

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

**In the Matter of**

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

**And**

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

**Respondents.**

**The Honorable D. Michael Chappell**

**Docket No. 9393**

**MOTION OF NON-PARTY TURNING POINT BRANDS, INC. FOR *IN CAMERA*  
TREATMENT OF PROPOSED TRIAL EXHIBITS**

Pursuant to Rule 3.45 of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.45(b), non-party Turning Point Brands, Inc. (“Turning Point”) respectfully moves for *in camera* treatment of certain proposed trial exhibits in the above-captioned case. Each proposed trial exhibit (collectively, the “Confidential Documents”) contains Turning Point’s sensitive, non-public business information, the disclosure of which would cause Turning Point serious competitive harm by unfairly advantaging Turning Point’s competitors and by providing Turning Point’s customers with leverage over Turning Point in negotiations. In support of its motion, Turning Point provides the accompanying declaration of Frank Vignone, Vice President of Sales at Turning Point (“Vignone Declaration” or “Vignone Decl.”). A copy of each Confidential Document is attached to the Vignone Declaration.<sup>1</sup>

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<sup>1</sup> Certain of the Confidential Documents were produced with redactions, which are indicated on the Confidential Documents with the reason for the redaction. If a redaction does not have an explanation, the redacted information is information for which Turning Point seeks *in camera* treatment.

## I. BACKGROUND

Turning Point is a manufacturer, marketer, and distributor of products in the smoking accessories and other tobacco products industry, including the RipTide pod-based vaping system, which competes with the pod-based system manufactured by JUUL Labs, Inc. (“JUUL”). Vignone Decl. ¶ 4. Turning Point is not a party to the above-captioned action but, in response to subpoenas issued by JUUL and the FTC, Turning Point produced nearly 1,500 pages of documents. In addition, Turning Point’s CEO, Larry Wexler, provided deposition testimony. Turning Point requested confidential treatment for its production and Mr. Wexler’s deposition transcript under the Protective Order entered in the above-captioned action. Turning Point provided documents to its attorneys for production in a secure manner to ensure that they were accessible only to the intended recipients. The FTC and Respondents designated five of the documents produced by Turning Point as trial exhibits, along with Mr. Wexler’s deposition transcript and declarations submitted by Mr. Wexler and Turning Point’s General Counsel, Brittani Cushman. Turning Point requests *in camera* treatment for limited portions of only three of the documents it produced, the entirety of just one document, and excerpts constituting about two pages of Mr. Wexler’s deposition transcript.

FTC does not oppose this motion. Respondents are still considering their position with respect to Turning Point’s motion.<sup>2</sup>

## II. LEGAL STANDARD

Evidence is entitled to *in camera* treatment pursuant to Rule § 3.45 (b) if the evidence’s “public disclosure will likely result in a clearly defined, serious injury to the ... corporation

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<sup>2</sup> Respondents have requested that a limited number of in-house counsel responsible for this matter have access to in camera sessions in which confidential Turning Point material is discussed and filings related to that material. Respondents and Turning Point continue to discuss that request.



requesting *in camera* treatment.” The FTC recognizes that “[t]he likely loss of business advantages is a good example of a clearly defined, serious injury,” *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 138, at \*6 (Sept. 19, 2000) (internal quotation marks omitted), so courts attempt “to protect confidential business information from unnecessary airing,” *In re H.P. Hood & Sons, Inc.*, 1961 FTC LEXIS 368, \*12 (Mar. 14, 1961). ALJs have broad discretion in determining what is entitled to *in camera* treatment. *In re Gen. Foods Corp.*, 95 FTC. 352, 1980 WL 338997, at \*2 (Mar. 10, 1980).

To determine whether “disclosure would result in a serious competitive injury, the FTC considers whether the information is “sufficiently secret and sufficiently material ... that disclosure would result in a serious competitive injury.” *Id.* at \*4; *In re Bristol-Myers Co.*, 90 FTC 455, 1977 WL 189054, at \*1-2, (Nov. 11, 1977). Three of the factors consider the degree to which the materials in question are kept secret (the “Secrecy Factors”): (1) the extent to which the information is known outside of movant’s business; (2) the extent to which the information is known by employees and others involved in movant’s business; and (3) the extent of measures taken by movant to guard the secrecy of the information. *Id.* at \*2. The other three factors consider the materiality of the information (the “Materiality Factors”): (4) the value of the information to movant and its competitors; (5) the amount of effort or money expended by movant in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. *Id.*

The FTC treats requests for *in camera* treatment by non-parties with “special solicitude.” *In re Kaiser Aluminum & Chem. Corp.*, 103 FTC. 500, 1984 WL 565325, at \*1 (May 25, 1984); *In re The Crown Cork & Seal Co.*, 71 FTC. 1714, 1967 WL 94017, at \*1 (1967) (“[P]etitioner’s plea warrants special solicitude coming as it does from a third party bystander in no way involved

in the proceedings whose records, if *in camera* treatment is denied, will be open to the scrutiny of its competitors.”).

**III. THE CONFIDENTIAL DOCUMENTS MERIT *IN CAMERA* TREATMENT**

Turning Point seeks *in camera* treatment for the information set forth in the following chart:

<i>In Camera</i> Exhibit Number	Exhibit No.	Document Description	Bates Range	Locations Containing Confidential Information
A-1	PX3133 RX1790	Riptide Product Launch: Sales Training Brand Overview	TPB-JLI-FTC000000108-154	TPB-JLI-FTC000000130-135; TPB-JLI-FTC000000138-141
A-2	PX3134 RX1791	National Account Review 10/23/19	TPB-JLI-FTC000000226-272	TPB-JLI-FTC000000228; TPB-JLI-FTC000000231; TPB-JLI-FTC000000233; TPB-JLI-FTC000000235 TPB-JLI-FTC000000238; TPB-JLI-FTC000000241; TPB-JLI-FTC000000244-245; TPB-JLI-FTC000000248-249; TPB-JLI-FTC000000252-253; TPB-JLI-FTC000000256-257; TPB-JLI-FTC000000259; TPB-JLI-FTC000000261-263; TPB-JLI-FTC000000265-272
A-3	PX3135	Playing to Win Highlights	TPB-JLI-FTC000000294-313	Entire Document
A-4	PX3145	September 2019 IVG Business Presentation	TPB-JLI-FTC000000040-054	TPB-JLI-FTC000000041-042
A-5	PX7030 RX0133	Deposition of Larry Wexler	PX7030-001-094	25:10 to 26:15; 152:21 to 153:11

For PX3133/RX1790, PX3134/RX1791, and PX3145, Turning Point seeks *in camera* treatment only for those slides associated with the Bates numbers or ranges in the right column above. For PX7030/RX0133, Turning Point seeks *in camera* treatment only for the portions of the transcript identified in the right column above. Each document or portion of a document set forth above contains information that is “sufficiently secret and sufficiently material to [Turning Point’s] business that disclosure would result in serious competitive injury” and warrants *in camera* treatment.” *See In re Gen. Foods*, 1980 WL 338997, at \*4.

**A. The Secrecy Factors Support Granting The Confidential Documents *In Camera* Treatment**

The Confidential Documents are sufficiently secret to merit *in camera* treatment. They are kept confidential in the ordinary course of Turning Point’s business and are not disclosed to the public.<sup>3</sup> Vignone Decl. ¶¶ 6-9, 11. The information in PX3133/RX1790, PX3134/RX1791, and PX3135 is also not generally available to Turning Point employees; they are saved in a folder on an individual computer and they are not kept on Turning Point’s server. *Id.* ¶ 10. Turning Point has also taken steps to keep the documents confidential in connection with this litigation, designating them confidential under the Protective Order and providing them to Turning Point’s attorneys in a secure manner.

Turning Point has strict rules about employee access to and dissemination of sensitive or proprietary information. Turning Point’s employees are bound by Turning Point’s Code of Business Conduct and Ethics, which they sign upon hiring and which prohibits them from disclosing confidential and proprietary information outside of Turning Point *Id.* ¶ 12. Similarly, Turning Point’s Employee Handbook, which new hires are also required to review, prohibits the

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<sup>3</sup> PX3133/RX1790 is marked “For Internal Use Only” on each page. Vignone Decl. ¶ 6.

disclosure of “secret, proprietary, [or] confidential” information” to employees without a need to know the information. *Id.* ¶ 13. These rules apply to the Confidential Documents. *Id.* ¶ 14.

**B. The Materiality Factors Also Support Granting The Confidential Documents *In Camera* Treatment**

All of the documents and information for which Turning Point seeks *in camera* treatment are highly material to Turning Point, its competitors, and, in some cases, its customers. Disclosure of this information would result in the “loss of business advantages” to Turning Point and is therefore entitled to *in camera* treatment. *In re Hoechst*, 2000 FTC LEXIS 138, at \*6.

**1. PX3133/RX1790**

PX3133/RX1790, entitled “Riptide Product Launch: Sales Training Brand Overview” is a PowerPoint presentation developed in 2019 to train Turning Point’s sales force to more effectively market RipTide. Vignone Decl. ¶ 6. Pages TPB-JLI-FTC000000130-135 and TPB-JLI-FTC000000138-141 describe detailed short- and long-term marketing plans for the placement of RipTide, including goals for Turning Point’s sales force, specific strategies and messaging, and sample prices and discounts. *Id.*

If this information on these pages were disclosed to the public, it would provide competitors with insight into what Turning Point views as the strengths and weaknesses of RipTide compared to its competitors, brand positioning, and pricing, giving an unfair advantage to Turning Point’s competitors, who could use this information to tailor their marketing strategies to counter Turning Point’s. It would also give customers leverage in negotiations with Turning Point by informing them of Turning Point’s specific promotional pricing and sales strategies. *See In re Mcwane, Inc., & Star Pipe Prods., Ltd.*, 2012 WL 5879803, at \*1 (FTC Nov. 8, 2012) (granting non-party’s motion for *in camera* treatment of “strategic planning” documents); *See In re Polypore*

*Int'l, Inc.*, 2009 WL 1499350, at \*5 (FTC May 13, 2009) (granting *in camera* treatment for documents containing “business plans and strategies”).

## 2. PX3134/RX1791

PX3134/RX1791, entitled “National Account Review 10/23/19” is a PowerPoint providing an overview of Turning Point’s National Account performance in 2019. Vignone Decl. ¶ 7. There is highly material information throughout this document, which provides, at the retailer level, information about the distribution levels of various Turning Point products (not limited to RipTide), promotional programs that Turning Point is running, upcoming plans, analysis of how Turning Point’s programs are performing, and strategies for improving Turning Point’s performance, as well as detailed granular data about retailer-specific performance. *Id.*<sup>4</sup>

This information is highly valuable to Turning Point, its competitors, and its customers. If it were disclosed to the public, it would provide an unfair advantage to Turning Point’s competitors because they would be able to understand how Turning Point’s products perform at particular chain stores and Turning Point’s specific strategies and promotions designed to improve Turning Point’s performance, giving them the opportunity to undercut Turning Point in the deals they offer Turning Point’s customers. *See In re Polypore*, 2009 WL 1499350, at \*5 (granting *in camera* treatment for “customer-specific documents” and “documents containing “pricing strategy” and “market analysis”). It would also provide Turning Point’s customers with leverage in negotiations with Turning Point because Turning Point’s customers would be able to see all the promotions that Turning Point offers other chain stores.

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<sup>4</sup> This information is located on the slides with the Bates numbers TPB-JLI-FTC000000228, TPB-JLI-FTC000000231, TPB-JLI-FTC000000233, TPB-JLI-FTC000000235, TPB-JLI-FTC000000238, TPB-JLI-FTC000000241, TPB-JLI-FTC000000244-245, TPB-JLI-FTC000000248-249, TPB-JLI-FTC000000252-253, TPB-JLI-FTC000000256-257, TPB-JLI-FTC000000259, TPB-JLI-FTC000000261-263, and TPB-JLI-FTC000000265-272. Vignone Decl. ¶ 7.

### 3. PX3135

PX3135 is a “Playing to Win” Highlights Document from March 2019, which documents develops in Turning Point’s relationships with specific customers. Vignone Decl. ¶ 8. This document is material to Turning Point, its competitors, and its customers because it contains the names and locations of specific retail stores that carry Turning Point’s products as well as detailed, granular information about the performance of specific Turning Point products at specific stores, documents changes to the Turning Point products carried by these specific retail stores, and describes meetings between representatives of Turning Point and the retailers at TPB-JLI-FTC000000294-296 and TPB-JLI-FTC000000301-313. *Id.* If disclosed, this information would advantage Turning Point’s competitors in their dealings with these retailers by informing them how Turning Point was performing at particular retailers and about changes to Turning Point’s relationships with these retailers. It would provide Turning Point’s customers with unfair leverage in negotiations with Turning Point because they would know how Turning Point’s products perform at similar retailers as well as promotions or offers Turning Point is providing other retailers. *See re Polypore*, 2009 WL 1499350, at \*5 (granting *in camera* treatment for “customer-specific documents”)

### 4. PX3145

PX3145 is an example of a presentation, delivered periodically to management, concerning Turning Point’s vapor distribution and direct-to-consumer vapor businesses (known as “IVG”) and addressing developments in the vapor industry and other information that is relevant to understanding vapor products, including those manufactured and/or distributed by Turning Point. Vignone Decl. ¶ 9. TPB-JLI-FTC000000041-042 contains detailed information about IVG’s financial performance, comparing its actual performance to its budget and analyzing, at a granular level, its SG&A expenses, and highly sensitive profits and margin data.

This information is material to Turning Point, its competitors, and its customers because public disclosure of this information would provide Turning Point's competitors with an unfair advantage over Turning Point by allowing them to understand nonpublic information about Turning Point's financial performance, including Turning Point's costs, expenses, and margins. *Id.* ¶ 9. See *In re Polypore*, 2009 WL 1499350, at \*5 (granting *in camera* treatment for documents containing "costing data" and "sales and financial information").

#### 5. PX7030-001-094

During his deposition, Mr. Wexler twice referred to plans of Turning Point that are the subject of ongoing and anticipated litigation at 25:10 to 26:15 and 152:21 to 153:11. The information contained in these statements is material and, if disclosed, could harm Turning Point's relationships with business partners and provide competitors with an unfair advantage. Vignone Decl. ¶ 11.

#### IV. TURNING POINT'S NON-PARTY STATUS WEIGHS IN FAVOR OF GRANTING *IN CAMERA* STATUS

Turning Point's status as a non-party further strengthens its claim for *in camera* treatment of the Confidential Documents. As a non-party, its request deserves "special solicitude." See *In re Kaiser Aluminum*, 1984 WL 565325, at \*1. As the FTC has previously recognized, granting "special solicitude" to third-party requests for *in camera* treatment "encourages cooperation with future adjudicative discovery requests." *Id.*

#### V. DURATION

Turning Point seeks *in camera* treatment for the Confidential Documents for a period of five years. Five years is necessary to protect Turning Point from suffering the competitive injuries it would suffer if the highly sensitive information contained in the Confidential Documents were disclosed. If this information is disclosed sooner, Turning Point will lose the advantages it has

gained from the confidentiality of the information contained in the Confidential Documents. *In re Otto Bock Healthcare N. Am., Inc.*, 2018 FTC LEXIS 111, at \*11 (July 6, 2018) (granting *in camera* treatment for five years from time of order to non-party's ordinary business records, including documents containing product level sales data and pricing information); *In re I-800 Contacts*, 2017 FTC LEXIS 55, at \*8-10 (Apr. 4, 2017).

## VI. CONCLUSION

For the forgoing reasons, Turning Point respectfully requests that the Court grant *in camera* treatment of the Confidential Documents for at least five years.

Date: May 7, 2021

Respectfully submitted,

*/s/ Mark A. Ford*

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

**In the Matter of**

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

**And**

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

**Respondents.**

**Docket No. 9393**

**[PROPOSED] ORDER GRANTING MOTION OF NON-PARTY TURNING POINT BRANDS FOR *IN CAMERA* TREATMENT OF PROPOSED TRIAL EXHIBITS**

On May 7, 2021, non-party Turning Point Brands, Inc. (“Turning Point”) moved for *in camera* treatment of certain proposed trial exhibits. Upon consideration, the Motion is GRANTED and it is hereby ORDERED that the following documents are provided with *in camera* treatment under 16 C.F.R. § 3.45(b) for five years from the date of this order.

<b>Exhibit No.</b>	<b>Document Description</b>	<b>Bates Range</b>	<b>Locations Containing Confidential Information</b>
PX3133 RX1790	Riptide Product Launch: Sales Training Brand Overview	TPB-JLI-FTC000000108-154	TPB-JLI-FTC000000130-135; TPB-JLI-FTC000000138-141
PX3134 RX1791	National Account Review 10/23/19	TPB-JLI-FTC000000226-272	TPB-JLI-FTC000000228 TPB-JLI-FTC000000231; TPB-JLI-FTC000000233; TPB-JLI-FTC000000235 TPB-JLI-FTC000000238; TPB-JLI-FTC000000241; TPB-JLI-FTC000000244-245; TPB-JLI-FTC000000248-249; TPB-JLI-FTC000000252-253; TPB-JLI-FTC000000256-257; TPB-JLI-FTC000000259;

			TPB-JLI-FTC000000261-263; TPB-JLI-FTC000000265-272
PX3135	Playing to Win Highlights	TPB-JLI-FTC000000294-313	Entire Document
PX3145	September 2019 IVG Business Presentation	TPB-JLI-FTC000000040-054	TPB-JLI-FTC000000041-042
PX7030 RX0133	Deposition of Larry Wexler	PX7030-001-094	25:10 to 26:15; 152:21 to 153:11

ORDERED:

\_\_\_\_\_  
The Honorable D. Michael Chappell  
Chief Administrative Law Judge

Date: May [ ], 2021

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

**In the Matter of**

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

**And**

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

**Respondents.**

**The Honorable D. Michael Chappell**

**Docket No. 9393**

**PROOF OF SERVICE OF PUBLIC FILING  
AND CERTIFICATION PURSUANT TO 16 C.F.R. § 4.2**

I, Mark A. Ford, hereby certify that on May 7, 2021, I served a copy of Non-Party Turning Point Brands, Inc.'s Motion for *In Camera* Treatment, supporting declaration of Frank Vignone, and Proposed Order electronically via email and the Office of the Secretary's electronic filing system to:

April Tabor  
Acting Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room H-113  
Washington, DC 20580  
secretary@ftc.gov

And pursuant to ¶ 1 of the Scheduling Order in the above-captioned matter by email to:

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
Office of Administrative Law Judges  
600 Pennsylvania Avenue, NW, Room H-110  
Washington, DC 20580

And pursuant to ¶ 2 of the Scheduling Order in the above-captioned matter by email to Complaint Counsel and counsel of record for the Respondents:

<p>James Abell jabell@ftc.gov Dominic Vote dvote@ftc.gov Peggy Bayer Femenella pbayer@ftc.gov Erik Herron eherron@ftc.gov Joonsuk Lee jlee4@ftc.gov Meredith Levert mlevert@ftc.gov Kristian Rogers krogers@ftc.gov David Morris dmorris1@ftc.gov Michael Blevins mblevins@ftc.gov Michael Lovinger mlovinger@ftc.gov Frances Anne Johnson fjohnson@ftc.gov Jennifer Milici jmilici@ftc.gov Nicole J. Lindquist nlindquist@ftc.gov Jeanine K. Balbach jbalbach@ftc.gov Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, DC 20580</p> <p><i>Complaint Counsel</i></p>	<p>David Gelfand dgelfand@cgsh.com Jeremy Calsyn jcalsyn@cgsh.com Jessica Hollis jhollis@cgsh.com Matthew Bachrack mbachrack@cgsh.com Linden Bernhardt lbrenhardt@cgsh.com Cleary Gottlieb Steen &amp; Hamilton LLP 2112 Pennsylvania Avenue NW Washington, DC 20037</p> <p><i>Counsel for Respondent Juul Labs, Inc.</i></p> <p>Debbie Feinstein debbie.feinstein@arnoldporter.com Robert Katerberg robert.katerberg@arnoldporter.com Justin Hedge justin.hedge@arnoldporter.com Francesca Pisano francesca.pisano@arnoldporter.com Le-Tanya Freeman tanya.freeman@arnoldporter.com Adam Pergament adam.pergament@arnoldporter.com David Kouba david.kouba@arnoldporter.com Arnold &amp; Porter Kaye Scholer LLP 601 Massachusetts Avenue NW Washington, DC 20011</p> <p>Marc Wolinsky MWolinsky@wlrk.com Jonathan Moses JMMoses@wlrk.com Kevin Schwartz KSchwartz@wlrk.com Adam Goodman ALGoodman@wlrk.com Wachtell, Lipton, Rosen &amp; Katz 51 West 52nd Street New York, NY 10019</p>
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/s/ Mark A. Ford

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

**In the Matter of**

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

**And**

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

**Respondents.**

**The Honorable D. Michael Chappell**

**Docket No. 9393**

**DECLARATION OF FRANK VIGNONE IN SUPPORT OF NON-PARTY TURNING  
POINT BRANDS, INC.’S MOTION FOR *IN CAMERA* TREATMENT OF PROPOSED  
TRIAL EXHIBITS**

1. I am Vice President of Sales at Turning Point Brands, Inc. (“Turning Point”), non-party in the above-captioned proceeding. In this role I am responsible for the strategic development, direction and execution of Turning Point’s sales organization including field sales, retail and wholesale national accounts, trade marketing, and customer service. I have worked at Turning Point since January 2018 and prior my current position I was the Senior Director of National Accounts, responsible for developing and leading go to market strategies, training, development and advancement for our national accounts team.

2. I am familiar with the documents forming the subject of the instant motion (the “Confidential Documents”). Turning Point produced these documents in response to subpoenas issued by the FTC and JUUL Labs, Inc. in the above-captioned proceedings. True and Correct copies of the Confidential Documents are attached as Exhibits A1-A5.

3. I have personal knowledge of the following facts, with the exception of the facts contained in Paragraphs 12 and 13, which I believe to be true on information and belief based on my investigation.

4. Turning Point is a manufacturer, marketer, and distributor of products in the smoking accessories and other tobacco products (“OTP”) industry. The OTP industry consists of non-cigarette products, and Turning Point has three focus segments in this industry: the Zig-Zag® Products segment, which primarily includes rolling papers and cigarette wraps; the Stoker’s® Products segment, which includes moist snuff and chewing tobacco; and the NewGen Products segment, which includes a Turning Point subsidiary dedicated to alternative products (including CBD and nutraceuticals), Turning Point’s vape distribution business, and certain hemp and cannabis products. Among Turning Point’s NewGen products is the RipTide pod-based vaping system, which competes with JUUL.

5. Turning Point’s primary competitors are significantly larger and have more resources, and impose continuing competitive pressure on Turning Point. Turning Point must therefore compete aggressively to ensure that its products are available to consumers and are competitively priced. I know from my experience at Turning Point that information about Turning Point’s customers, sales strategies, marketing plans, and finances is highly valuable both to Turning Point’s competitors and its customers, and the disclosure of such information would unfairly advantage Turning Point’s competitors and would provide Turning Point’s customers with leverage over Turning Point in negotiations.

6. PX3133/RX1790 is a PowerPoint presentation that was developed in 2019 to train Turning Point’s sales force to more effectively market RipTide. This document is kept confidential in the ordinary course of Turning Point’s business and is marked “For Internal Use Only” on each

page. It has not been disclosed to the public. This document provides an overview of RipTide's distinguishing features, pricing, competitors, and sales and marketing plans. In particular, the pages numbered TPB-JLI-FTC000000130-135 and TPB-JLI-FTC000000138-141 describe detailed short- and long-term marketing plans for the placement of RipTide in independent retail stores. These slides describe goals for Turning Point's sales force, detail specific strategies and messaging, and provide sample pricing for RipTide products, including discounts. Although these plans were introduced to the sales force in 2019, they are similar to the plans that Turning Point uses today. If information on these pages were disclosed to the public, it would provide an unfair advantage to Turning Point's competitors, who could alter their marketing strategies, pricing, and messaging to specifically counter Turning Point. Moreover, insight into Turning Point's specific promotional pricing and sales strategies would give customers leverage in negotiations with Turning Point.

7. PX3134/RX1791 is a PowerPoint that provides an overview of Turning Point's National Account performance in 2019. It is kept confidential in the ordinary course of business and has not been disclosed to the public. It provides information about the distribution levels of various Turning Point products at each retailer, promotional programs that Turning Point is running with each retailer, upcoming plans for each retailer, analysis of how Turning Point's programs are performing at each retailer, and strategies for improving Turning Point's performance with each retailer. This information is contained on the slides with the Bates numbers TPB-JLI-FTC000000228, TPB-JLI-FTC000000231, TPB-JLI-FTC000000233, TPB-JLI-FTC000000235, TPB-JLI-FTC000000238, TPB-JLI-FTC000000241, TPB-JLI-FTC000000244-245, TPB-JLI-FTC000000248-249, TPB-JLI-FTC000000252-253, TPB-JLI-FTC000000256-257, TPB-JLI-FTC000000259, and TPB-JLI-FTC000000261-263. The presentation also contains



detailed, granular data analyzing how Turning Point's different products have performed with each retailer at TPB-JLI-FTC000000265-272. If this information were disclosed to the public, it would provide an unfair advantage to Turning Point's competitors because they would be able to understand how Turning Point's specific products perform at specific chain stores and Turning Point's specific strategies and promotions designed to improve Turning Point's performance, giving them the opportunity to undercut Turning Point in the deals they offer Turning Point's customers. It would also provide Turning Point's customers with leverage in negotiations with Turning Point because Turning Point's customers would be able to see all the promotions that Turning Point offers other chain stores that sell Turning Point's products.

