissent here suggests that other such positions might exist, and complains that we do not resolve their status in this opinion. . . . [But] the dissent fails to support its premonitions of doom; none of the positions it identifies are similarly situated to the Board.” *Id.* at 506 (internal citations and quotation marks omitted). In short, *Free Enterprise Fund* provides no basis to rule that this Court is unconstitutional.

### **C. FTC Enforcement Actions Comport with Constitutional Requirements for Due Process and Equal Protection**

Respondents are the largest tobacco company in the U.S. and one of the leading disruptors of the tobacco industry, both represented by a plethora of experienced counsel throughout the entirety of this litigation and the investigation that preceded it. Yet Respondents invoke the case of an alleged enemy combatant who had “received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive’s factual assertions”—adduced from military interrogations—“before a neutral decision maker.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 537 (2004); Resps.’ Post-Trial Br. at 138 (citing *id.* at 533). The comparison is unavailing.

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Respondents suggest that judicial review of cease and desist orders is limited and inadequate to protect their rights (Resps.' Post-Trial Br. at 137-38), but ignore repeated court holdings that the availability of judicial review of Commission orders fully protects such interests. As the Ninth Circuit recently explained, "the FTC statutory scheme ultimately allows [Respondent] to present its constitutional challenges to a federal court of appeals after the administrative proceeding, [so Respondent] has not suffered any cognizable harm." *Axon Enter.*, 986 F.3d at 1177. For this reason, appellate courts have consistently rejected attacks on the adequacy of the FTC Act's judicial review scheme. *Id.*

Moreover, the FTC process affords extensive protections throughout the investigation and litigation of a matter, belying Respondents' hyperbolic characterization of the Commission as "judge, jury, and executioner." Resps.' Post-Trial Br. at 137. Firms before the FTC have the opportunity to "present their views of the law, facts, and economics to the Commission before it determines whether there is 'reason to believe' that a violation occurred." Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMPETITION L. & ECON. 623 (2016). If a decision is made to issue a complaint, it is true that Congress gave the FTC an option to proceed in administrative court. But the ALJ "is independent of the Commission," respondents "can cross-examine witnesses and experts," and "the Commissioners remain cordoned off from the case until the parties argue on appeal from the ALJ." *Id.* Tellingly, Respondents fail to identify any specific rule or ruling of this Court that purportedly prejudiced them through some deviation from the "stringent evidentiary and procedural rules [] obtained in federal court." Resps.' Post-Trial Br. at 137.

There also is no equal protection issue here because it is entirely within the prosecutorial discretion of the FTC to investigate and litigate a matter that DOJ has declined to investigate and

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litigate, and vice versa, where the matter is within the statutory remit of both agencies. It is well established that “prosecutorial discretion [is] immune from review in the courts.” *Johns v. DOJ*, 653 F.2d 884, 893 (5th Cir. 1981); *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.”). For example, in *United States v. Kay*, 961 F.2d 1505 (10th Cir. 1992), the defendant lodged a due process challenge to being sentenced under federal rather than state law, because “his arrest, the search of his home, and the subsequent investigation were carried out by local law enforcement officials and [] only later was his case referred to federal authorities.” *Id.* at 1505-06. The court rejected that contention, explaining that “the ultimate decision whether to charge a defendant, and what charges to file, rests solely with state and federal prosecutors.” *Id.* at 1506 (citation and internal quotation marks and ellipsis omitted).

\* \* \*

Respondents fail to establish any constitutional infirmity with the FTC commissioners, the ALJ, or the due process afforded to respondents by the FTC Act. Moreover, Respondents’ attempt to dress up their challenge to the prosecutorial discretion of the FTC and DOJ in the finery of equal protection is similarly unavailing. Much as they might prefer otherwise, Respondents must win or lose on the merits.

## **VI. Complaint Counsel Is Entitled to the Remedies It Seeks**

The appropriate remedies for Respondents’ illegal Transaction are the complete divestiture of Altria’s equity stake in JLI and the immediate termination of all agreements associated with the Transaction. Once Complaint Counsel has established a violation of Section 7, “all doubts as to the remedy are to be resolved in its favor.” *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961). Complaint Counsel has met its burden of proof in

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support of its Section 1 and Section 7 claims and entry of the Proposed Order<sup>88</sup> is necessary to remedy and prevent the violations of law found to exist. *See FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428-30 (1957). Further, The Court has “wide discretion” in its choice of remedy where there is a “reasonable relation to the unlawful practices found to exist.” *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946). Respondents claim Complaint Counsel’s proposed remedies are improper for four reasons (Resps.’ Post-Trial Br. at 138-42), but each of these arguments can be rejected in turn.

First, Respondents’ claim that Complaint Counsel’s proposed remedies are punitive. Resps.’ Post-Trial Br. at 138. They are not, rather they return Respondents and consumers to where they were prior to Respondents’ antitrust violation. *See In the Matter of Evanston Northwestern Healthcare Corp.*, No. 9315, 2007 WL 2286195, at \*77 (F.T.C. Aug. 6, 2007) (The court must “attempt to craft a remedy that will create a competitive environment that would have existed in the absence of the violations.”) (citing *In re RSR Corp.*, 88 F.T.C. 800, 893 (F.T.C. 1976), *aff'd*, *RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir. 1979)). In the absence of the Transaction, Altria would have been competing aggressively in the U.S. closed-system e-cigarette market.<sup>89</sup> Indeed, in the nearly three years since the Transaction, Altria could have been using its vast resources to develop or acquire products and to submit a PMTA for those products. The simplest and most effective way to remedy the anticompetitive harm arising from the Transaction is to restore Altria to the position it occupied before agreeing with JLI to halt all current and future competition between the two firms. Thus, Altria must have both the *ability* and *incentive* to resume competing aggressively in the closed-system e-cigarette market. Altria’s full divestiture of its equity stake in JLI coupled with the immediate termination of the

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<sup>88</sup> The Proposed Order was included as Attachment A to Complaint Counsel’s Post-Trial Brief.