8. PX3135 is a "Playing to Win" Highlights Document from March 2019. Turning Point creates these documents periodically to document customer-specific developments. It is kept confidential in the ordinary course of business and has not been disclosed to the public. It contains the names and locations of specific retail stores that carry Turning Point's products, documents changes to the Turning Point products carried by these specific retail stores, and describes meetings between representatives of Turning Point and the retailers at TPB-JLI-FTC000000294-296 and TPB-JLI-FTC000000301-313. It also contains detailed, granular information about the performance of specific Turning Point products at specific stores at TPB-JLI-FTC000000297-300. The information in this document, if disclosed to the public, would provide Turning Point's competitors with an unfair advantage over Turning Point by providing them with granular information about Turning Point's performance at particular retailers and incremental improvements that Turning Point has made at these retailers over time. It would provide retailers with leverage in negotiations with Turning Point because it would inform them of how Turning

Point's products perform at other, similar retailers, and would give them information about promotions that Turning Point is offering to other retailers.

9. PX3145 is a presentation concerning Turning Point's vapor distribution and direct-to-consumer vapor businesses (referred to internally as "IVG"). These presentations are delivered periodically to Turning Point's management and inform management of developments in the vapor industry and the performance of Turning Point's vapor business and provide other information that is relevant to understanding vapor products, including those manufactured and/or distributed by Turning Point. These presentations are kept confidential in the ordinary course of business and have not been disclosed to the public. This presentation contains detailed information about IVG's financial performance, comparing its actual performance to its budget and analyzing, at a granular level, its SG&A expenses, and highly sensitive profits and margin data at TPB-JLI-FTC00000041-042. Public disclosure of this information would provide Turning Point's competitors with an unfair advantage over Turning Point because it would allow them to understand nonpublic information about Turning Point's financial performance, including Turning Point's costs, expenses, and margins.

10. I keep PX3133/RX1790, PX3134/RX1791, and PX3135 saved to my computer. They are not saved on Turning Point's server or otherwise made generally available to the employees of Turning Point.

11. I have reviewed portions of the deposition of Larry Wexler, Turning Point's President and Chief Executive Officer. In the portion of the deposition from 25:10 to 26:15 and 152:21 to 153:11, Mr. Wexler testifies about specific but significant non-public strategic plans. These plans have no bearing on the issues in this case but are nevertheless highly sensitive. If those specific plans become public, it may significantly impact Turning Point's relationships with

business partners and provide competitors unfair competitive advantage. Turning Point has kept the plans described in this portion of Mr. Wexler’s transcript highly confidential—they are not publicly disclosed and they are only communicated to Turning Point employees on a strict “need to know” basis.

12. The importance of not disclosing confidential information is emphasized within Turning Point. When hired, it is my understanding that it is standard practice for new Turning Point employees to sign Turning Point’s Code of Business Conduct and Ethics, which prohibits employees from disclosing confidential or proprietary information outside of Turning Point. This prohibition extends to “all non-public information that might be of use to competitors or harmful to [Turning Point] or its customers, if disclosed, as well as “information that suppliers and customers have entrusted [Turning Point]” and “information about [Turning Point’s] financial condition, prospects or plans, its marketing and sales programs and research and development information.”

13. It is my understanding that it is also standard practice for newly hired Turning Point employees to sign an acknowledgement that they have read Turning Point’s Employee Handbook, which provides that “secret, proprietary, confidential, or attorney-client privileged information will not be disclosed to external parties or employees without a ‘need to know.’ Such information includes, but is not limited to, business information related to our clients and information regarding the development of systems, processes, products, know how, technology, or other internal business-related communications.”

14. The portions of the documents and transcript described above are each considered confidential and proprietary and are subject to these confidentiality restrictions spelled out in the Code of Business Conduct and Employee Handbook.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April  
30, 2021.

DocuSigned by:

*Frank Vignone*

435225ED09FF4DB...

Frank Vignone

# **PUBLIC EXHIBITA-1**

## **PX3133 RX1790**



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TO INSPIRE OUR ADULT CONSUMERS THROUGH INNOVATION AND  
MOTIVATION WHILE ON THEIR UNIQUE JOURNEY OF DEFINING  
MOMENTS.

I N N O V A T I V E . A D V E N T U R O U S . E N C O U R A G I N G .



Riptide PRODUCT LAUNCH - SALES TRAINING & BRAND OVERVIEW

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# Product Attributes



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Riptide PRODUCT LAUNCH - SALES TRAINING & BRAND OVERVIEW

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# History

JUNE 2017

Riptide is introduced to Vapor Shark customers with Tobacco Derived Nicotine.

AUGUST 2017

Riptide second iteration adjusted for throat hit and nicotine impact with tobacco-free nicotine.

OCTOBER 2017

Riptide third iteration adjusted for flavor.

TODAY

Riptide final iteration powered by NicTech.

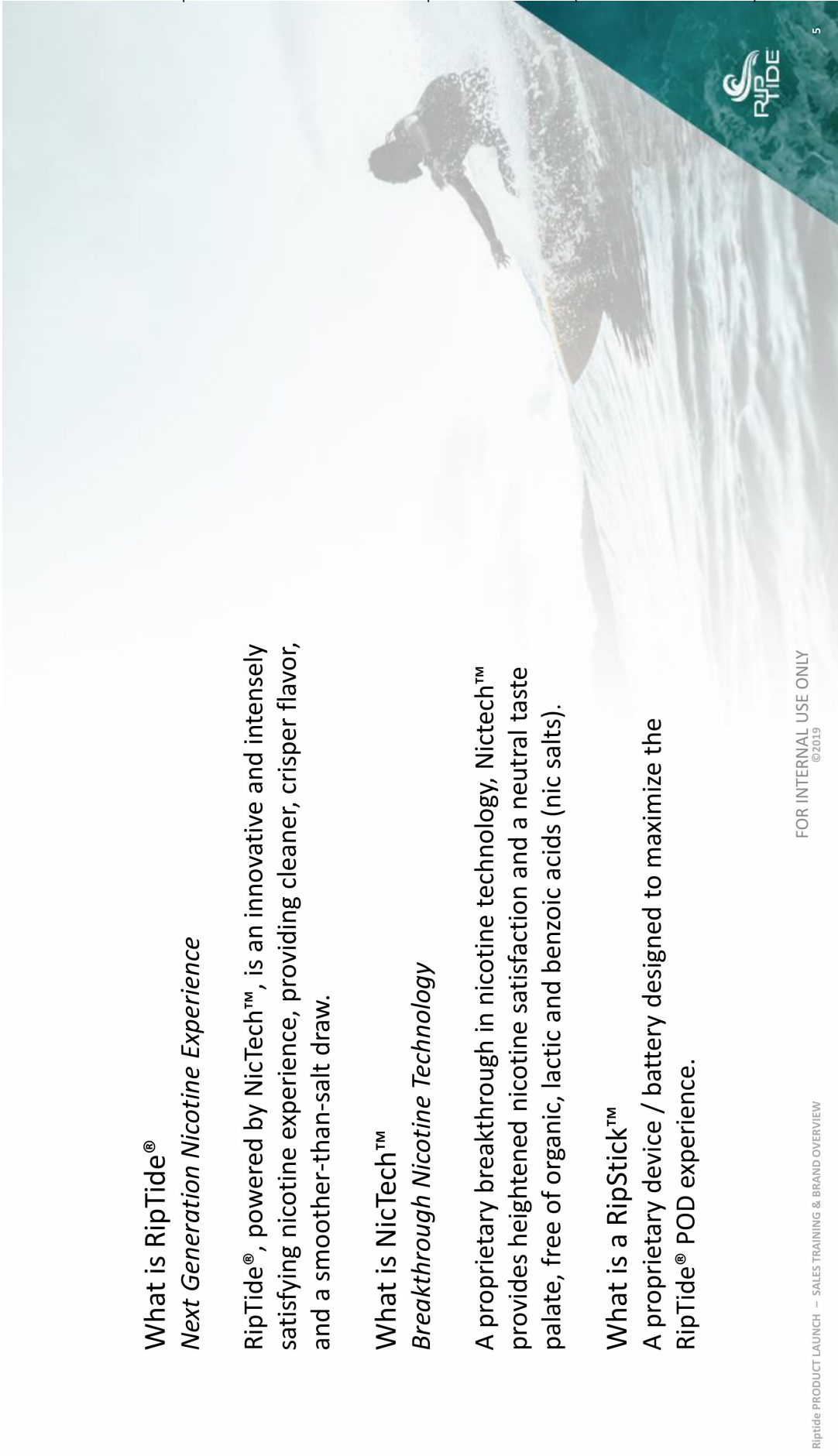
**KTA: Riptide has undergone extensive trial and consumer testing**



Riptide PRODUCT LAUNCH – SALES TRAINING & BRAND OVERVIEW

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**What is RipTide®**  
*Next Generation Nicotine Experience*

RipTide®, powered by NicTech™, is an innovative and intensely satisfying nicotine experience, providing cleaner, crisper flavor, and a smoother-than-salt draw.

**What is NicTech™**  
*Breakthrough Nicotine Technology*

A proprietary breakthrough in nicotine technology, NicTech™ provides heightened nicotine satisfaction and a neutral taste palate, free of organic, lactic and benzoic acids (nic salts).

**What is a RipStick™**  
 A proprietary device / battery designed to maximize the RipTide® POD experience.

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Riptide PRODUCT LAUNCH – SALES TRAINING & BRAND OVERVIEW



**NICTECH**

**2.0**

- HEIGHTENED NICOTINE SATISFACTION
- ACHIEVES MORE SATISFACTION WITH LESS
- ORGANIC, BENZOIC & LACTIC ACIDS FREE
- MORE E-LIQUID THAN JUUL
- CRISPER, CLEANER FLAVOR – SMOOTHER THAN SALT

**KTA: Nictech meets Riptide and the Riptide Ripstick**

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VERVIEW

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RIPIDE

# N<sup>2.0</sup>

## NICTECH

	COMBUSTIBLE CIGARETTES	TRADITIONAL VAPOR NICOTINE	SALT NICOTINE
NICOTINE IMPACT IN FIRST MINUTE	5 NG / ML	1 NG / ML	2 NG / ML
			<b>TBD NG / ML</b>

	HARSH	HARSH	HARSH
SMOOTHNESS	HARSH	HARSH	HARSH
			<b>SMOOTH</b>

	YES	NO	YES	NO
BENZOIC ACID (NICOTINE SALT)	YES	NO	YES	<b>NO</b>
TOBACCO BASED NICOTINE	YES	YES	YES	<b>NO</b>

**KTA: Nictech achieves more with less**

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**Ripstick**

	<b>RIPSTICK®</b>	JUUL®	VUSE ALTO®	MYBLUE®
BATTERY POWER	<b>380 MAH</b>	180 MAH	350 MAH	350 MAH
POD CAPACITY	<b>1.4ML</b>	0.7 ML	1.8 ML	1.5 ML
BENZOIC ACID	<b>No</b>	Yes	No	Yes (my blue Intense)
CHARGER	<b>MICRO USB</b>	PROPRIETARY	PROPRIETARY	MICRO USB

**KTA: The Ripstick has a larger battery than major competitive devices**

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RIP TIDE

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## Riptide Flavors

All of our e-liquids are powered by NicTech, and designed to work optimally with the RipStick. These pods have a large, 1.4ml capacity, and are available in 2.4% and 5.0% NicTech Strengths.



*A bold and robust blend featuring the traditional flavor of a variety of masterfully cured tobaccos.*



*A crisp, clean, and incredibly refreshing blend of hearty tobacco notes accented with the perfect touch of cooling menthol.*



*Experience all of the bold, face-puckering flavor of the world's most elusive fruit: the beautiful blue raspberry.*



*Experience the best part of Saturday morning with this tart-and-tangy mixed fruit cereal inspired masterpiece.*



*A daiquiri inspired blend of fresh coconut, ripe Georgia peaches, and supremely scrumptious strawberries.*



NICTECH

Riptide PRODUCT LAUNCH – SALES TRAINING & BRAND OVERVIEW

**KTA: 5 great flavors; mango in the works**

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# Riptide Pods



**KTA: 5 styles; 2 nic strengths**

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AUTHENTIC. CONSUMER DRIVEN.  
TRUE TO ITS CORE. POSITIVE.



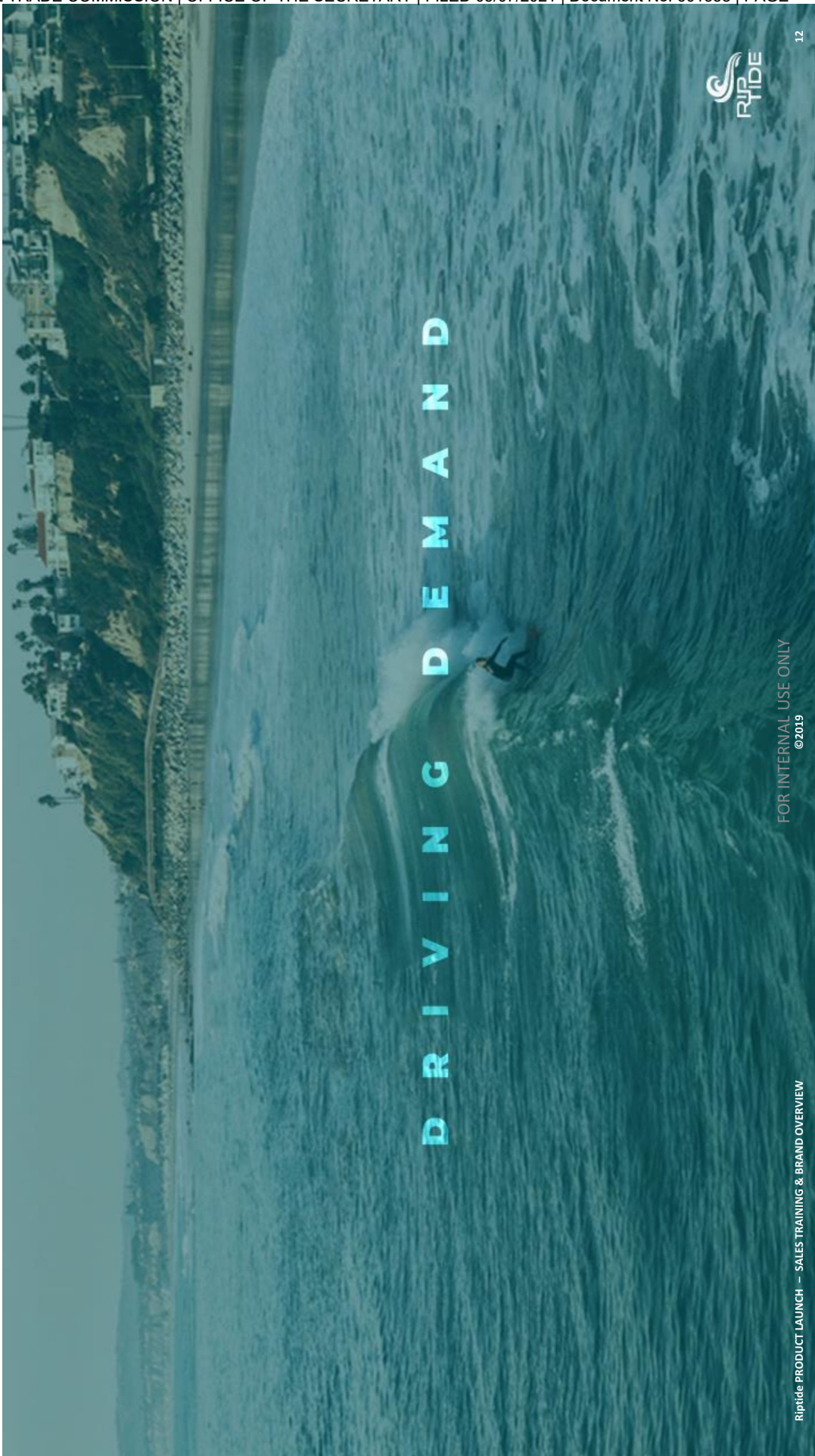
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Riptide PRODUCT LAUNCH – SALES TRAINING & BRAND OVERVIEW

- E-COMMERCE
- DIGITAL MARKETING
- MICRO INFLUENCERS
- PUBLIC RELATIONS
- SWEEPSTAKES
- TRIAL PROGRAM
- MOBILE APP
- POP/POS
- BRANDED SWAG

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RIPSTICK

RIPIDE

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# Support Materials

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# Point of Sale Materials



RIPTIDE®						
Item #	Product	Facts / Graphic	UPC	Style	Gross Price	QTY.
591702	Graphic Kit-Riptide Dsp NFP Conversion Labels	<a href="#">Graphic</a>		12/SHEET	\$0.00	
594301	Display-Riptide 2 Tier	<a href="#">Graphic</a>	Z1P	1/CASE	\$0.00	
594302	Display-Riptide 1 Tier	<a href="#">Graphic</a>	Z1P	1/CASE	\$0.00	
594303	Display-Riptide Pusher System	<a href="#">Graphic</a>	Z1P	12/CASE	\$0.00	
598202	WINDOW CLING LG - RIPTIDE	<a href="#">Graphic</a>	Z2/3P	50/PACK	\$0.00	
598203	WINDOW CLING SM - RIPTIDE	<a href="#">Graphic</a>	Z2/3P	50/PACK	\$0.00	
591703	STYRENE □ RIPTIDE	<a href="#">Graphic</a>	Z2/3P	EACH	\$0.00	
594306	COUNTERMAT ADHESIVE BASE - RIPTIDE	<a href="#">Graphic</a>	Z2P/3P	10/PACK	\$0.00	
594307	COUNTERMAT RUBBER BASE - RIPTIDE	<a href="#">Graphic</a>	Z2P	10/PACK	\$0.00	
598201	DOOR CLING - Riptide	<a href="#">Graphic</a>	Z3P	50/PACK	\$0.00	
594305	COREPLAST - RIPTIDE	<a href="#">Graphic</a>	Z4P	10/CASE	\$0.00	
594304	Bollard Sign - Riptide	<a href="#">Graphic</a>	Z4P	10/CASE	\$0.00	



**KTA: POS is available now.**

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# Point of Sale Materials



**The We Card calendar makes it easy to check ID!**



## 3 Tier Display



## Trial Tips



**KTA: More POS to come**

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# Merchandising



Type	In Line Pusher	1 tier	2 tier	3 tier
Width (left - right)	9-3/8"	10-3/8"	10-3/8"	10-3/8"
Depth (front - back)	9 3/4"	10"	10"	10"
Height with Header	N/A	8-1/8"	13-5/8"	19"
Height w/o header	2-1/8"	5-3/4"	11-1/4"	16-3/4"

## KTA: Solutions to meet retailer needs

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# List Pricing

ITEM #	PRODUCT	PKG IND & MFG's UPC	CASE UPC	CARTON UPC	UNIT UPC	CASE PRICE	CARTON PRICE	UNIT PRICE	CASE STYLE	GROSS WEIGHT
RIPTIDE® TFN VAPOR POD SYSTEM BATTERY										
16504	RIPTIDE® RIPSTICK TFN BLACK BATTERY KIT	1 08 404391	6504 1	6502 0	6500 6	\$350.00	\$35.00	\$7.00	10/5's	5.41 LBS
RIPTIDE® TFN VAPOR PODS 2.4%										
16183	RIPTIDE® TFN POD BRIGHT LEAF TOBACCO 2.4%	1 08 404391	6183 8	6182 4	6181 7	\$185.00	\$9.25	\$1.85	20/5'S	4.15 LBS
16186	RIPTIDE® TFN POD MINT 2.4%	1 08 404391	6186 9	6185 5	6184 8	\$185.00	\$9.25	\$1.85	20/5'S	4.15 LBS
16189	RIPTIDE® TFN POD BLUE RASPBERRY 2.4%	1 08 404391	6189 0	6188 6	6187 9	\$185.00	\$9.25	\$1.85	20/5'S	4.15 LBS
16195	RIPTIDE® TFN POD BERRY CRUNCH 2.4%	1 08 404391	6195 1	6194 7	6193 0	\$185.00	\$9.25	\$1.85	20/5'S	4.15 LBS
16201	RIPTIDE® TFN POD TROPICAL 2.4%	1 08 404391	6201 9	6200 5	6199 2	\$185.00	\$9.25	\$1.85	20/5'S	4.15 LBS
RIPTIDE® TFN VAPOR PODS 5.0%										
16231	RIPTIDE® TFN POD BRIGHT LEAF TOBACCO 5.0%	1 08 404391	6231 6	6230 2	6229 6	\$185.00	\$9.25	\$1.85	20/5'S	4.15 LBS
16234	RIPTIDE® TFN POD MINT 5.0%	1 08 404391	6234 7	6233 3	6232 6	\$185.00	\$9.25	\$1.85	20/5'S	4.15 LBS
16237	RIPTIDE® TFN POD BLUE RASPBERRY 5.0%	1 08 404391	6237 8	6236 4	6235 7	\$185.00	\$9.25	\$1.85	20/5'S	4.15 LBS
16243	RIPTIDE® TFN POD BERRY CRUNCH 5.0%	1 08 404391	6243 9	6242 5	6241 8	\$185.00	\$9.25	\$1.85	20/5'S	4.15 LBS
16249	RIPTIDE® TFN POD TROPICAL 5.0%	1 08 404391	6249 1	6248 7	6247 0	\$185.00	\$9.25	\$1.85	20/5'S	4.15 LBS



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**COMPETITIVE PRICING**

**\$12.99**  
(BATTERY)

**\$3.99**  
(PODS)

**INTRODUCTORY PRICE**

**\$4.98**  
(BATTERY + POD)

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Riptide PRODUCT LAUNCH – SALES TRAINING & BRAND OVERVIEW

RIP TIDE

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# POD System Typical Consumer Retail Pricing

NJOY ACE	
Consumer Pricing	
ACE Device Kit (device only)	\$7.99
ACE 2pk 1.9ml POD	\$9.99
<b>ACE DEVICE INTRO PRICING*</b>	
ACE Device Kit Intro Price	\$0.99
Net Consumer Trial Price (with Pod Pk Purchase)	\$10.99+ tax

\* Currently, only known \$.99 Intro pricing being offered in WAWA stores.



RIPTIDE	
Consumer Pricing	
RIPTIDE RIPSTICK (device only)	\$12.99
RIPTIDE 1pk 1.4ml POD	\$3.99
<b>RIPTICK DEVICE INTRO PRICING*</b>	
RIPTICK Device Intro Price	\$0.99
Net Consumer Trial Price (with Pod Pk Purchase)	\$4.98+ tax

\* Intro offer for all Chains/Independents with relevant Juul/ E-Category volume.



VUSE ALTO	
Consumer Pricing	
ALTO KIT (device w/ 1 pod)	\$19.99-\$29.99
ALTO 2pk 1.8ml POD	\$13.49
<b>ALTO INTRO PRICING*</b>	
ALTO Kit Intro Price	\$19.99
Net Consumer Trial Price (with Pod Pk Purchase)	\$19.99+ tax

\* Currently seeing kit in chains at \$19.99, potential \$10.00 buydown. No known other current store intro, but rumored RAI direct to consumer couponing for discounted device.



My BLU	
Consumer Pricing-Varied by Store/Market	
My Blu Starter Kit (device w/ 4 pods)	\$9.99-\$19.99
My Blu Device Kit (battery only)	\$9.99-\$19.99
My Blu 2pk 1.5ml POD	\$8.99-\$9.99
<b>MY BLU INTRO PRICING*</b>	
MY Blu Starter Kit	\$0.99
Net Consumer Trial Price (with Pod Pk Purchase)	\$.99+ tax

\* Known \$.99 My BLU ran in random retail locations Q3-Q4 2018. Currently seeing regular retail pricing to consumers at retail. (\$19.99 Kit price)



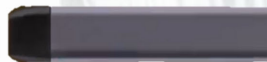
Juul	
Consumer Pricing-Varied by Store/Market	
JUUL Starter Kit (device w/ 4 pods)	\$29.99 - \$59.99
JUUL Device Kit (battery only)	\$17.99 - \$19.99
JUUL 4pk .7ml POD	\$14.99 - \$17.99
JUUL 2pk .7ml POD	\$9.99
<b>JUUL INTRO PRICING*</b>	
JUUL Starter Kit TPR	\$29.99
Net Consumer Trial Price (with Pod Pk Purchase)	\$29.99+ tax

\* \$29.99 Starter Kit reflective of JUUL Kit Buydown. Everyday pricing ranging \$39.99-\$59.99

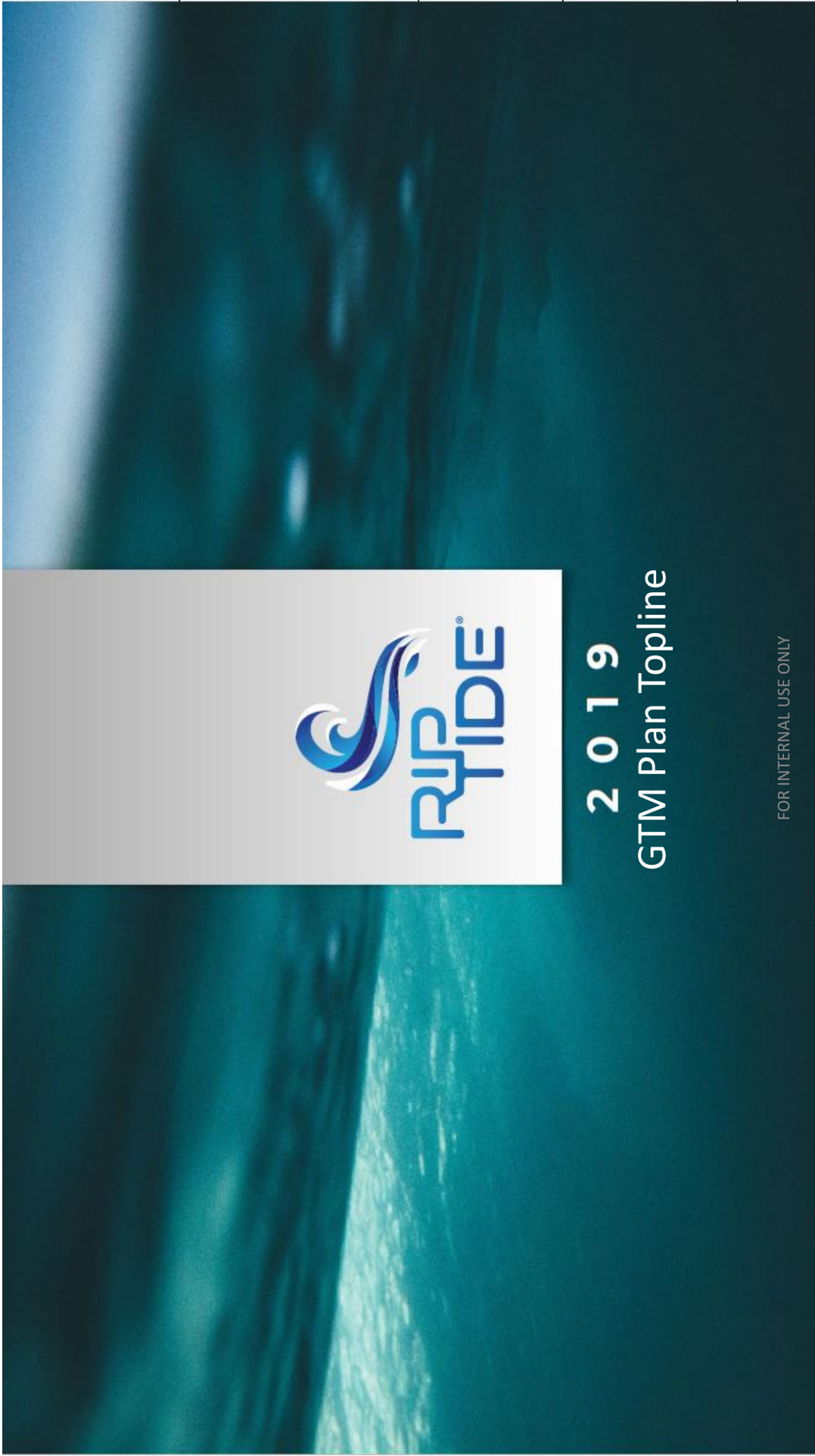


LEAP	
Consumer Pricing-Varied by Store/Market	
LEAP Starter Kit (device w/ 1 pod)	\$12.69-\$19.99
LEAP 2pk 1.5ml POD	\$6.89-\$7.99
<b>LEAP INTRO PRICING*</b>	
LEAP Starter Kit	\$12.69 - \$19.99
Net Consumer Trial Price (with Pod Pk Purchase)	\$12.69- \$19.99

\* Given current entrance to market, no current information on potential intro offering for LEAP. Anticipate some form of deep TPR near future.



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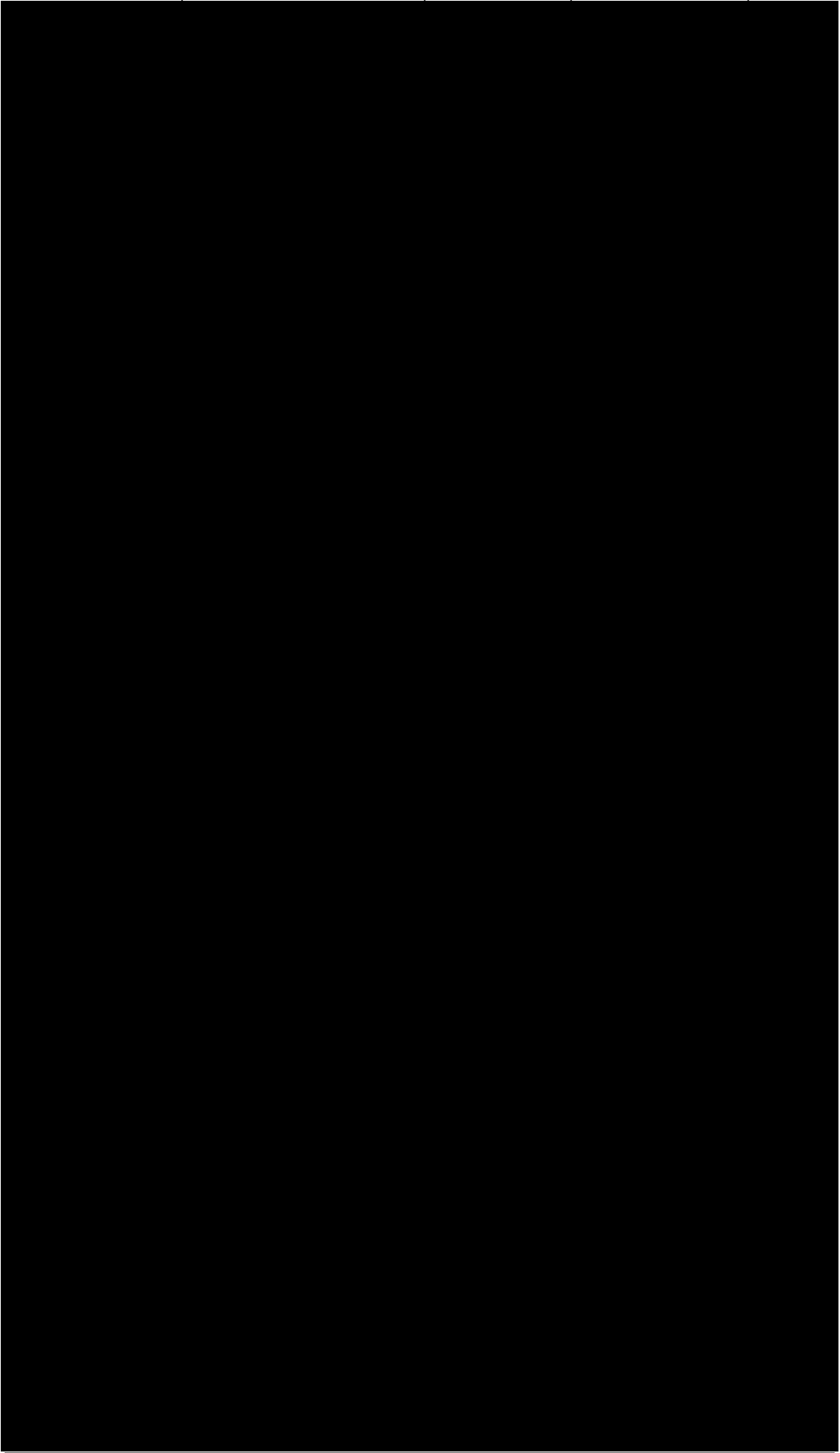
**2019**  
GTM Plan Topline

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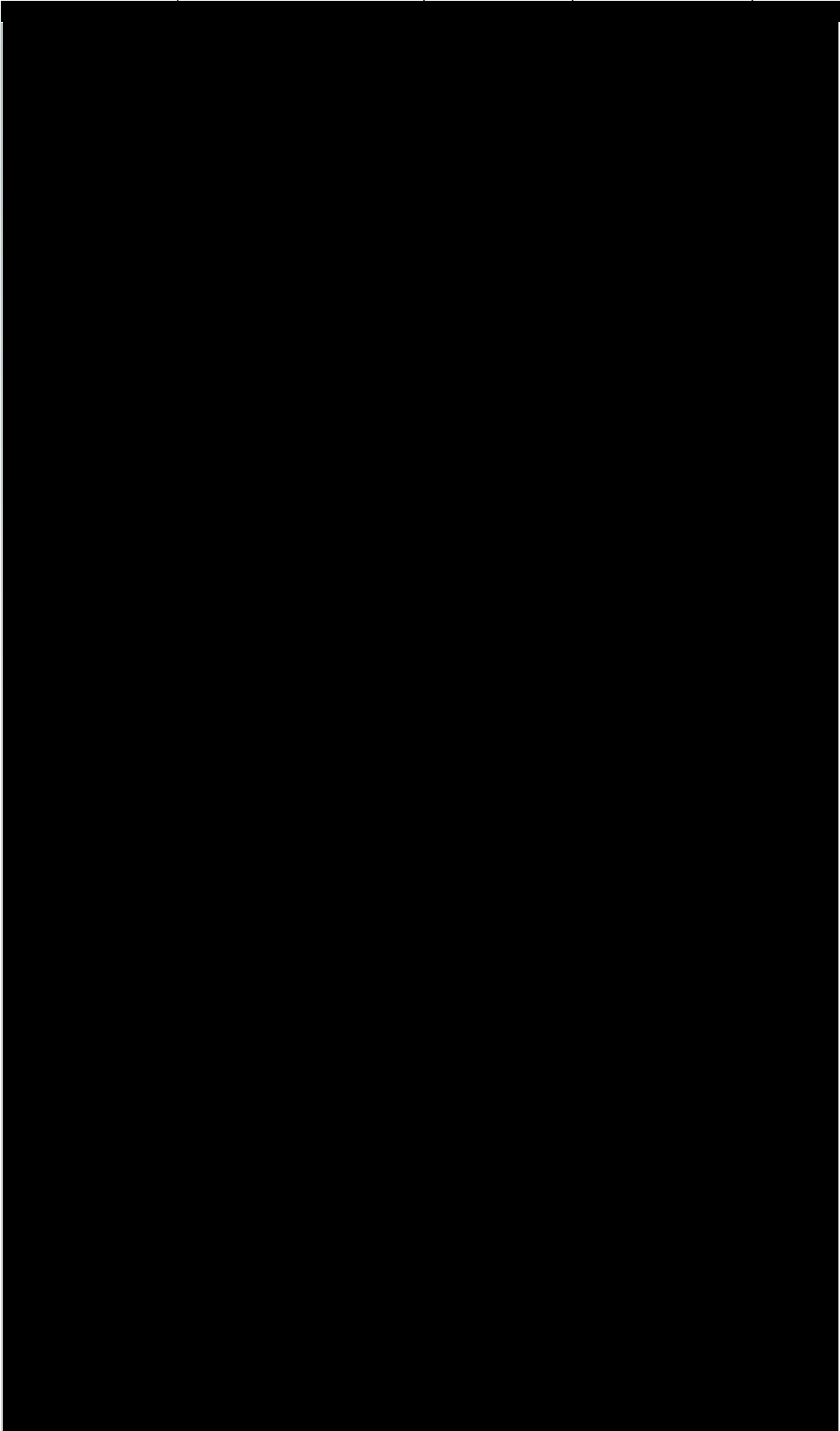
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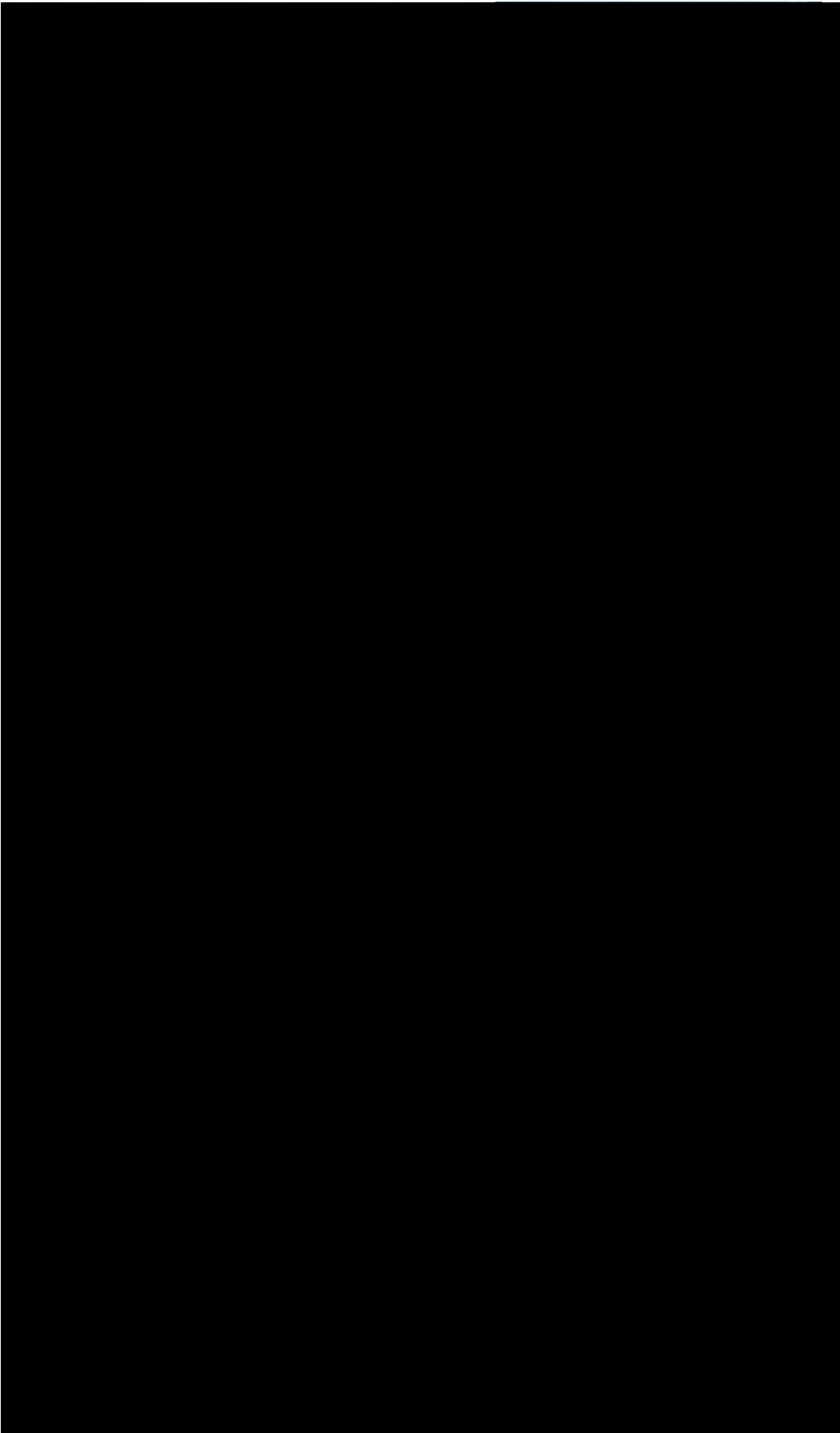
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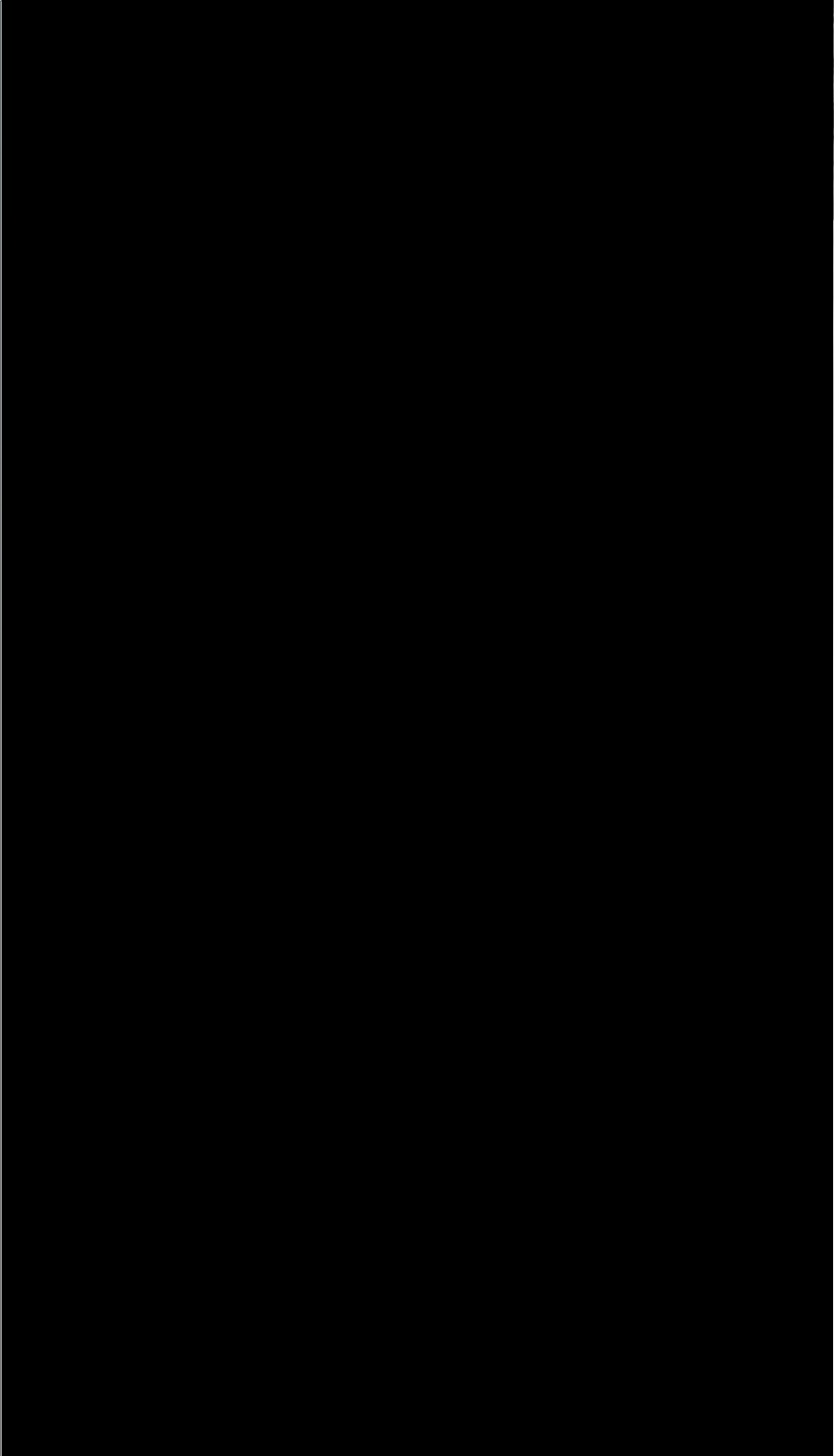
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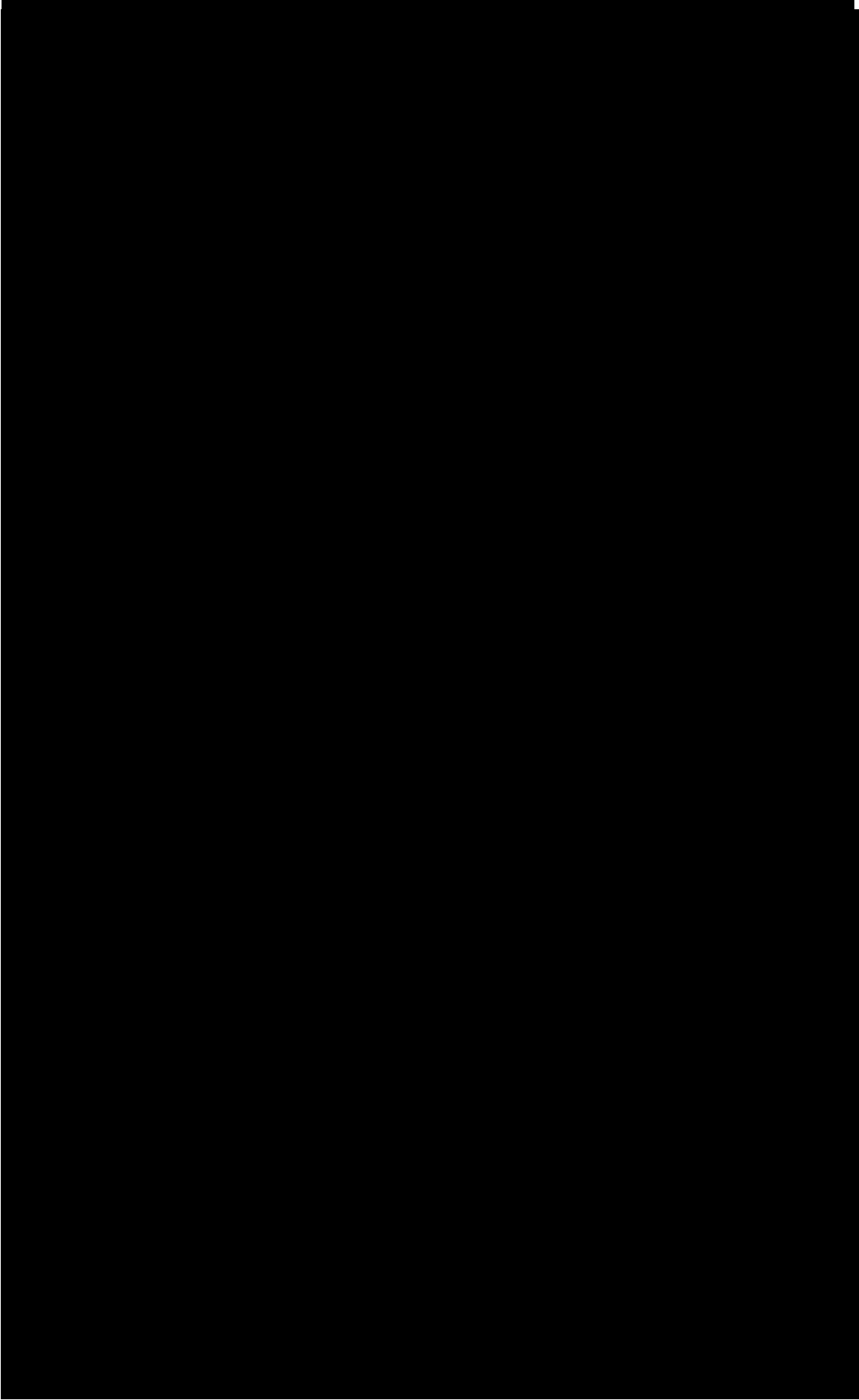


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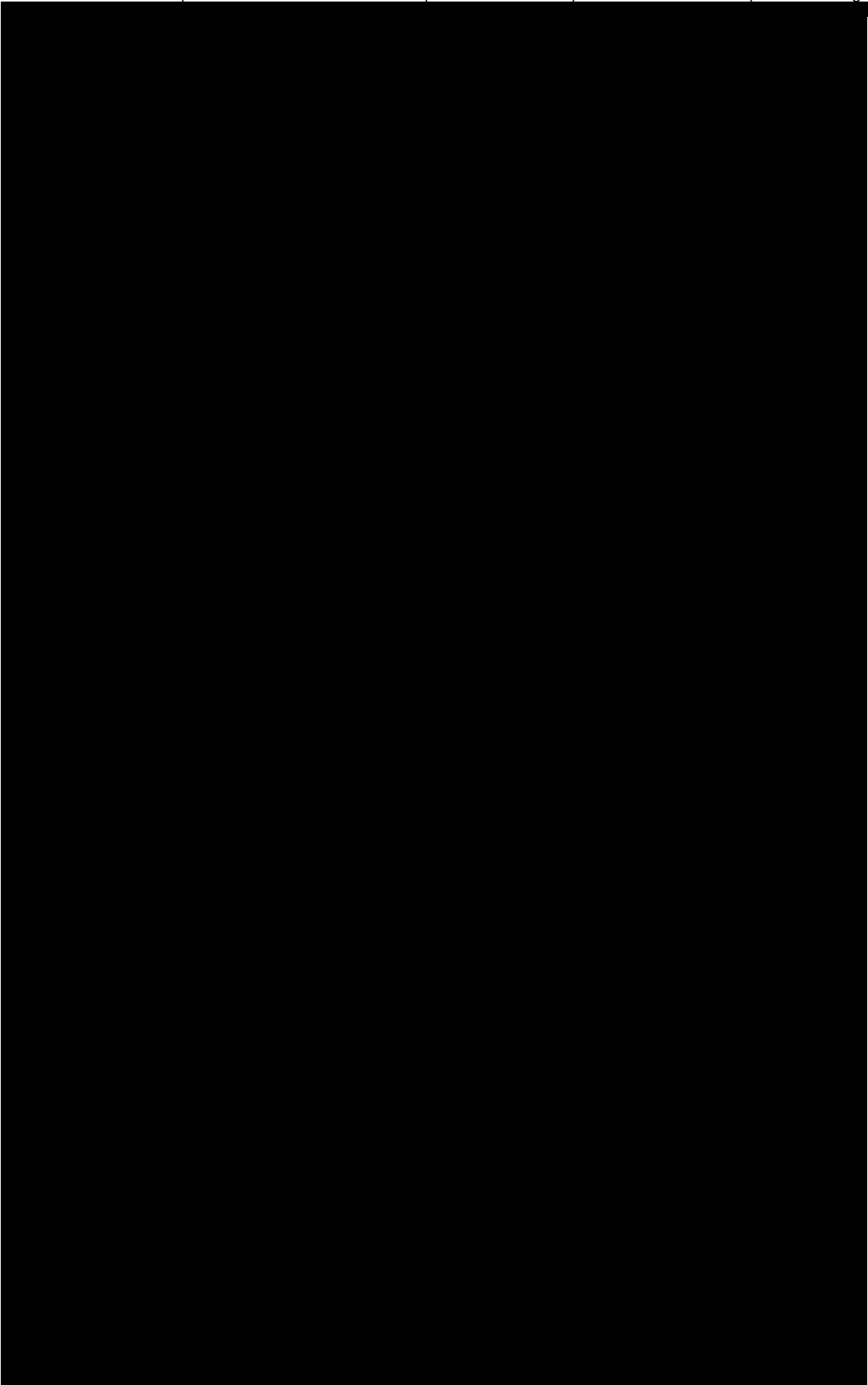
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# Riptide-In Store Offering

- Below is breakdown of Riptide Allowances.