<sup>89</sup> *See supra* Discussion § II.D.

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Transaction's agreements will achieve these objectives. Altria will be free to bring its considerable expertise, resources, and strategic partnerships to bear in a sustained effort to achieve market leadership through competition. Far from being "punitive," divestiture of an ongoing business is considered by courts to be the "natural remedy" for a Section 7 violation. *See du Pont*, 366 U.S. at 326, 329; *see also Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) (stating that "[c]omplete divestiture is particularly appropriate where . . . acquisitions violate the antitrust laws") (internal citations omitted); *RSR Corp.*, 602 F.2d at 1326 n.5 (stating that "complete divestiture of all pre-merger assets is the usual remedy for a Section 7 violation").

Second, Respondents claim that the proposed remedies would harm "the interest of the general public" by denying consumers the "benefit" of Altria assisting with JLI's PMTA submission. Resps.' Post-Trial Br. at 139-40. As discussed above, any assistance Altria provided JLI is highly speculative given the substantial uncertainty surrounding the FDA's PMTA requirements and the strong link between the JUUL product and youth initiation.<sup>90</sup> Accordingly, the Court need not count Altria's PMTA assistance to JLI as a "benefit" to the general public when crafting an appropriate remedy. In support of this argument, Respondents cite *In the Matter of Evanston Northwestern Healthcare*, a hospital merger case in which the Commission denied a proposed divestiture in favor of an injunctive remedy. *See* 2007 WL 2286195, at \*77-78. But the Commission noted that *Evanston* was a "highly unusual case in which a conduct remedy, rather than divestiture, is more appropriate." *Id.* at \*77. In particular, the Commission noted that a divestiture "may have a substantial negative effect" on one Respondent's cardiac surgery program, "potentially creating life-threatening risks." *Id.* at \*78. There are no similar risks to life associated with a divestiture remedy here. Indeed, the *Evanston* court reiterated that

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<sup>90</sup> *See supra* Discussion § II.G.

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“[d]ivestiture is the preferred remedy for challenges to unlawful mergers, regardless of whether the challenge occurs before or after consummation.” *Id.* at 79. In short, nothing in *Evanston* supports denying Complaint Counsel’s proposed divestiture remedy.

Third, Respondents argue that divestiture would be “inequitable” to Altria in a way that amounts to unjust punishment and claims that the Court must consider private property interests like shareholder losses when crafting its remedy. Resps.’ Post-Trial Br. at 140-41. For this proposition, Respondents cite *du Pont*, which acknowledged the Supreme Court precedent for considering the “interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise.” 366 U.S. at 360 (internal citation and quotation marks omitted). But *du Pont* hardly supports Respondents’ argument when read in full. Indeed, the Court in *du Pont* required a complete divestiture of *du Pont*’s 23 percent stake in General Motors. *See du Pont*, 366 U.S. at 328, 330-31 (“[C]omplete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7. . . . Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court’s mind when a violation of § 7 has been found.”). The *du Pont* court further noted:

If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result. Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences. This proposition is not novel; it is deeply rooted in antitrust law and has never been successfully challenged.

*Id.* at 327, 334. Here, a complete divestiture is necessary and required to return Respondents and consumers to their position prior to the illegal acquisition. No alternate remedy provides Altria with the same ability and incentives to compete in the U.S. closed-system e-cigarette market. As

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such, the Court should order divestiture in spite of Altria's claims of purported economic hardship.

Fourth, and finally, Respondents argue that the Transaction falls under the "solely for investment" exemption to the Clayton Act. Resps.' Post-Trial Br. at 141. Respondents claim that Altria's investment is "solely for investment" purposes due to Altria's "decision not to vote its shares pending the outcome of this action." *Id.* But looking to the structure of the Transaction, which included granting Altria seats on JLI's board, it is clear that Altria sought more than a passive investment in Altria, the current self-enforced "decision" to pause voting rights notwithstanding. CCF ¶¶ 47-49. Indeed, pursuant to the Transaction, Altria committed to participate in the e-cigarette business exclusively through JLI. CCF ¶ 107. This commitment is inconsistent with an investment "solely for investment" purposes. *See In the Matter of Golden Grain Macaroni Co.*, 78 F.T.C. 63, 73 (F.T.C. Jan 18, 1971) ("In other words, when an acquisition will necessarily affect the competitive behavior of the two involved firms, it cannot be said that the *sole* purpose of the acquisition was for investment.") (emphasis in original). Further, the "solely for investment" exemption to the Clayton Act only applies where the parties to the acquisition, are not "using [the acquisition] by voting or otherwise to bring about or in attempting to bring about, the substantial lessening of competition." *See United States v. Tracinda Inv. Corp.*, 477 F. Supp. 1093, 1098-99 (C.D. Cal. 1979) (internal citations and quotation marks omitted). Therefore, the exemption is not applicable here where the evidence of a substantial lessening of competition stemming from the Transaction is clear. Pursuant to the Transaction, Altria agreed to exit the U.S. closed-system e-cigarette market in exchange for a share of JLI's profits thus resulting in the complete elimination of all competition from Altria

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both now and in the future. Accordingly, the statutory exemption Respondents claim does not apply here.

### **CONCLUSION**

For the foregoing reasons, the qualitative and quantitative record evidence establishes that the Transaction violates Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, as alleged in the complaint, and justifies entry of an Order by the Court granting the relief sought therein.



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Dated: October 19, 2021

Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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I also certify that I delivered via electronic mail a copy of the foregoing document to:

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