Store Type	Max Promo Allowance Type	Details
Selling 10+ Juul Pod Packs/E-Cat Total Units 50+ PW	Full Deal	10 Free \$.99 sniped Battery Trial Offer Units to Store. \$30.00 Display Merch Payment. Store Must Take 30 POD Packs at full list with Placement of RT Display. (goal 3 of each flavor/nic strenght)
Selling 5+ Juul Pod Packs/E-Cat Total Units 25+ PW	Half Deal	10 Free \$.99 sniped Battery Trial Offer Units to Store. \$15.00 Display Merch Payment. Store Must Take min 20 POD Packs at full list with Placement of RT Display.
Selling Juul Pods at less than 5 4pks PW	Mini Deal	5 Free \$.99 sniped Battery Trial Offer Units to Store. \$10.00 Display Merch Payment. Store Must Take min 20 POD Packs at full list with Placement of RT Display.
Selling E-Cat 10+ Total Units PW	Distribution Allowance	\$2.00 Off Battery Carton, \$1.00 Off Pod Cartons. \$5.00 Display Allowance

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# Riptide in Store Offering/Execution

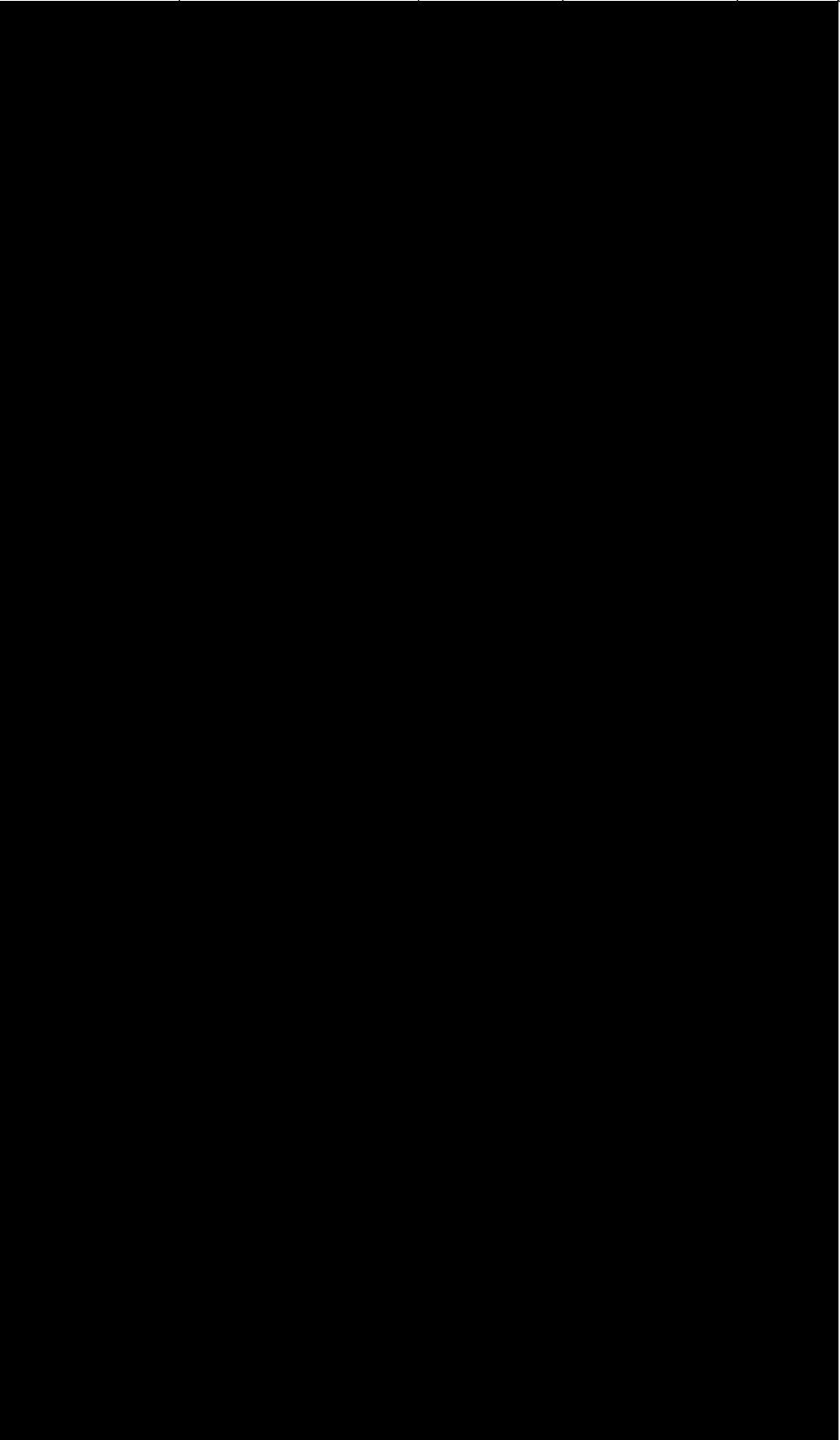
- The Merchandising/Display Credit can be found in the Riptide Category on the distribution screen, at the bottom of the list. To enter a Credit, click **RETURNS** next to this item under the Sales column:

RIPTIDE - DISPLAY/MERCHANDISING CREDIT	No		<input type="checkbox"/> Sales <input checked="" type="checkbox"/> Returns
--	----	--	---



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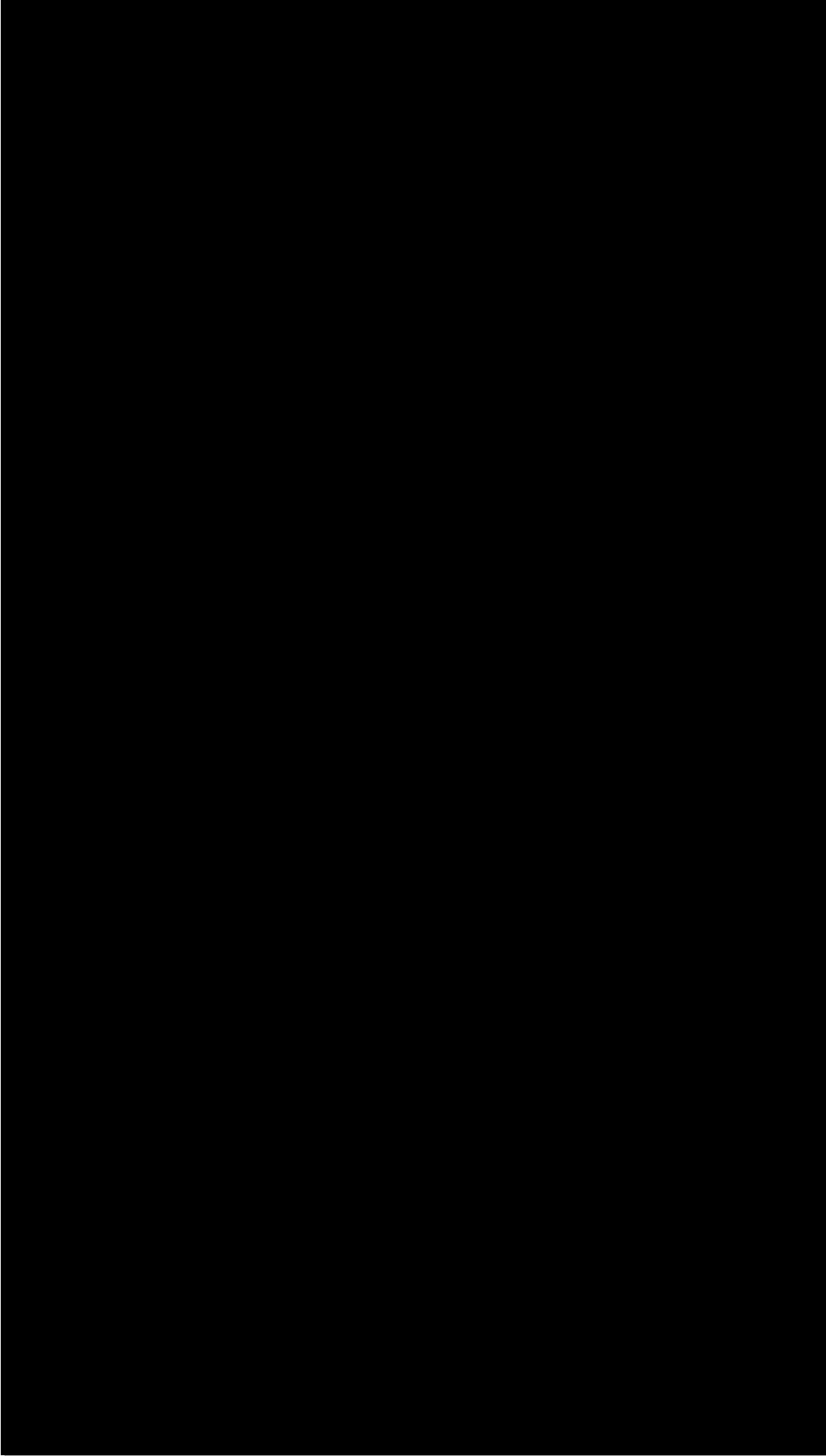
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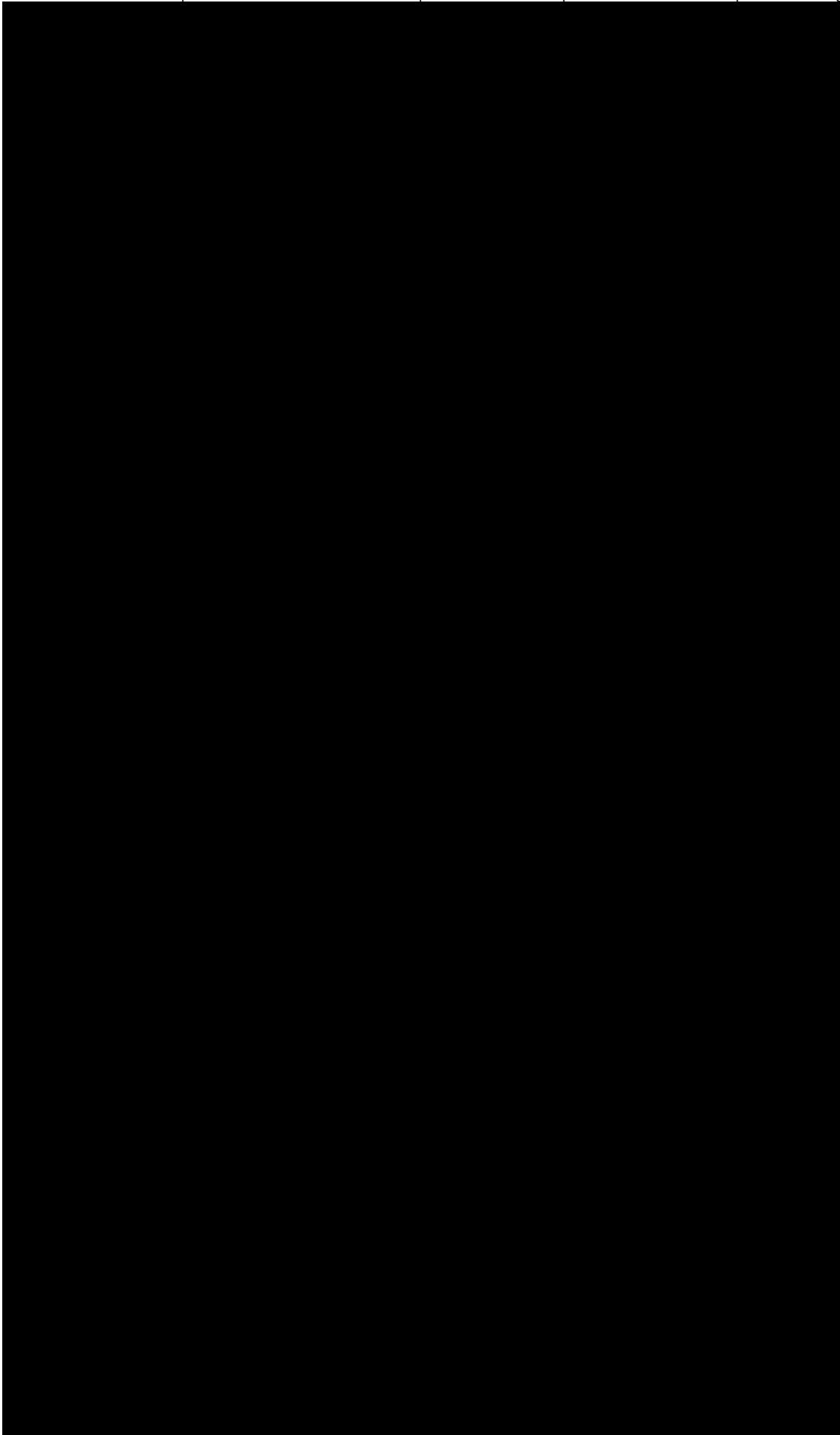
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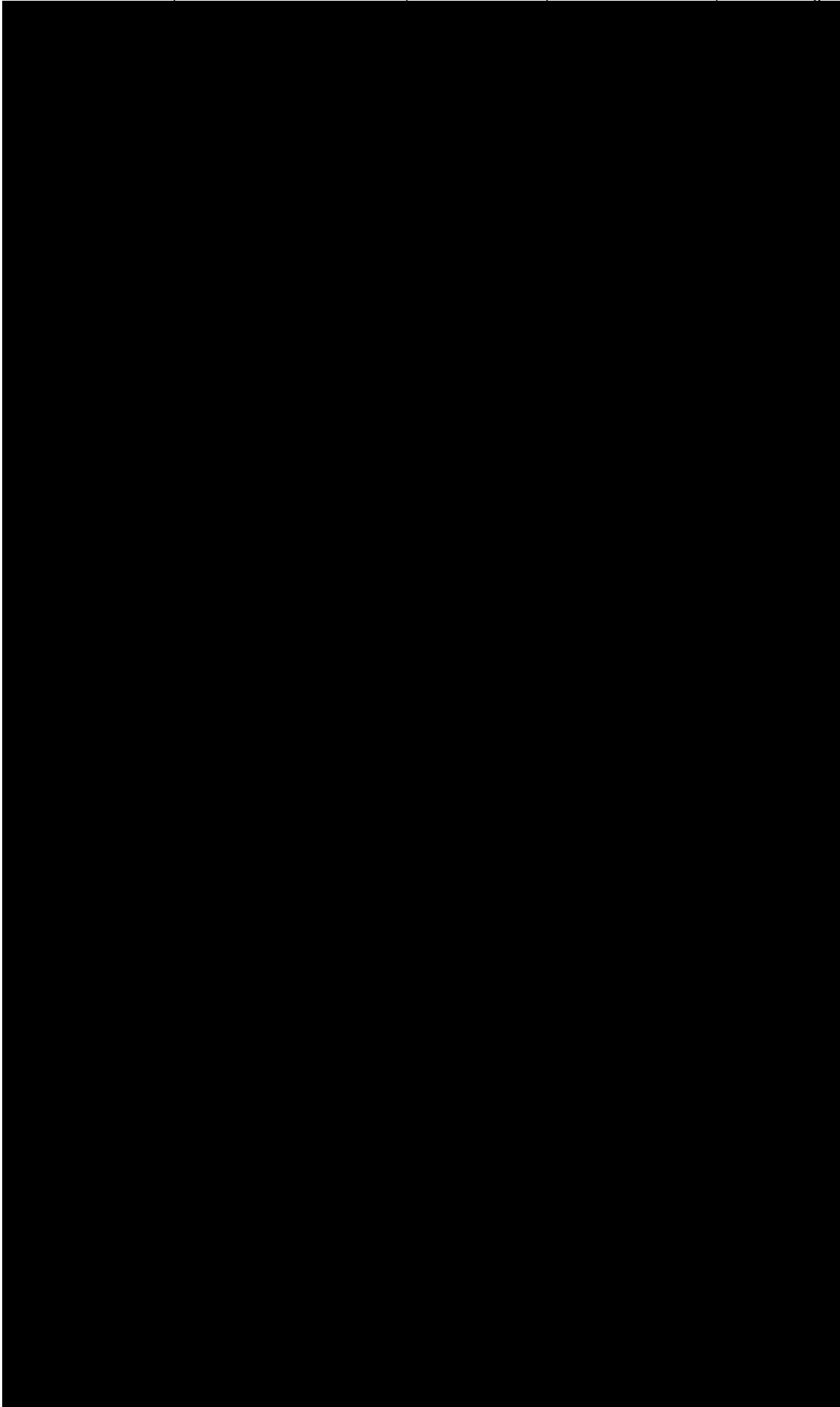
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# RW3 Survey:

1. Retailer reception to RipTide device and liquid? 1-4  
*(1 = No, 2 = Interested but not at this time, 3 = Hesitant but eventually accepted, 4 = No objections, happy to accept)*
2. Additional Comments
3. Any consumer feedback observed while in store?
4. Greatest objection to overcome?
5. If you overcame, how did you do so?
6. Which distribution deal did you use, if any? (None, Full, Half, Mini, Distribution Allowance)

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# Retail Profit Calculator

RIP TIDE									
	Cost/ctn	Cost/pk	SRP	Profit \$	Margin %	Mark Up %			
RIP STICK (Battery Pac	\$38.50	\$7.70	\$12.99	\$5.29	40.72%	68.70%			
PODS	\$10.18	\$2.04	\$3.99	\$1.95	48.97%	95.97%			
Initial Investment Full Deal = 6 ctns of different pods at full price	\$61.08	Potential Pod Profit	\$58.62	Rip Stick Profit (10 @ \$0.99)	\$9.90	Potential Display Merchandise Payment	\$30.00	Total Potential Full Deal Profit	\$98.52
Initial Investment Half Deal = 4 ctns of different pods at full price	\$40.72	Potential Pod Profit	\$39.08	Rip Stick Profit (10 @ \$0.99)	\$9.90	Potential Display Merchandise Payment	\$15.00	Total Potential Half Deal Profit	\$63.98
Initial Investment Mini Deal = 4 ctns of different pods at full price	\$40.72	Potential Pod Profit	\$39.08	Rip Stick Profit (5 @ \$0.99)	\$4.95	Potential Display Merchandise Payment	\$10.00	Total Potential Mini Deal Profit	\$54.03
Distribution allowance									
				\$2.00 off Rip Stick Carton and \$1.00 off Pod Cartons. \$5.00 Display allowance					
				Inpute cost for Rip Stick and Pods all else will auto populate.					
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# B2B Trade Samples

- TSMs Only - TSMs may expense a Ripstick & Individual Pods from their van stock for B2B purposes. Max 1 Ripstick & 2 Individual Pods per decision maker.

## Adding a Line Item

Expense Date:\* 2/23/2019

Location:

Customer: Samples-Trade Ripside

Expense Type:\* REMEMBER TO CHANGE PAYMENT TYPE

Notes:

Payment Type:\* Cash / Personal Credit Card

Reimbursable:

Amount:\* 0.00

Receipt: Access Receipts

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# Key Riptide Selling Points/Simple Answers

- What Makes Riptide Different
- Powerful battery-> What does a higher MAH(milliamp hours) battery mean?
  - Simply put, the higher the MAH's the more usage a customer has with the battery before they need to recharge it.
  - Each time a user puffs, the same amount of battery power is used to create vapor. With a stronger battery the user gets more puffs out of that battery before needing to charge.
  - Our Ripsticks and PODS have been designed specifically to generate the perfect amount of vapor with each puff of Riptide e-liquid.
- Flavor Assortment-> Adult consumers enjoy vaping both traditional tobacco/mint flavors as well as a variety of flavors.
  - We engage with 1000's of verified adult consumers on our strictly age gated websites daily, and flavor availability are an important factor to them as they look for an alternative to combustible cigarettes.
  - By offering quality tobacco, mint and other flavors we provide the best opportunity for cigarette consumers to try a vape product.
  - Simply put, adult consumers want a liquid that tastes good. For some that is a tradition tobacco taste, for others it is a flavor.
  - Retailers offering a selection of traditional and flavored POD's allows them to meet the full share of requirements of the adult consumers entering their store looking for cigarette alternative.
- Nictech-> Consumers are looking for vape products that satisfy. Brands such as Juul grew by offering a product that understood and delivered what consumers wanted. Riptide takes that to a new level:
  - Simply put, Nictech is our proprietary process developed for our e-liquid to maximize the products overall satisfaction. Unlike competitors using nicotine salts (the addition of Benzoic or other Acids to their liquid), we have just created a simple process to accomplish a cleaner, crisper flavor experience without creating the harshness a consumer gets from vaping nicotine salts. (like Coke or KFC's 11 herbs and spices we cant tell you what that trade secret is, but it is just a simple change to make our liquid superior)
  - Nictech provides the consumer with a higher level of satisfaction using less nicotine. This is why we offer both a 5% and 2.4% nic strength. Many consumers using a competitor's 5%+ e-liquid will find that they only need to use our 2.4% to achieve the same results.

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# Key Riptide Selling Points/Simple Answers

## Tobacco Derived Nicotine

- Tobacco derived nicotine, as the name implies, is extracted from tobacco by one of several methods including extractions with either water, organic solvents, or supercritical fluids or some combination thereof. The tobacco is placed into one of these liquids and the cellulose, chlorophyll and other plant materials are removed. The resulting material is then processed and distilled prior to purification to obtain USP grade nicotine. All of these methods allow for some of the minor tobacco constituents, e.g. nitrosamines, to be carried into the final product, albeit at trace levels.
- The resulting USP nicotine is then used for tobacco products, e.g. vapor products, and pharmaceutical nicotine replacement products.

## Synthetic Nicotine

- Synthetic nicotine is chemically the same molecule as tobacco derived nicotine but it is not obtained from a biological source like tobacco. Synthetic nicotine is made from chemically derived raw materials and is produced in a manufacturing plant similar to the production of pharmaceuticals. Raw materials are sourced from reliable suppliers and a series of chemical reactions occur in a controlled environment to create the product. One of the major advantages of synthetic nicotine is that it is free of the other tobacco constituents that are present in tobacco derived nicotine. Synthetic nicotine is also made to the USP standard.
- It is important to note that nicotine, whether tobacco derived or synthetic, has the same chemical and physical properties.



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# Key Riptide Selling Points/Simple Answers

- What Makes Riptide Different
  - Nictech is not about synthetic (tobacco free) nicotine
    - The use of Tobacco Free Nicotine in our Riptide liquid is not a selling attribute to the product since nicotine is nicotine regardless of where it comes from.
  - Why we use Tobacco Free Nicotine verse Tobacco Based?
    - Innovation
    - Nicotine in its purest form
      - No agricultural by-products
      - No nitrosamines
    - More expensive, but worth every penny more
    - Privileged

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# Key Riptide Selling Points/Simple Answers

## What Makes Riptide Different

- Lower Cost of consumer entry for Riptide, More transactions and Higher GM% for retailer
  - Unlike many other products on the market where a consumer has to spend upward of \$30.00 to purchase a kit and try a POD system, we understand that making Riptide less cost prohibitive to a customer is important to both the consumer and the retailer.
  - By having an aggressive list price driving a highly competitive retail price for the consumer, we allow a consumer to engage with Riptide without having to break the bank.
  - Even with our lower list, our SRP gives the retailer an higher GM% than competitors. To be successful retailers need to understand that not only is Riptide an excellent value for consumers, our \$3.99 PODS allow them to make 48%+ on each sale. Every consumer that switched from a pack of cigarettes to a Riptide POD increases the penny profit for that retailer.
  - Since we sell our POD's in single units, we are increasing the number of times a consumer enters a retailer to purchase them. This not only brings a customer into their store for Riptide, but also for other items they buy at that store.

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# Key Riptide Selling Points/Simple Answers

- How should I present Riptide? -Pre call Planning
  - Do your pre-call homework:
    - What is the volume of the store you are calling on? Is it a Full Deal, Half Deal etc store.
    - In your van, pre-pack the type of display you are presenting. Load it up with the right mix of POD's(both nic strengths) and \$.99 Trial Batteries based on store type.(put the \$.99 stickers on the batteries in van)
    - Make sure you know the cost of the display and revenue/margin the store will be making off the display. Use the retail profit calculator to determine. For many retailers, what they make of the investment will be as/more important than even the attributes of the product. Our top volume retailers will be able to bring in a full complement of Riptide with trial batteries for as low as \$31.00. This is for a retail value in product of over \$129.00 and penny profit in excess of \$58.00.
  - Make sure you have the POS items in hand you want to sell in with the product. This should include:
    - Trial offer danglers(2- one for display and a second for transaction counter)
    - Stryene sign to use as a secondary zone 2 interruption item
    - Counter mat for transaction counter(and DOB calendar when avail)
    - At least one type of window/door item
    - Larger exterior sign(coreplast/ballard)

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# Key Riptide Selling Points/Simple Answers

- How should I present Riptide?-Selling in the Store
  - First, do your overall store audit. They will see the display, which may open up questions on their part but more importantly you should be asking them questions about how the category is performing in their store.
    - What are their top sellers and why?
    - Do they have Juul?
    - If so do they still have Juul flavors?
    - If they don't have Juul flavors what did losing them do to their business?
  - One question/rebuttal they will most likely have is where will the display fit?
    - Part of your audit is to assess the stores back-bar situation and look for the recommendation of where Riptide display should go BEFORE presenting to the retailer.
    - This may require some re-setting of the store to maximize visibility. When auditing determine where the ideal space for the display is, and what steps/merchandising solution you may need to perform to make that happen.
    - Once you determine all the above, when you present Riptide also present the merchandising solution at the same time. This will help both answer that rebuttal prior to them asking and allow you to quickly move to execution of the product once accepted.



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# Key Riptide Selling Points/Simple Answers

- How should I present Riptide?-Selling in the Store
  - Sell using all the Riptide financial and product info. Keep it simple:
    - Let the retailer see a device and hold it.
    - Go ahead and let them try the device. Especially let them try if the buyer or another associate working is a smoker or vapor. (you can expense a carton of batteries and some pods as needed for in store trial)
    - Talk to them about what makes Riptide different:
      - Nictech versus Salt nicotine liquid
      - Our Flavors
      - Battery Strength
      - Marketing support
  - Talk to them about the \$'s that Riptide represents to them
    - High Margin, more consumer interaction with single pods
  - Explain to them why we are offering trial batteries to help them quickly build a consumer base
  - Tell them we are so optimistic about what Riptide will do that we are going to give them the batteries for free to drive that consumer trial.
  - Sell in the display and POS with the product. Why it is necessary, where you want it to go and how it will help make them \$'s...
  - Speak to them about their lower cost to invest in Riptide.
  - Use the merchandising payment to close the deal when needed. Make sure they know that payment is for keeping the display up in the agreed upon location.



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# Key Riptide Selling Points/Simple Answers

- How should I present Riptide?-Selling in the Store
  - Close the deal.
    - Once they say yes, create the invoice.
    - You will be selling in the trial batteries at full price, then discounting each to zero.
    - If they are taking the merchandising payment, select return on the Riptide merchandising payment item on the distribution tab and then enter in the payment amount on the cash sales tab. (similar to how we do the Stoker's can trial at retail)
    - If a retailer wants to purchase some additional PODS try and pre-book them first thru their direct account. This will push out quicker wholesale engaged shipments.
  - Merchandise the display
    - Discuss with the retailer re-order options for the product, telling them they need to keep an eye on demand as trial increases. Tell them to order future product directly from their wholesaler.
    - Again, if they want more product get that second pre-book written and begin them pulling from their wholesaler right away.
  - Place the POS.
    - Think like a consumer, where will our pieces have the greatest impact.
    - Where is competitive POS, can we show value of moving to Riptide with placement



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## Notable points

- B2C web sales....1,000 Ripsticks in 4-hours when posted online @ \$.99; shut down site
- One point was brought up about the rubber pieces on the pod's that need to be removed before using is not in the instructions. That is being addressed on the next production run.
- Question of Warranty- 100% guaranteed. If a consumer has an issue they just need to return to store level.
- 99c sticker & danglers – need to add to soop | or | requisition via rsm & ship from SDF?

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# QUESTIONS? COMMENTS?

CONTACT US

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# **PUBLIC EXHIBIT A-2**

## **PX3134 RX1791**





# National Account Review

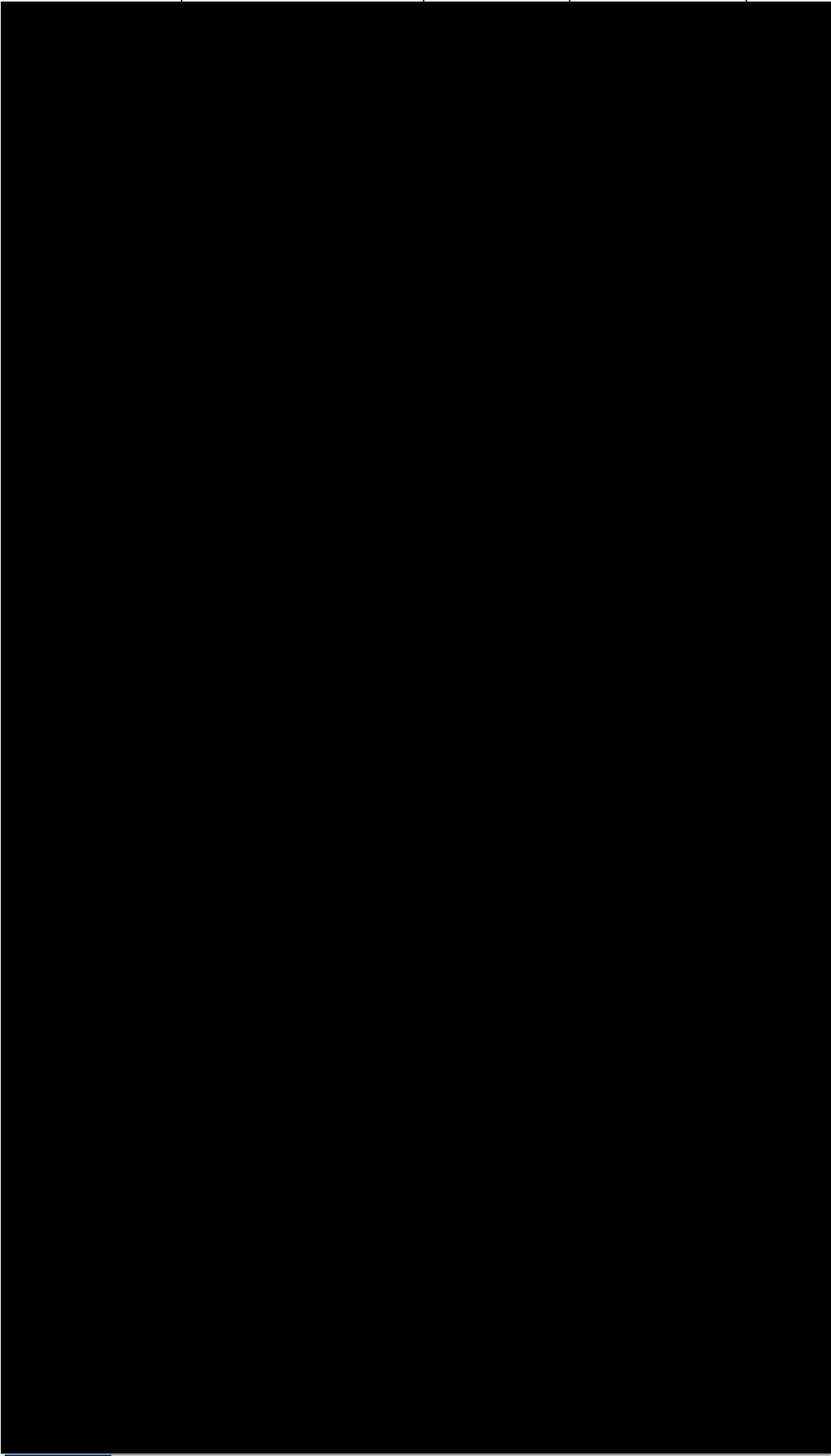
10.23.19



## Account Reviews

- Speedway
- Maverick
- Jacksons
- Chevron
- Kum & Go
- Casey's
- Quick Trip
- Buc-ee's
- Cumberland Farms
- Stewarts
- Global Partners

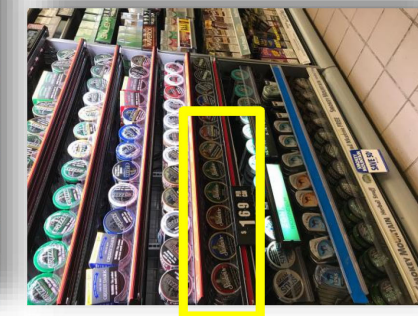
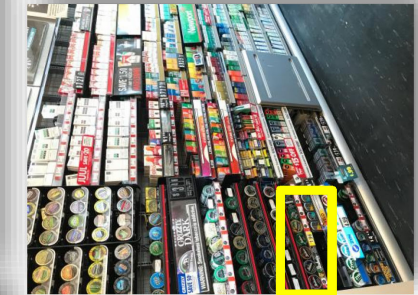
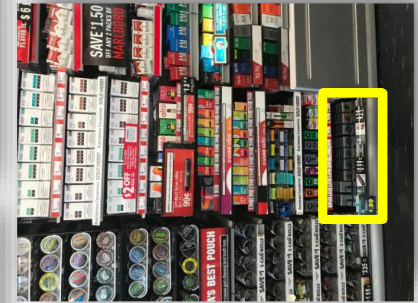
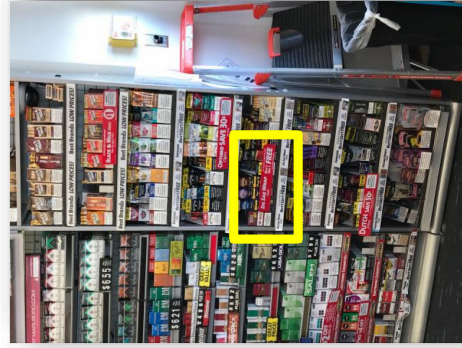




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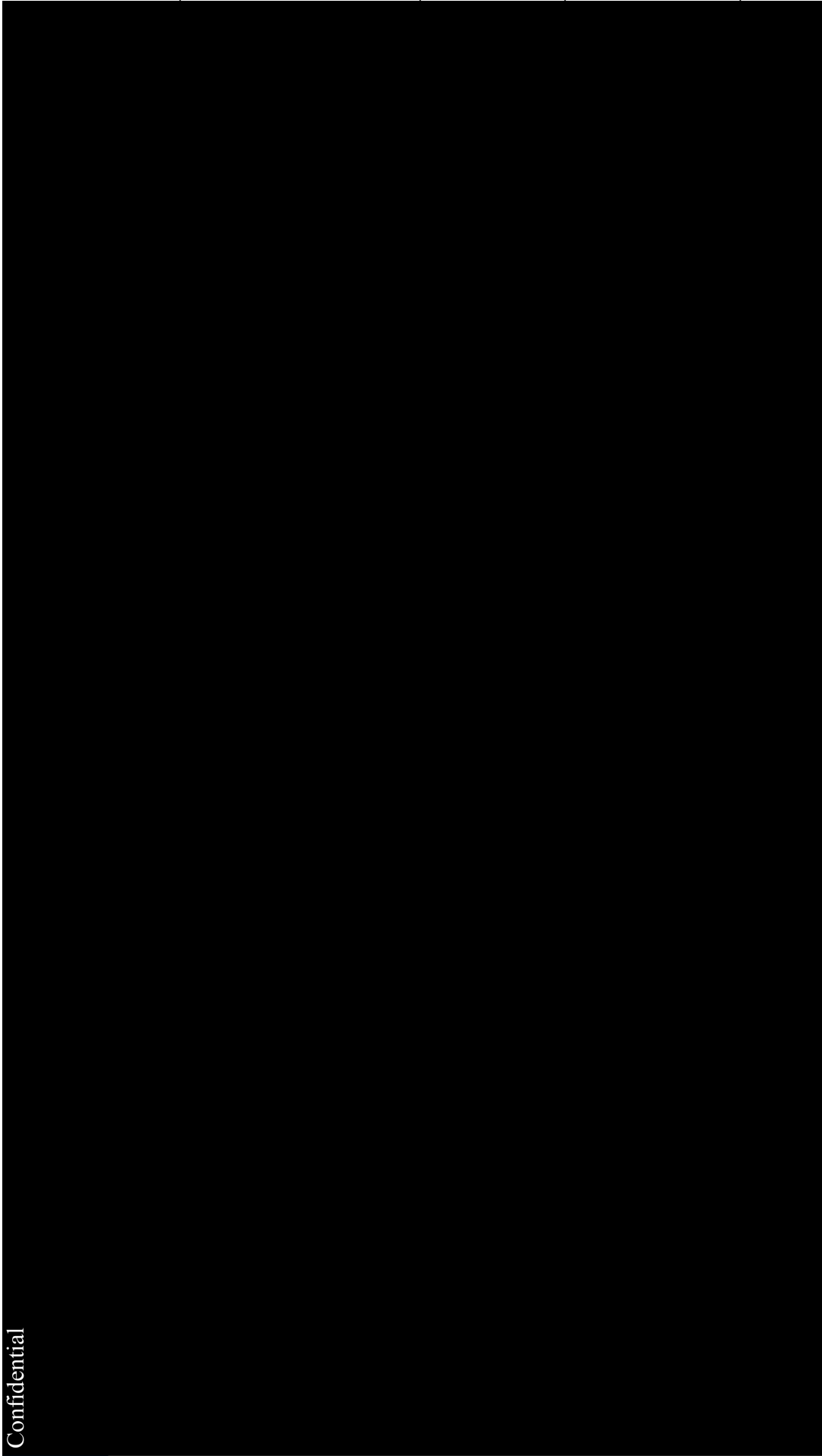
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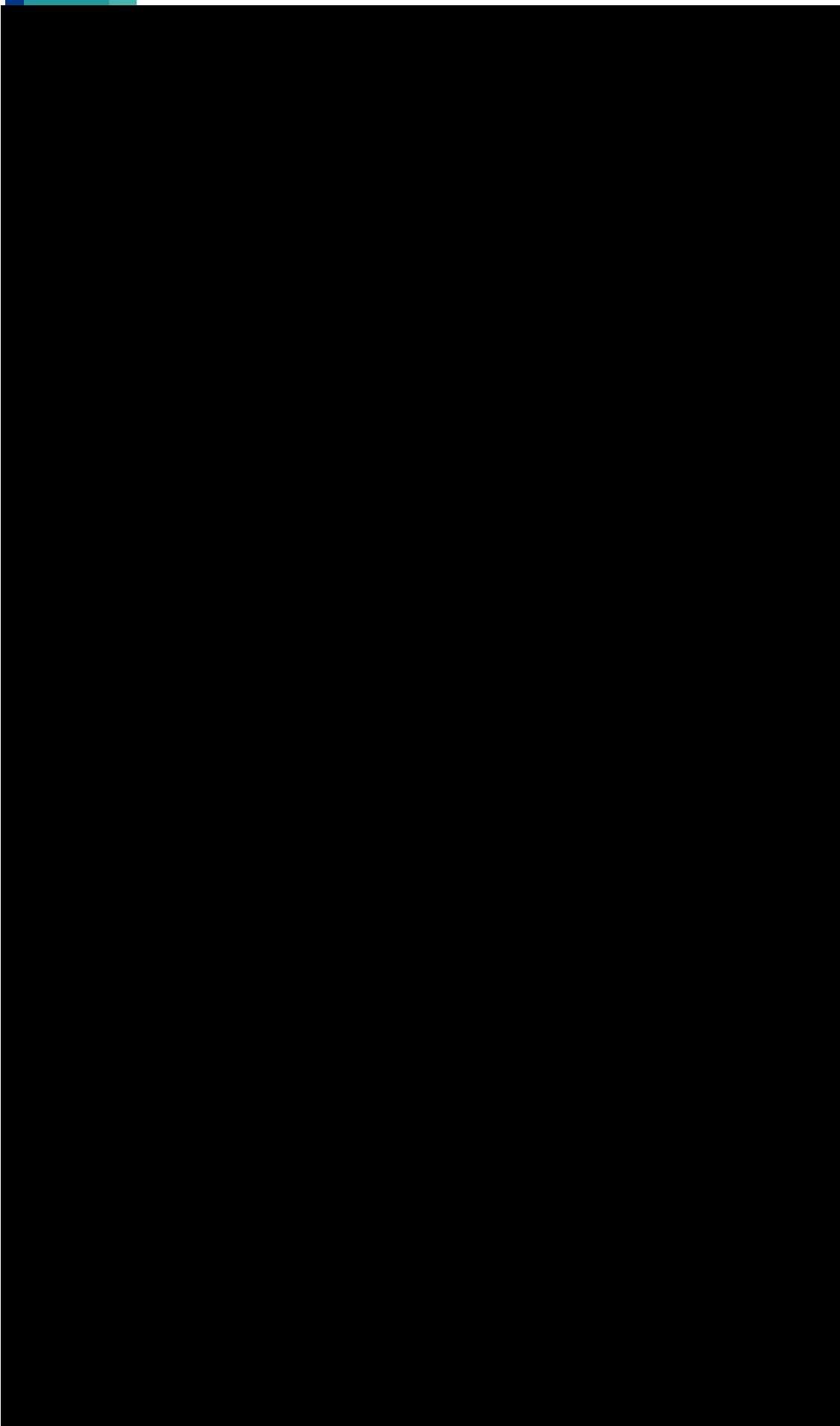
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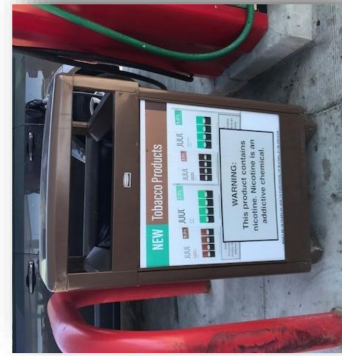
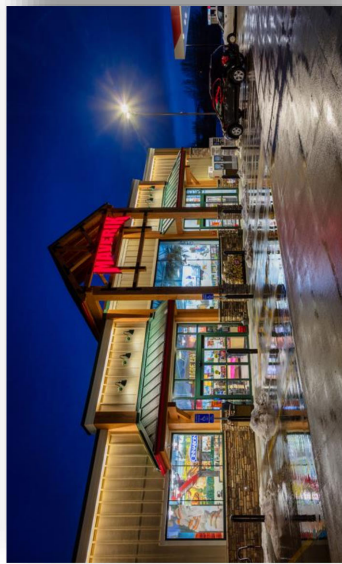


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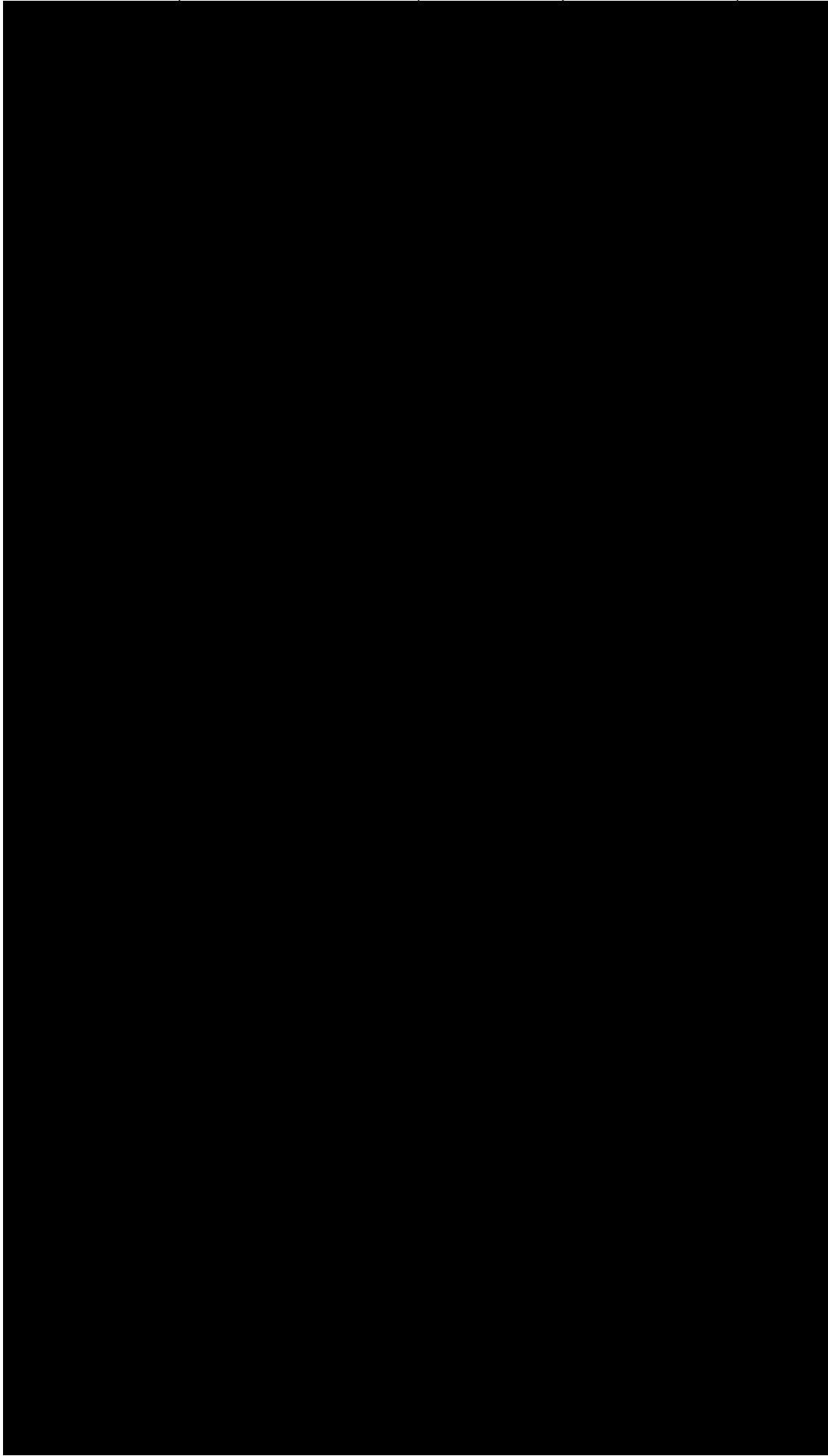


# Category Sets





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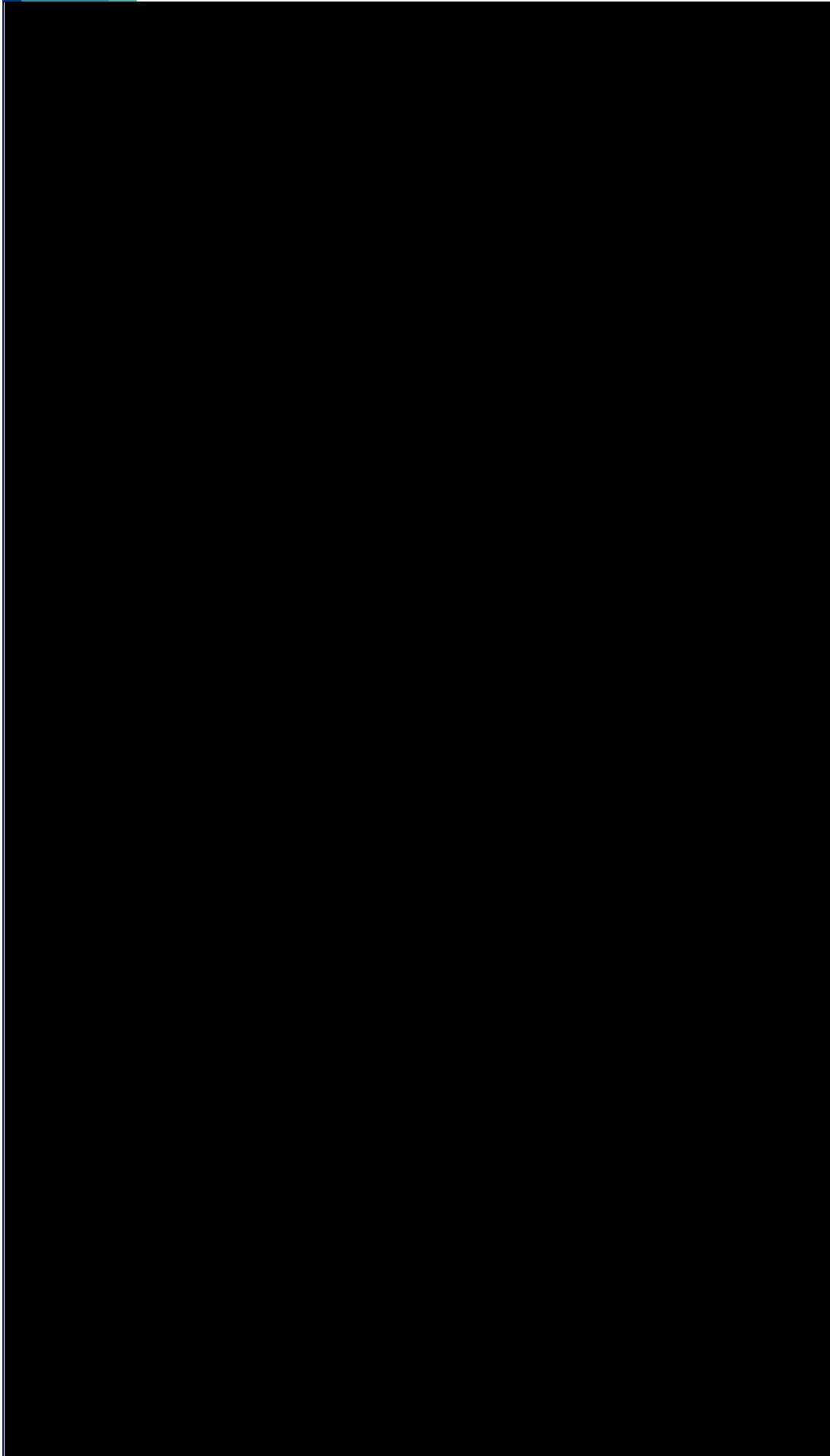
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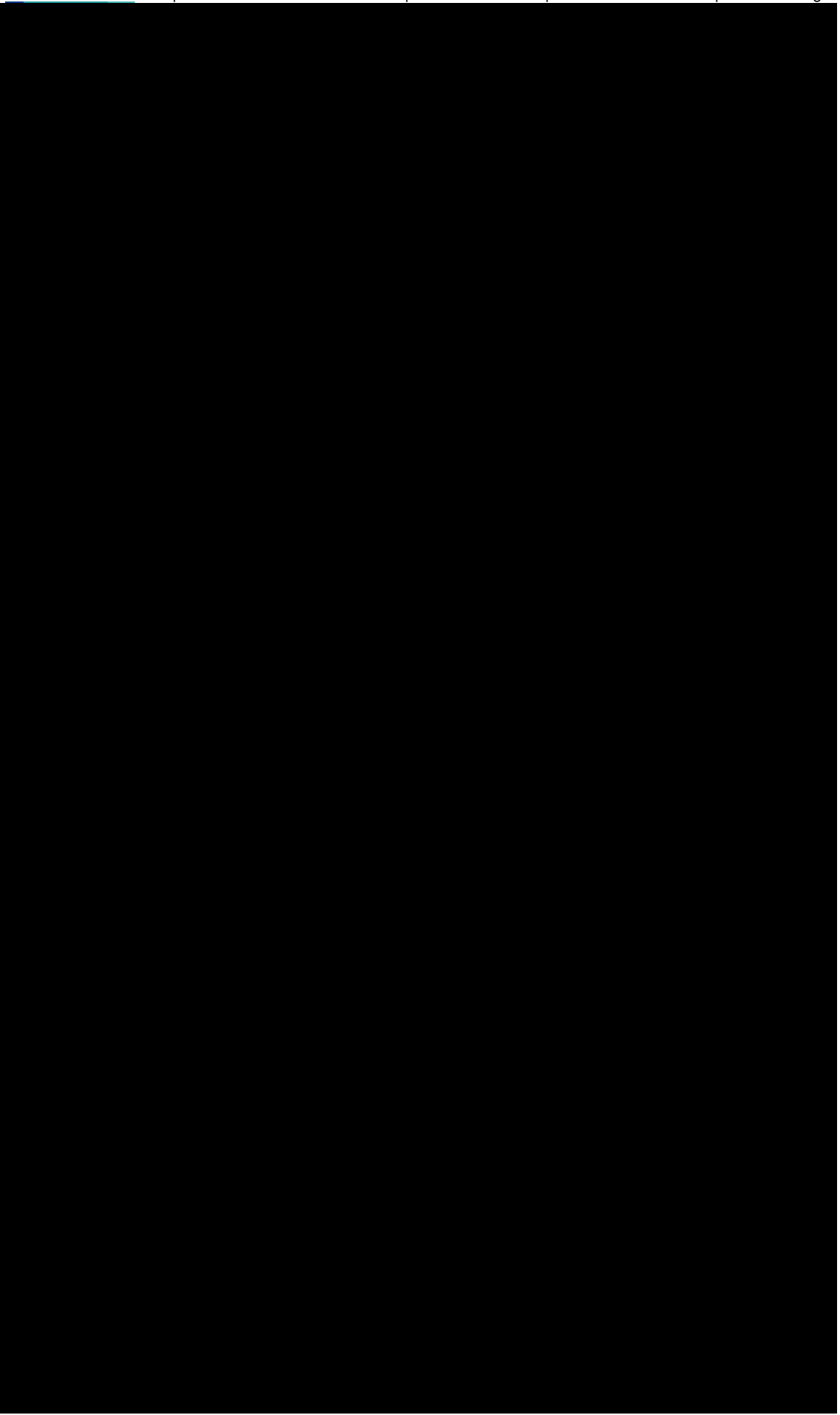


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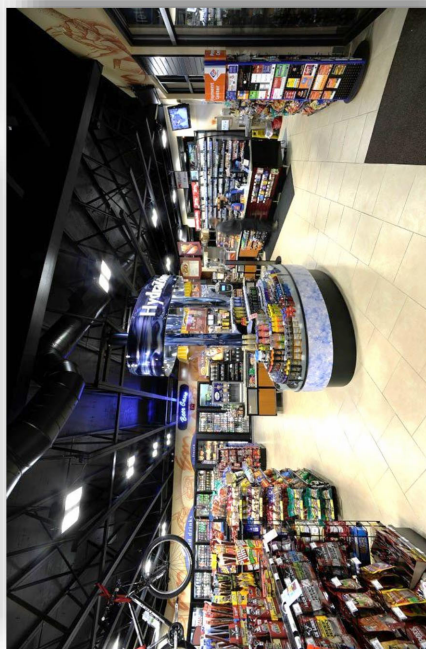
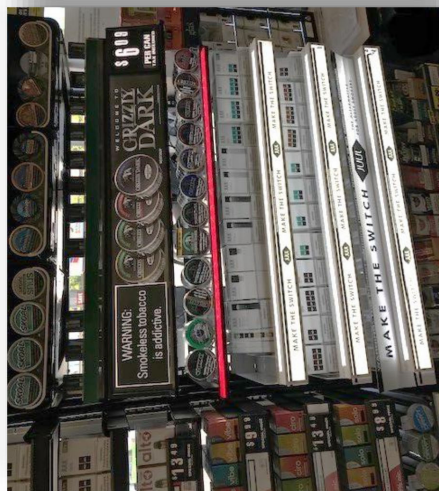
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# Category Sets



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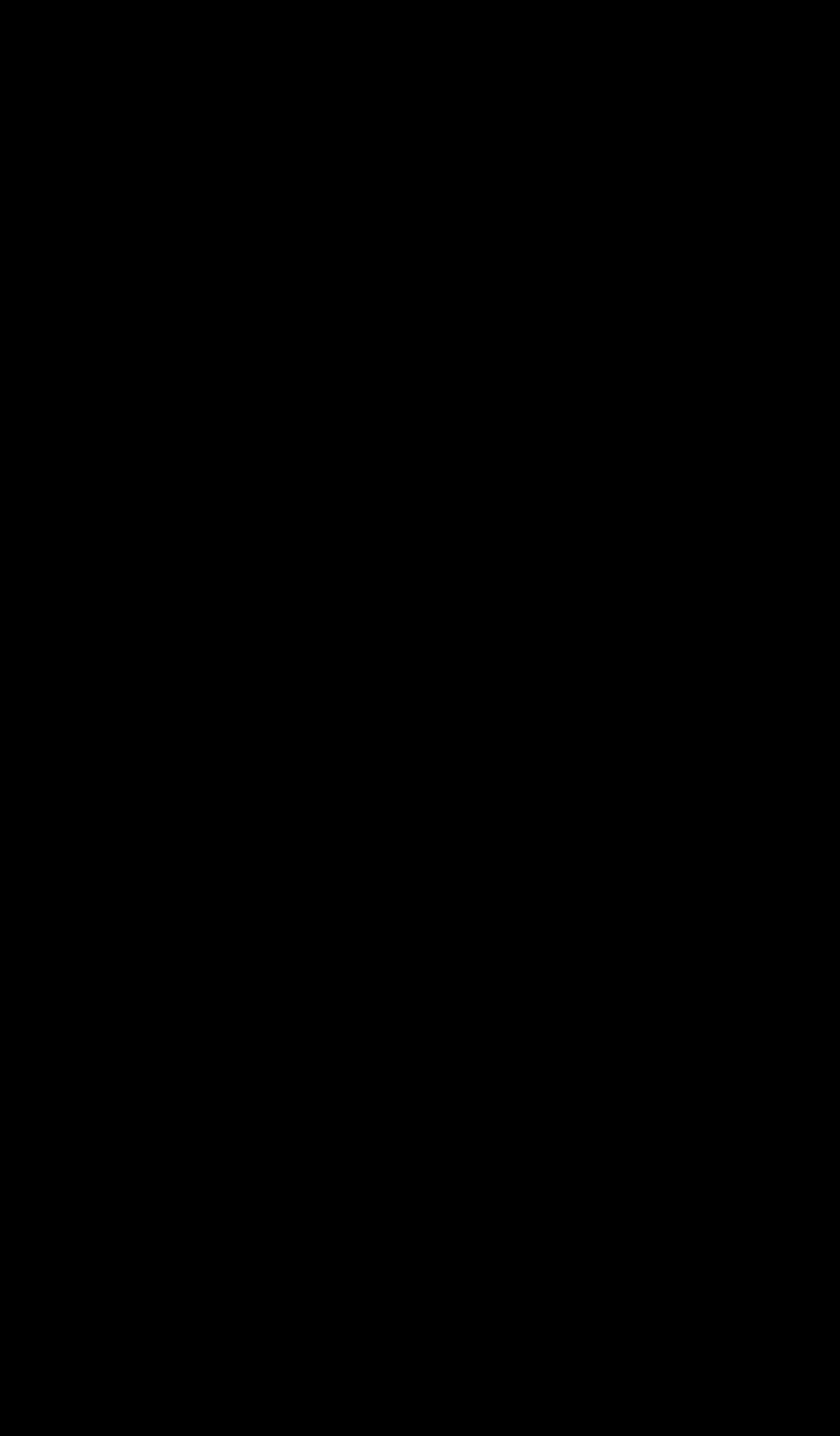


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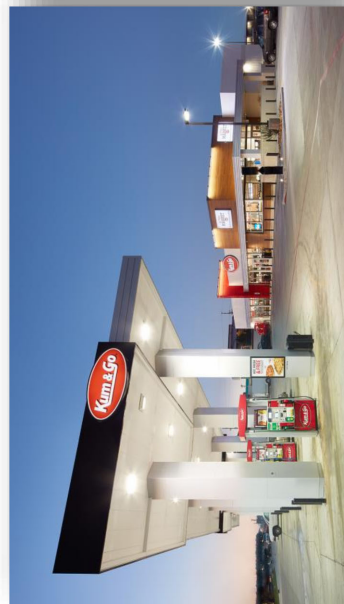
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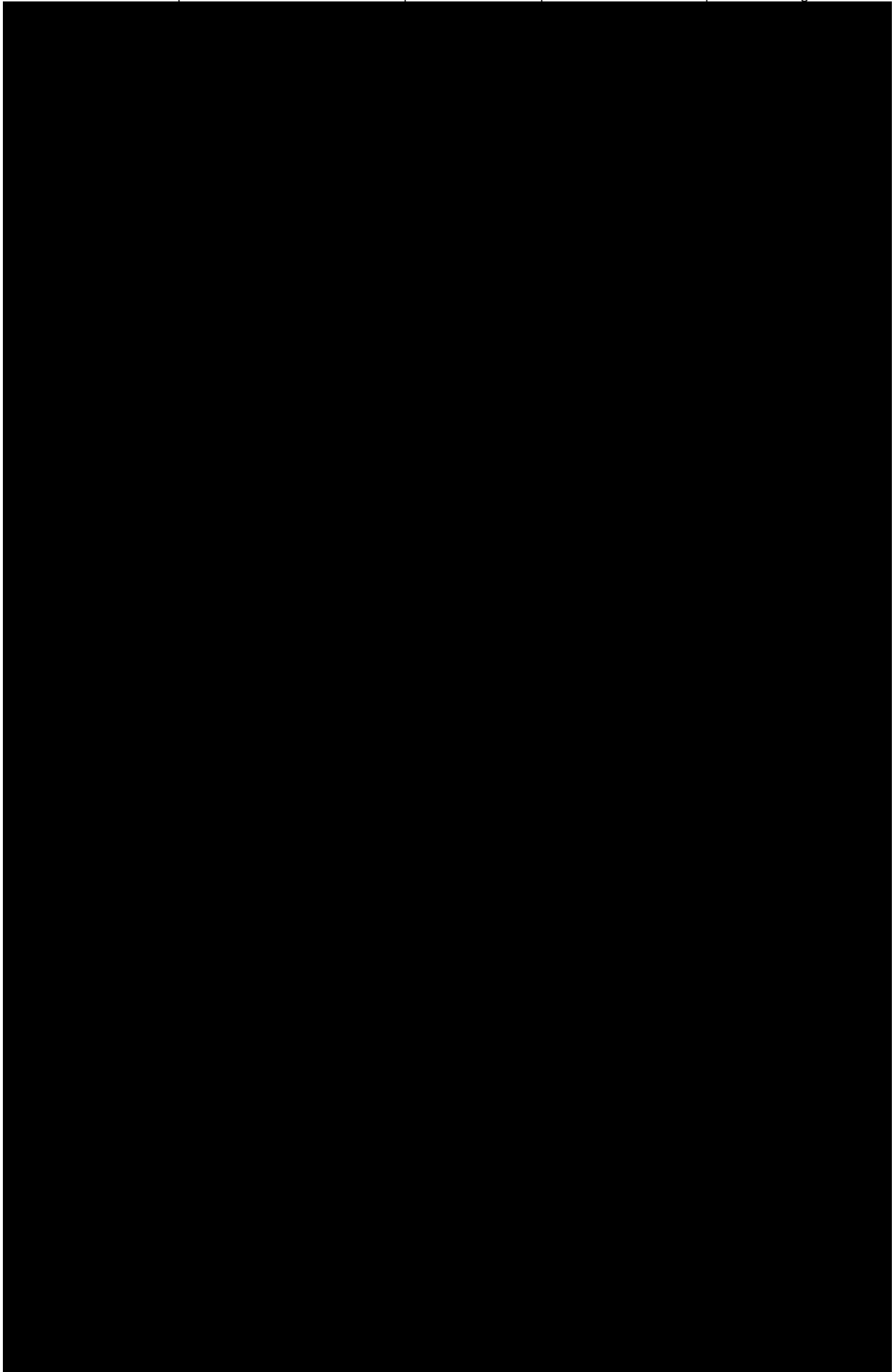
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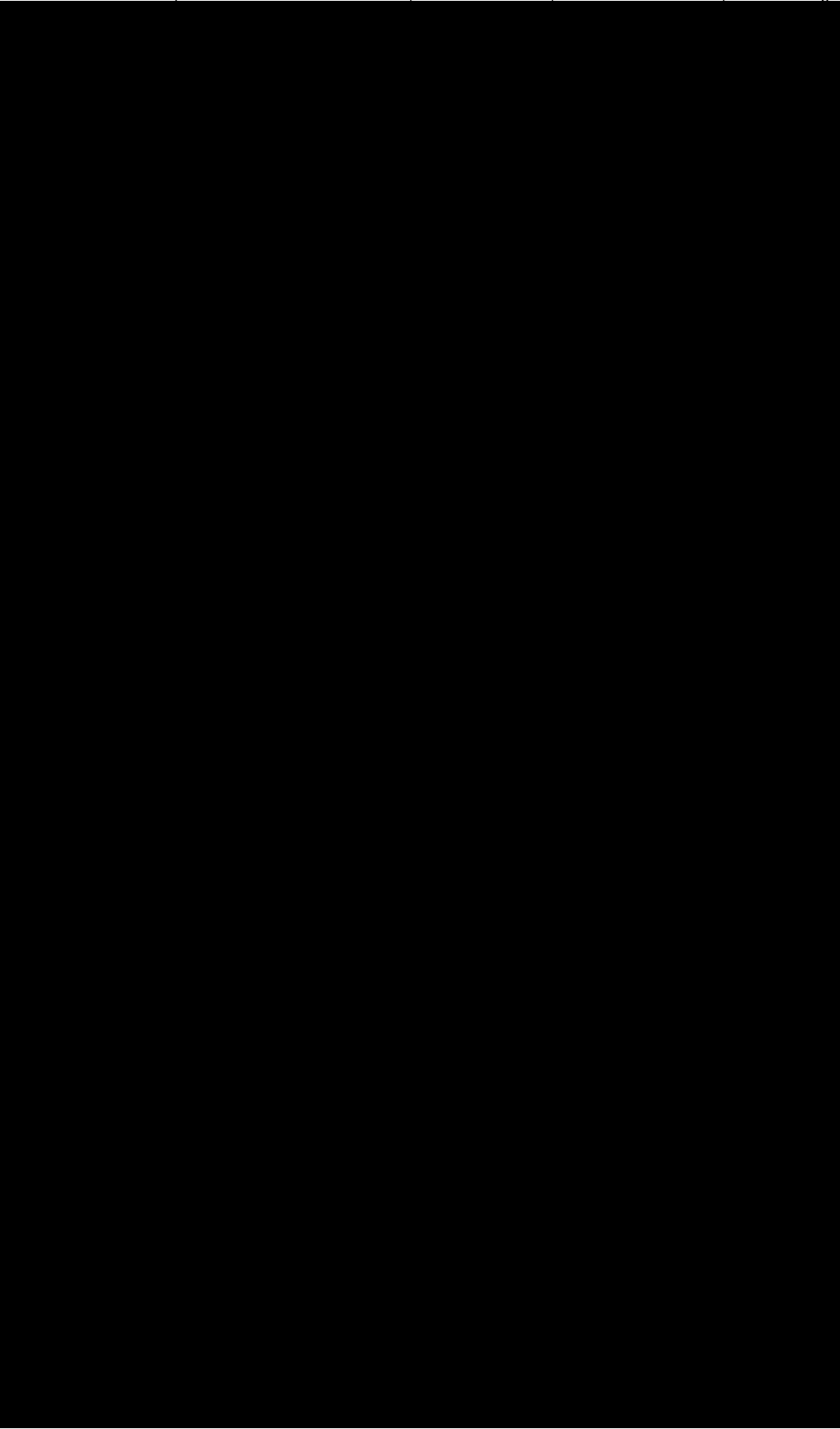
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# Outdoor Signage



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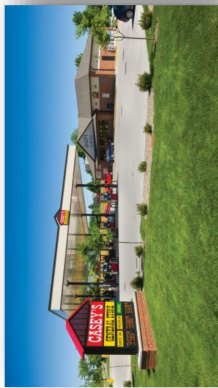
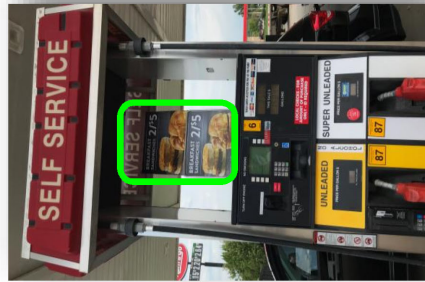
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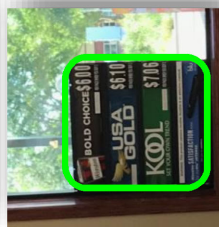
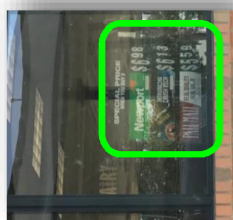
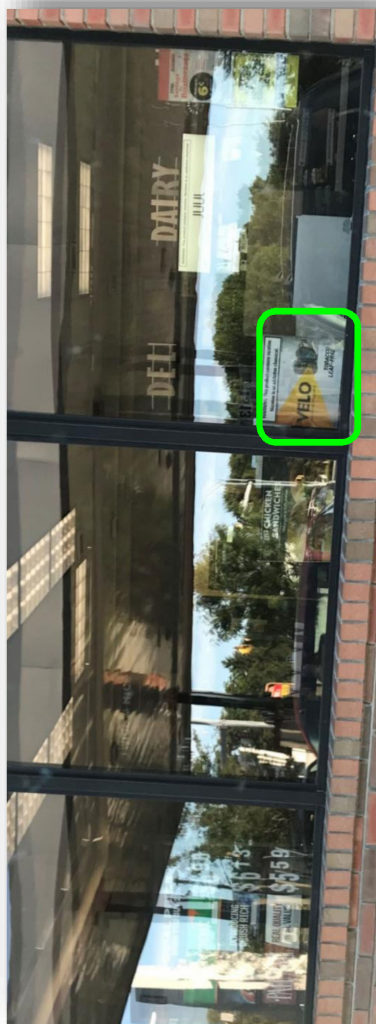
Category Sets



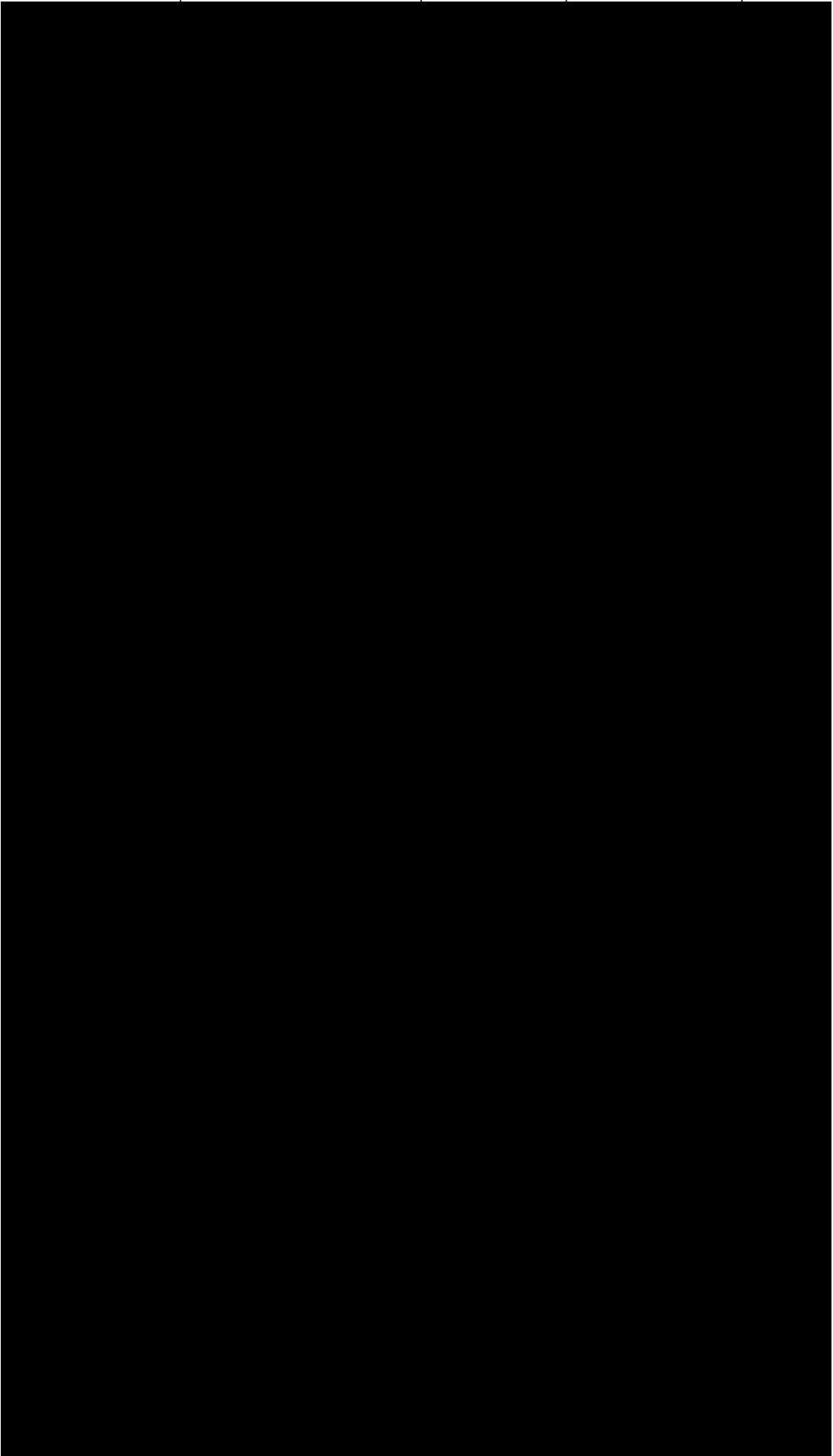
Exterior POS



# Window POS



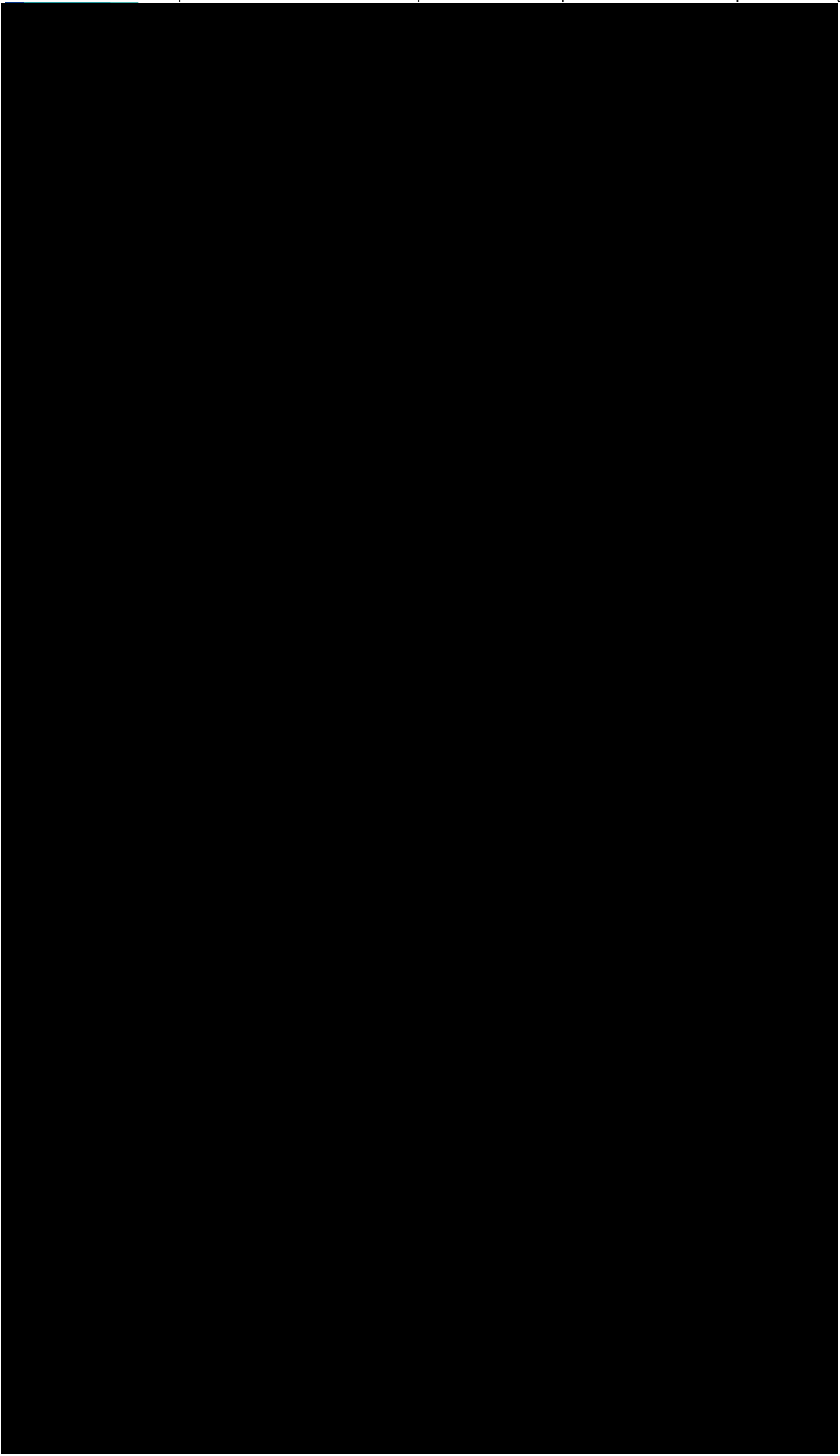
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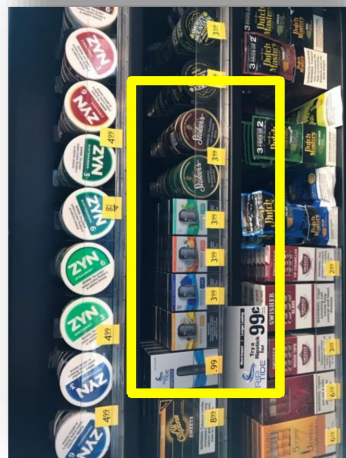
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# Category Sets

## Interior Category Sets & Signage:



## Account Information & Strategy



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### Vape Category:

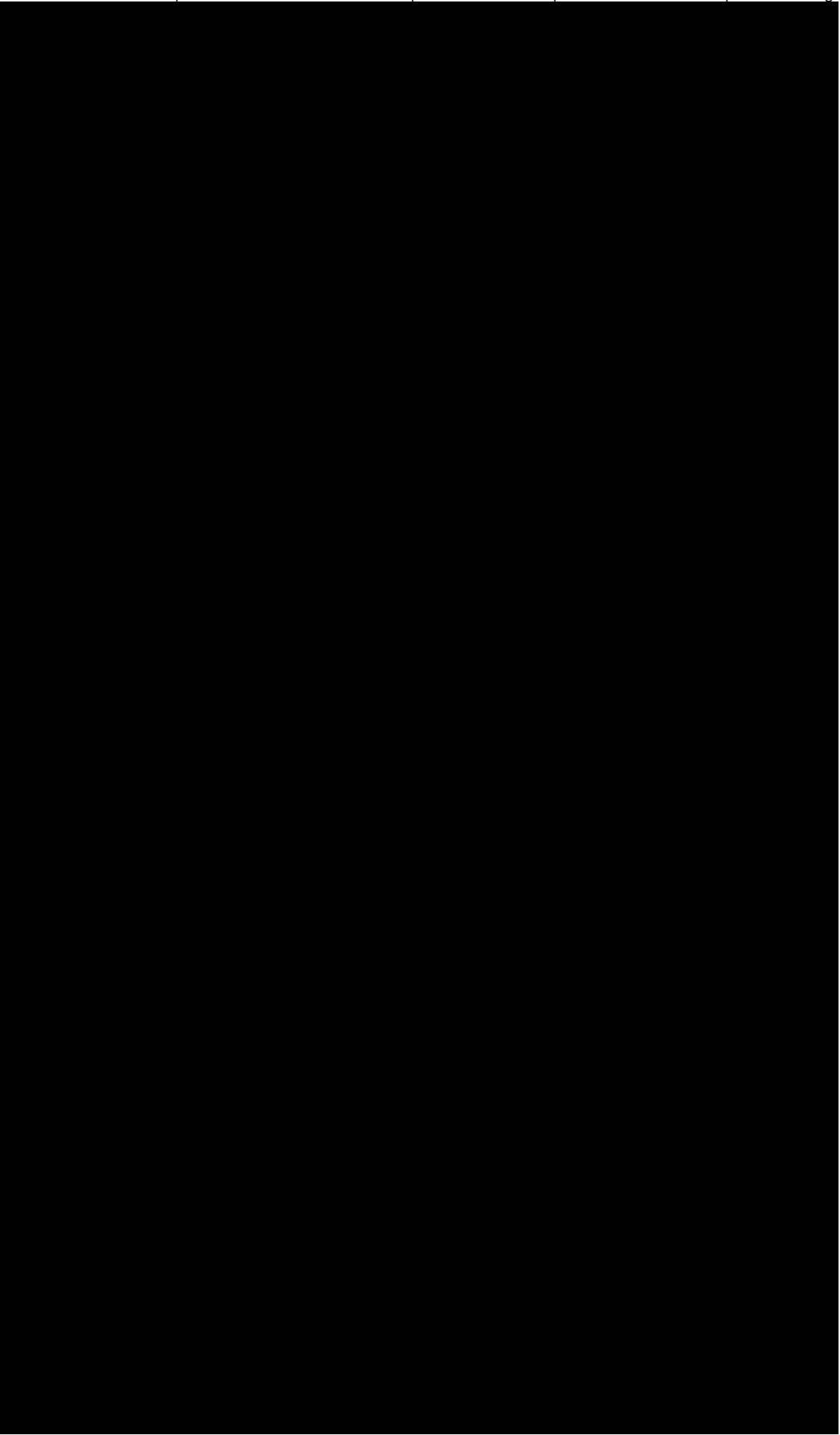
- Currently QuikTrip is carrying Riptide Blue Rasp, Tropical, Berry Crunch, Mango, and Mint in both 2.4% & 5.0%. We are in the process of setting up Bright Leaf Tobacco as well.

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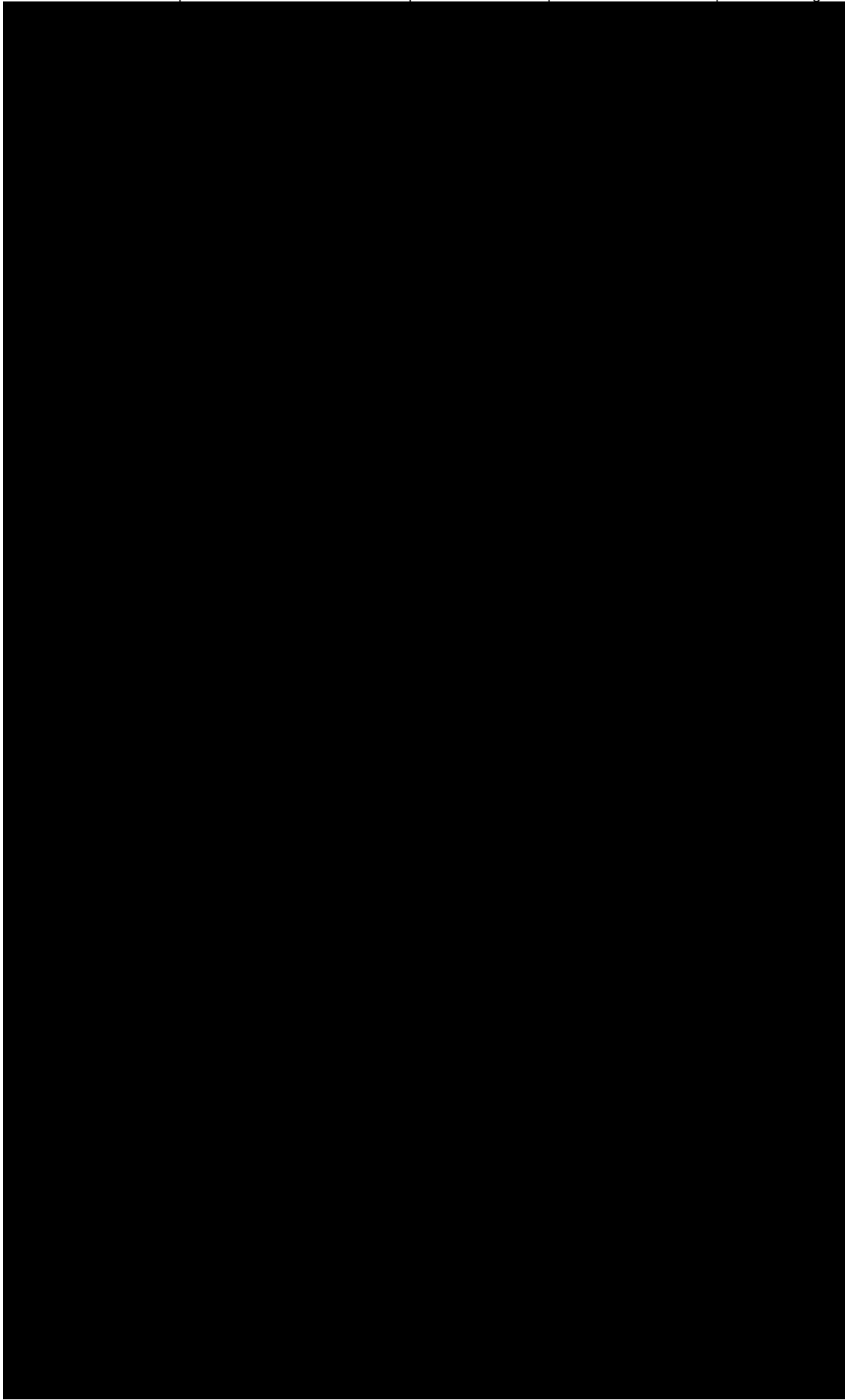


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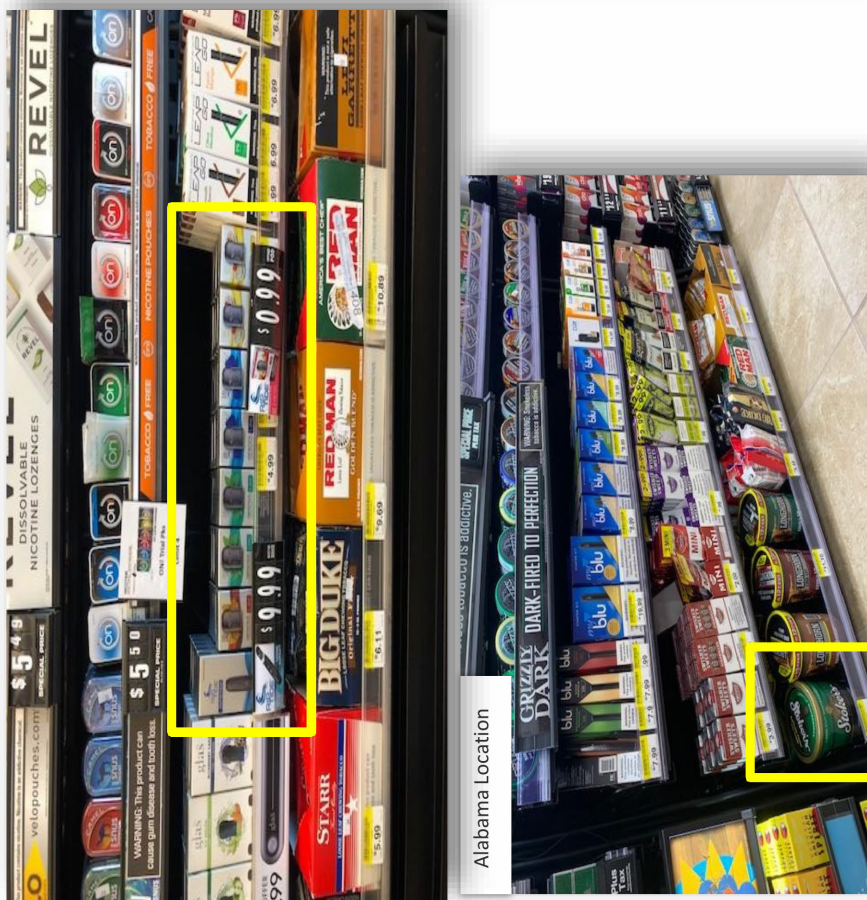
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# Category Sets



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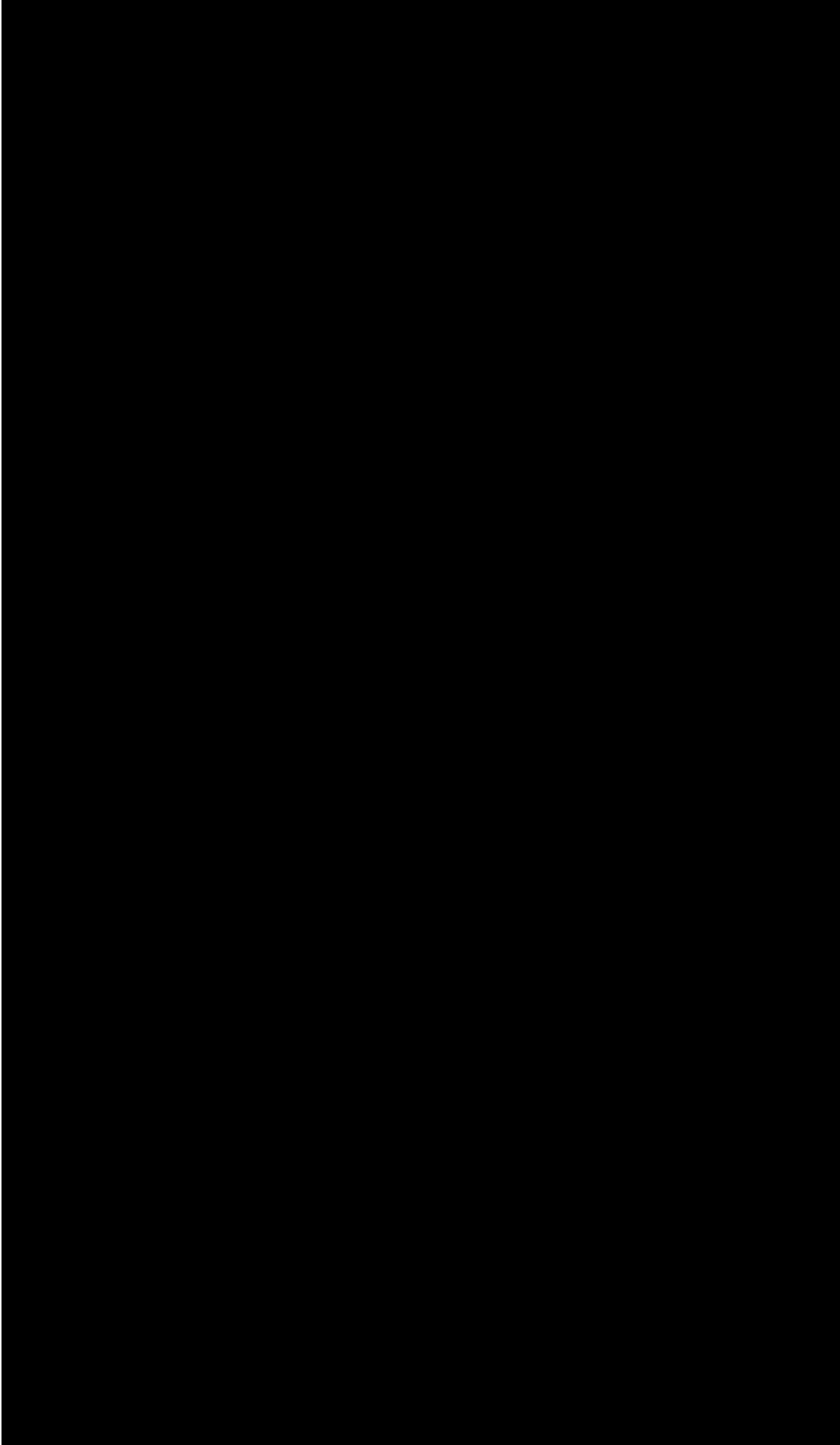
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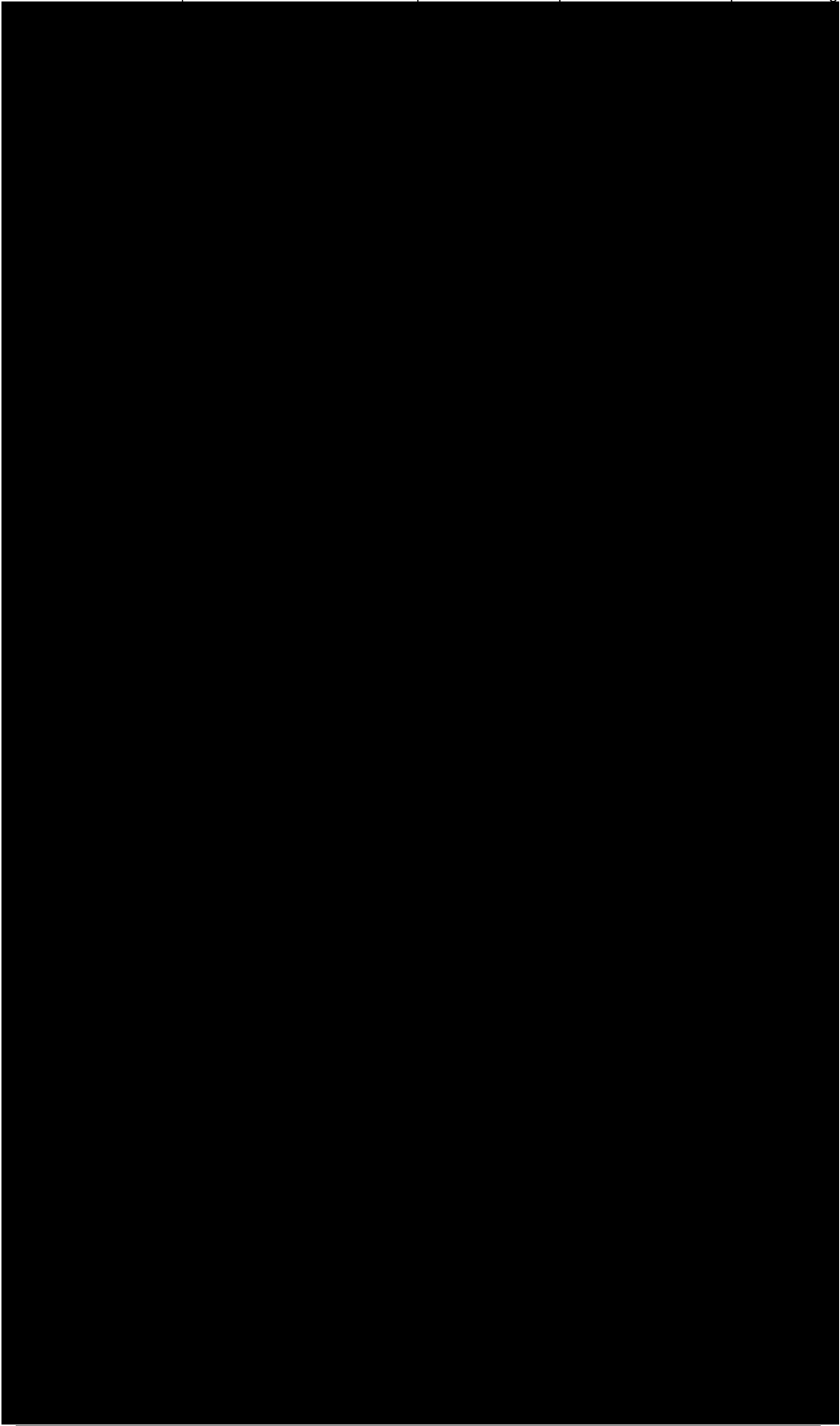
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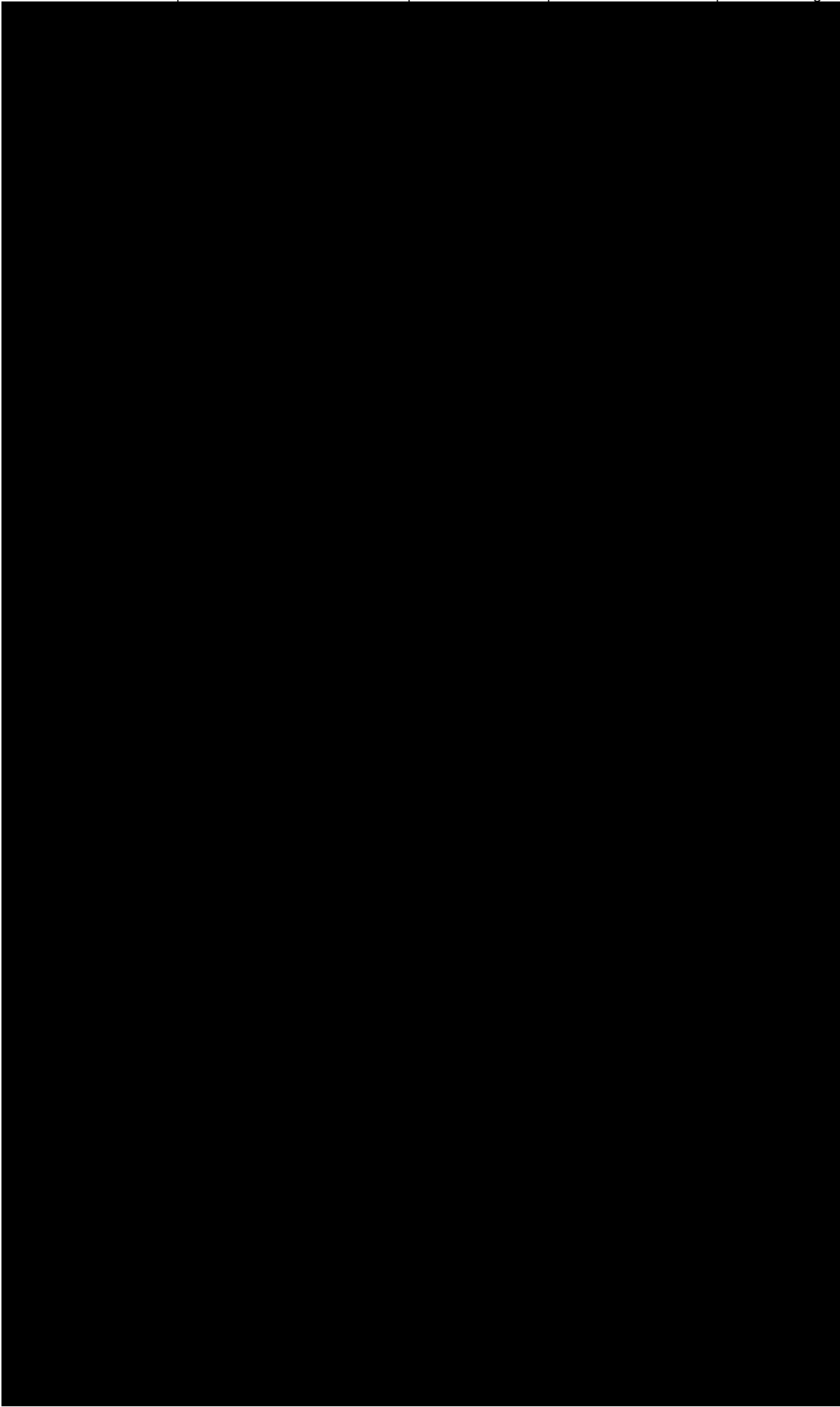
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# Cumberland Farms, Signage



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# Stewarts Shops – Sets



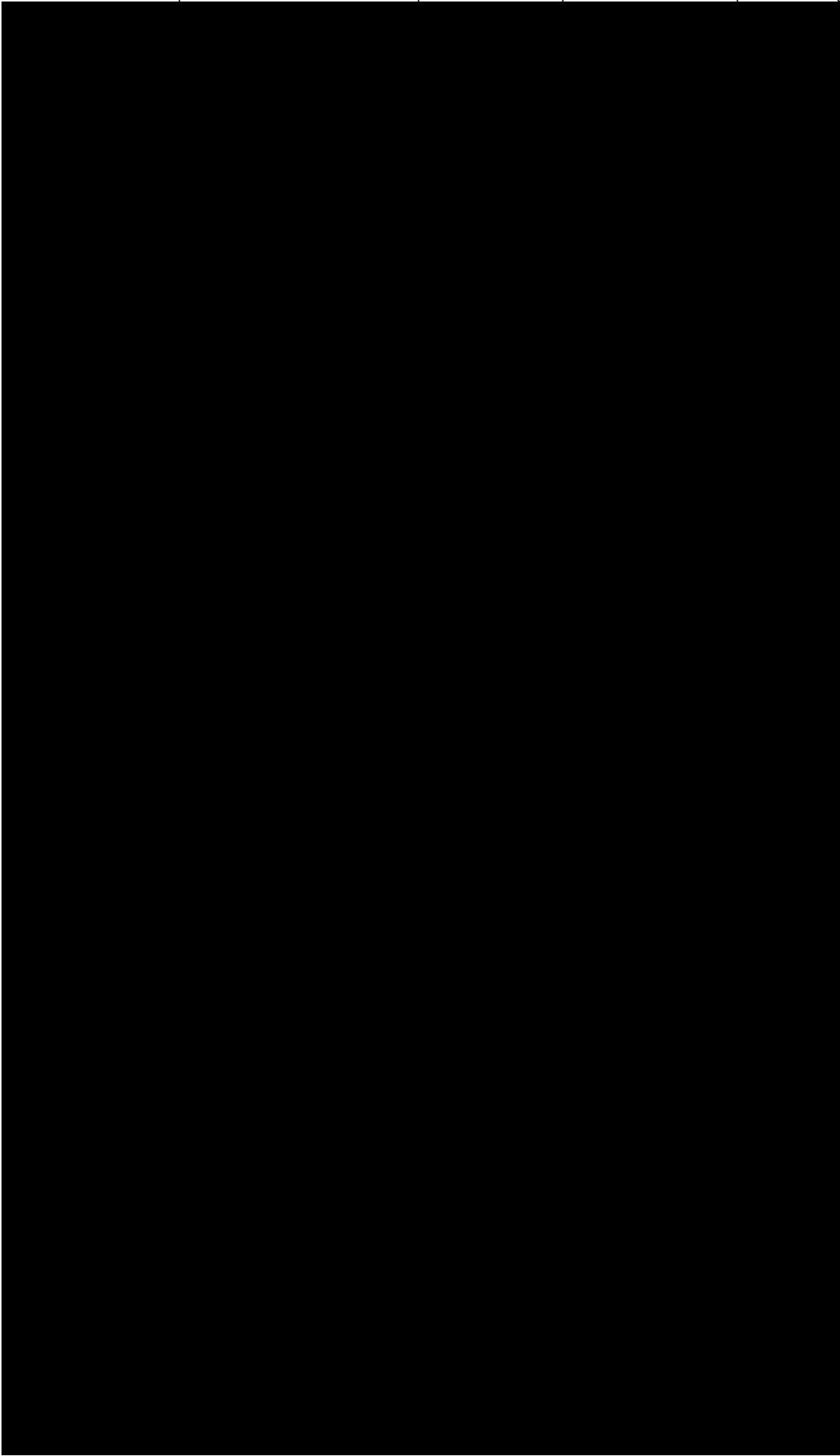
Top -Fixture



Bottom - Fixture



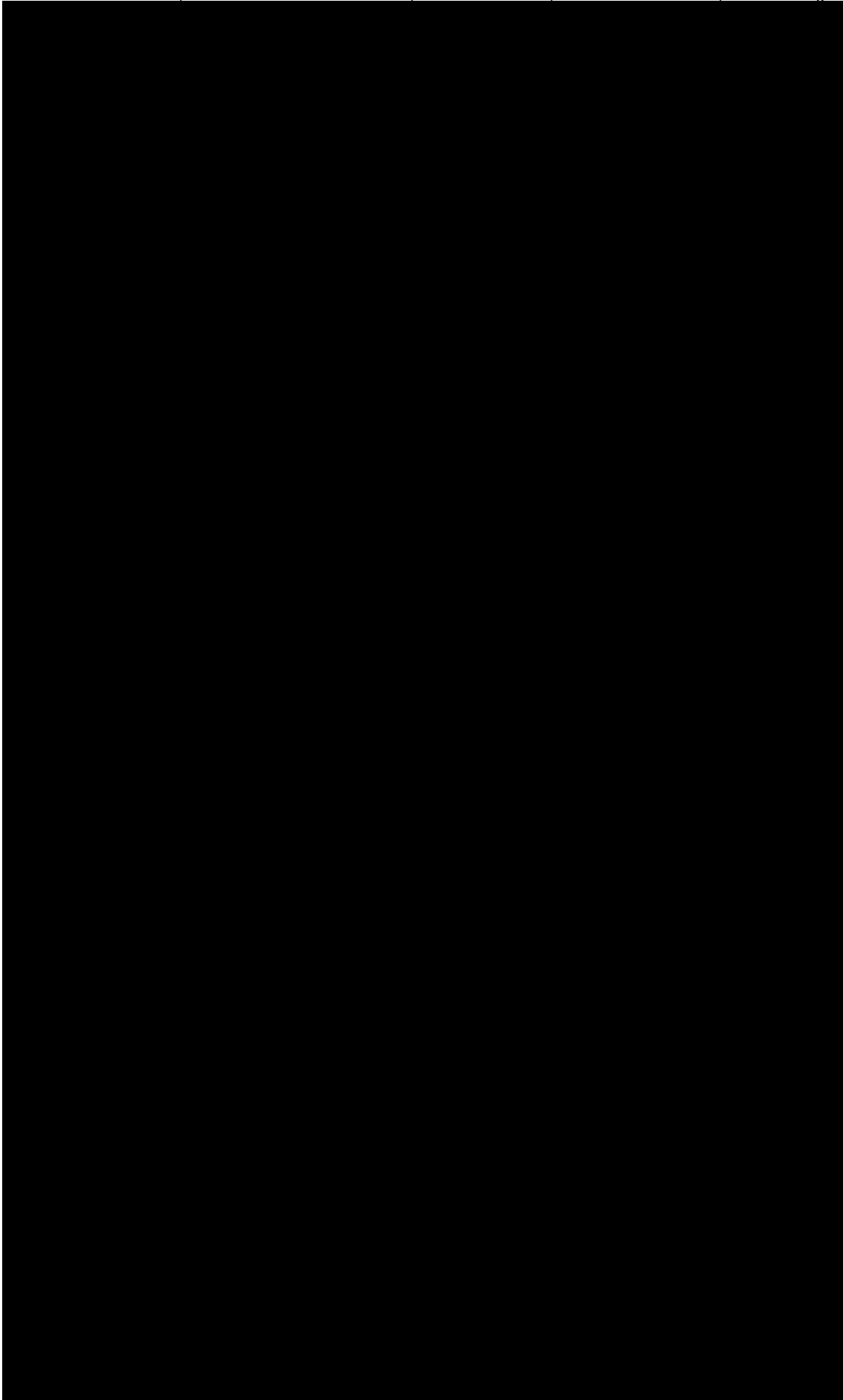
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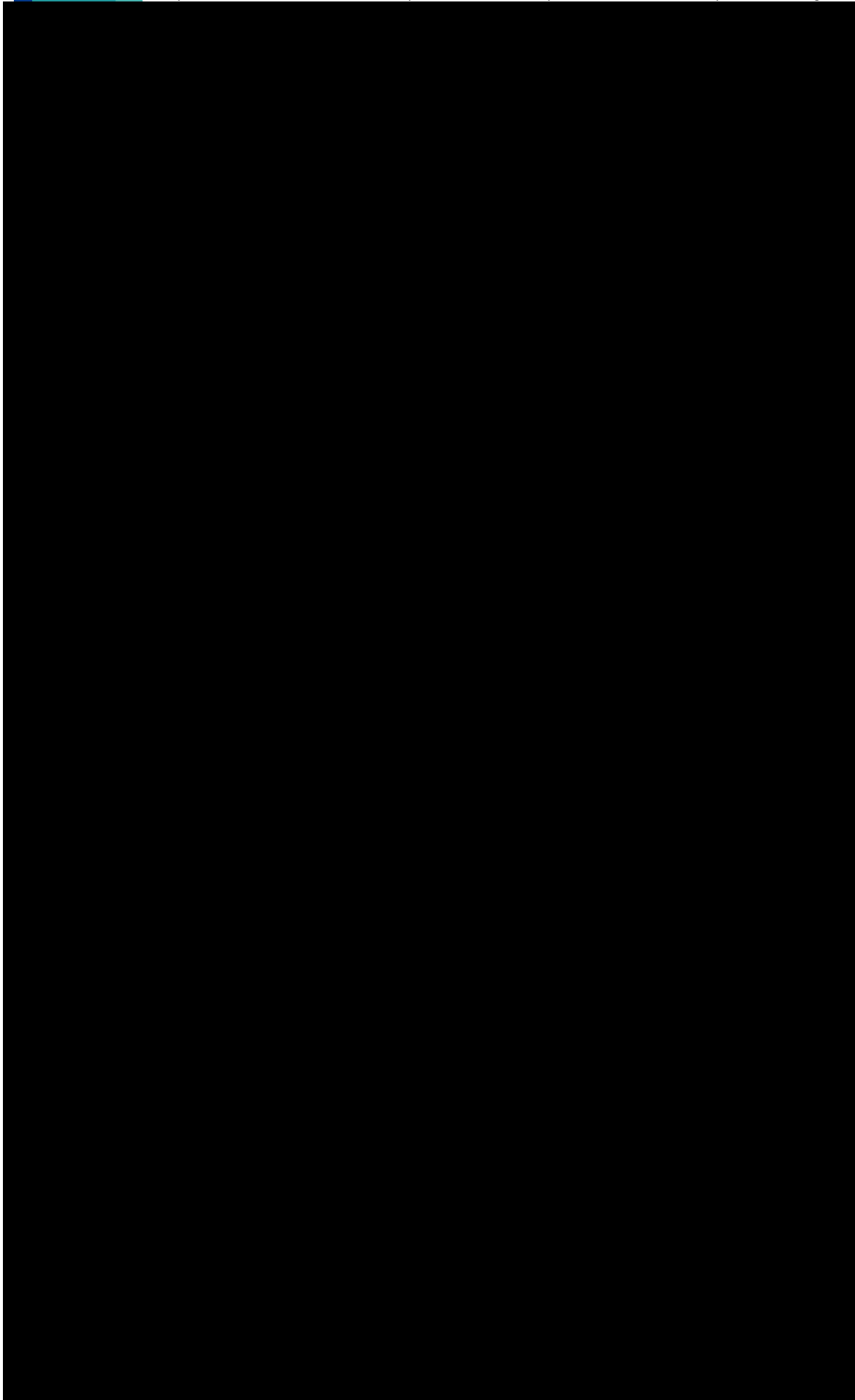
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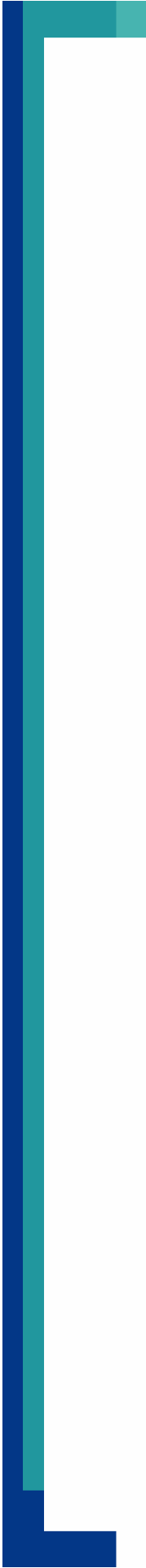


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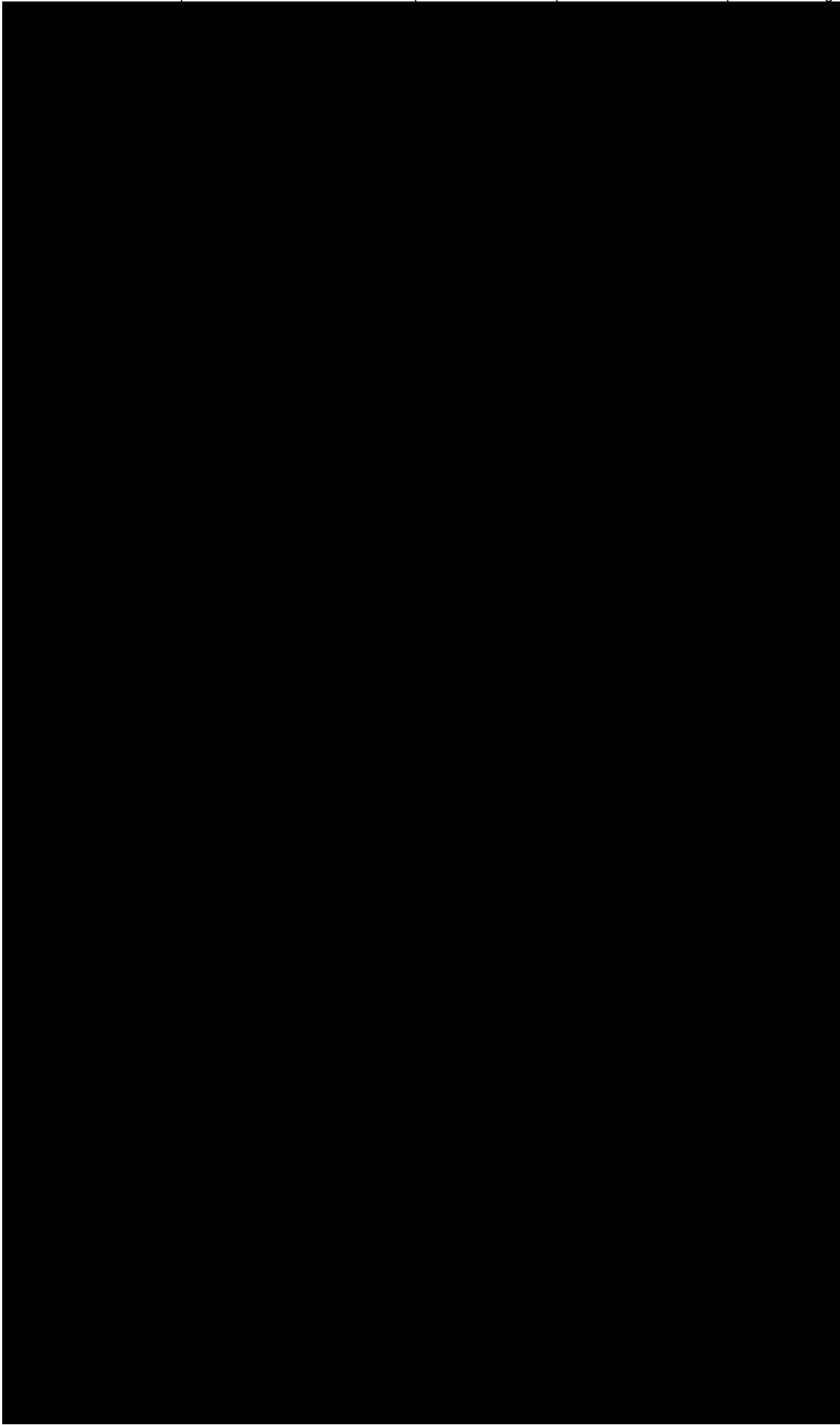


# Back Up Data

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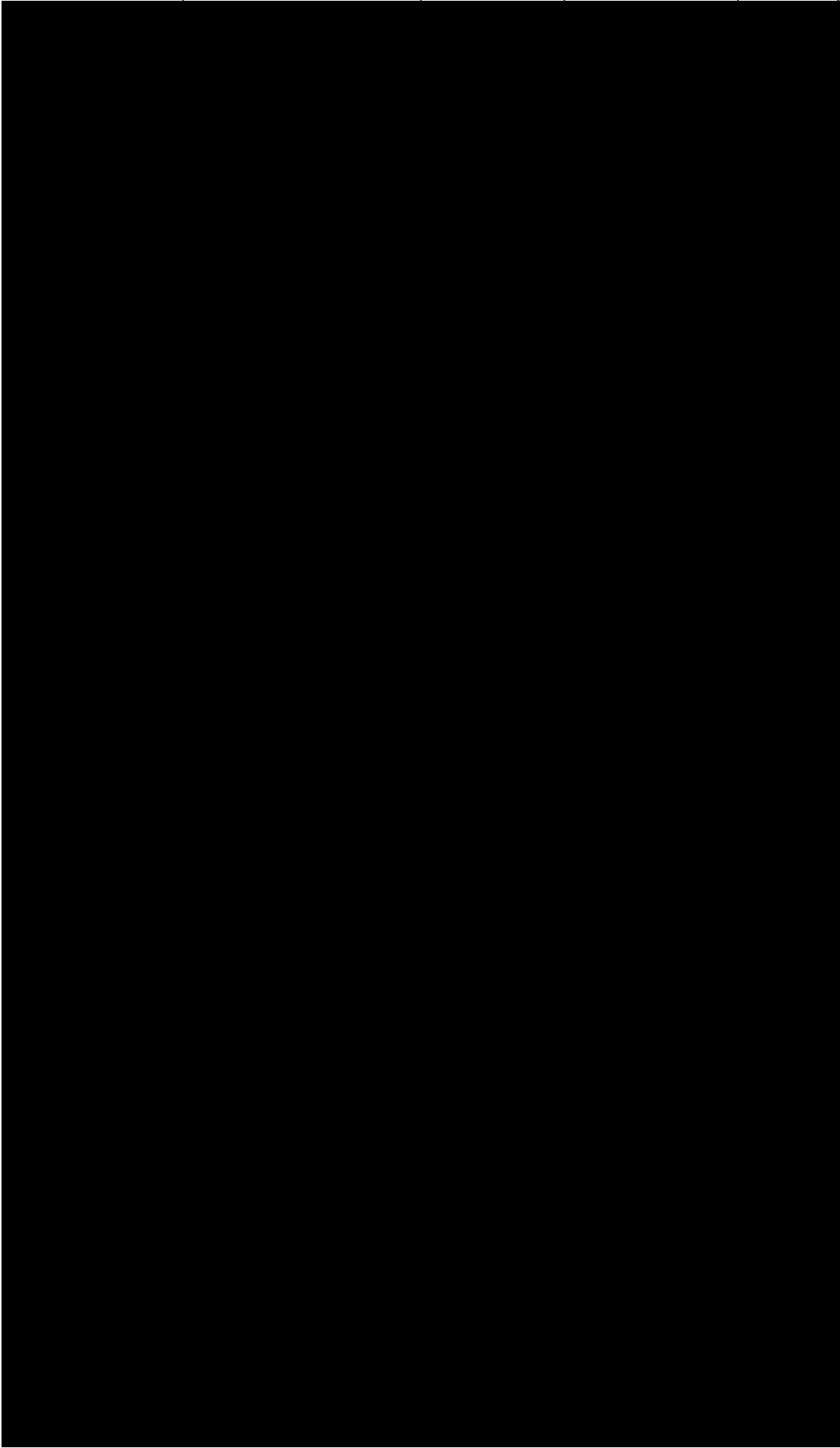
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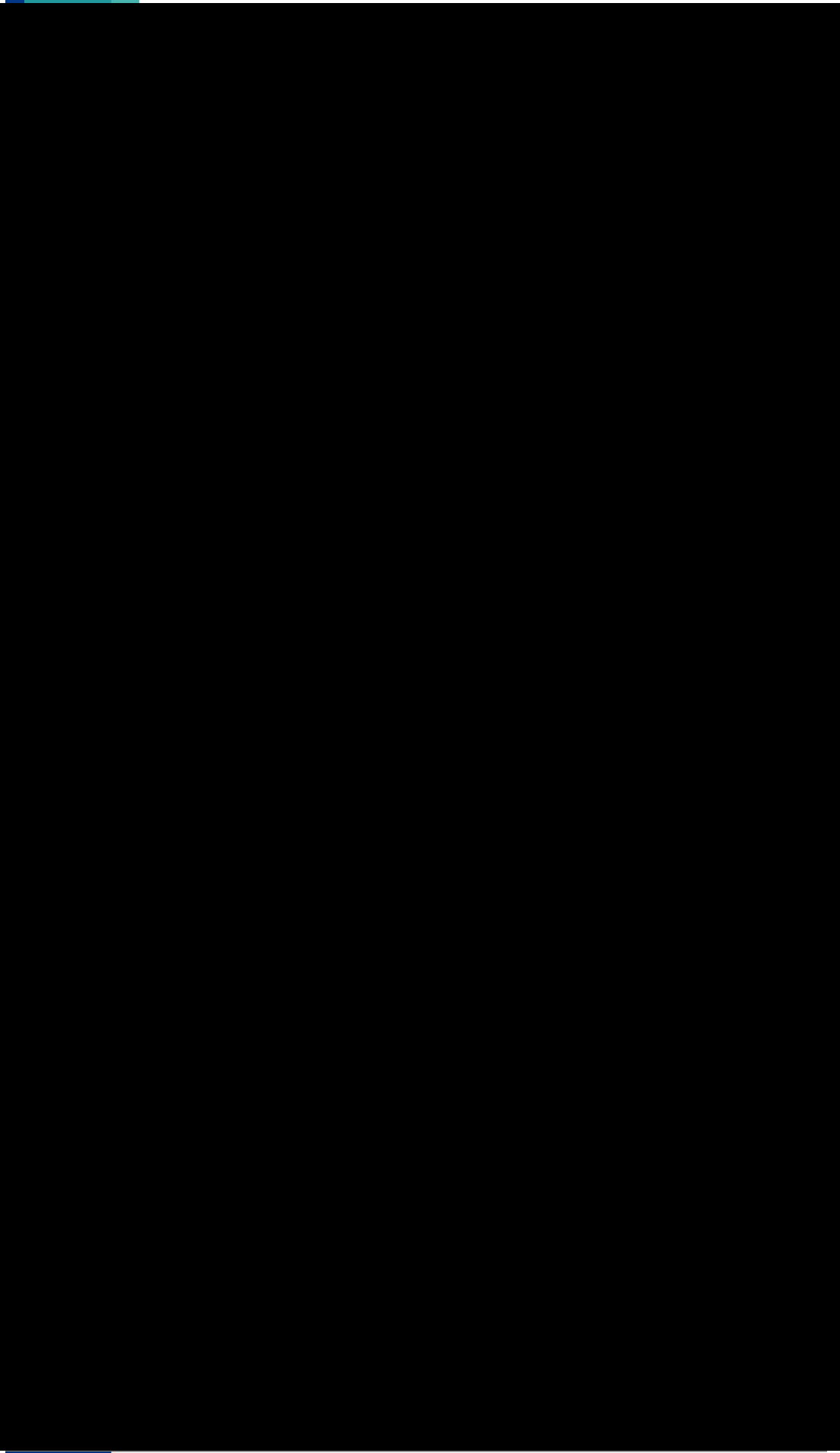
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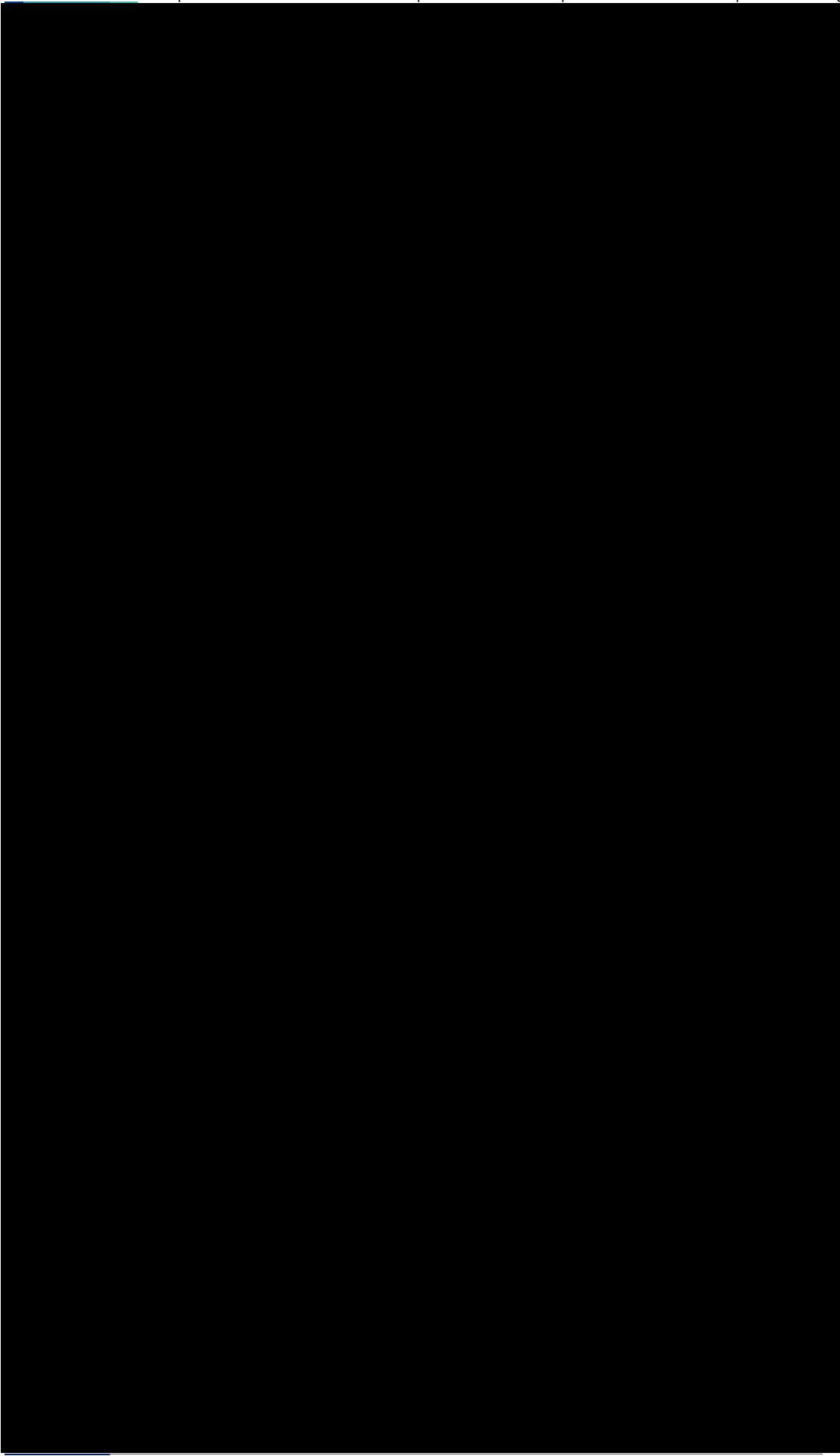
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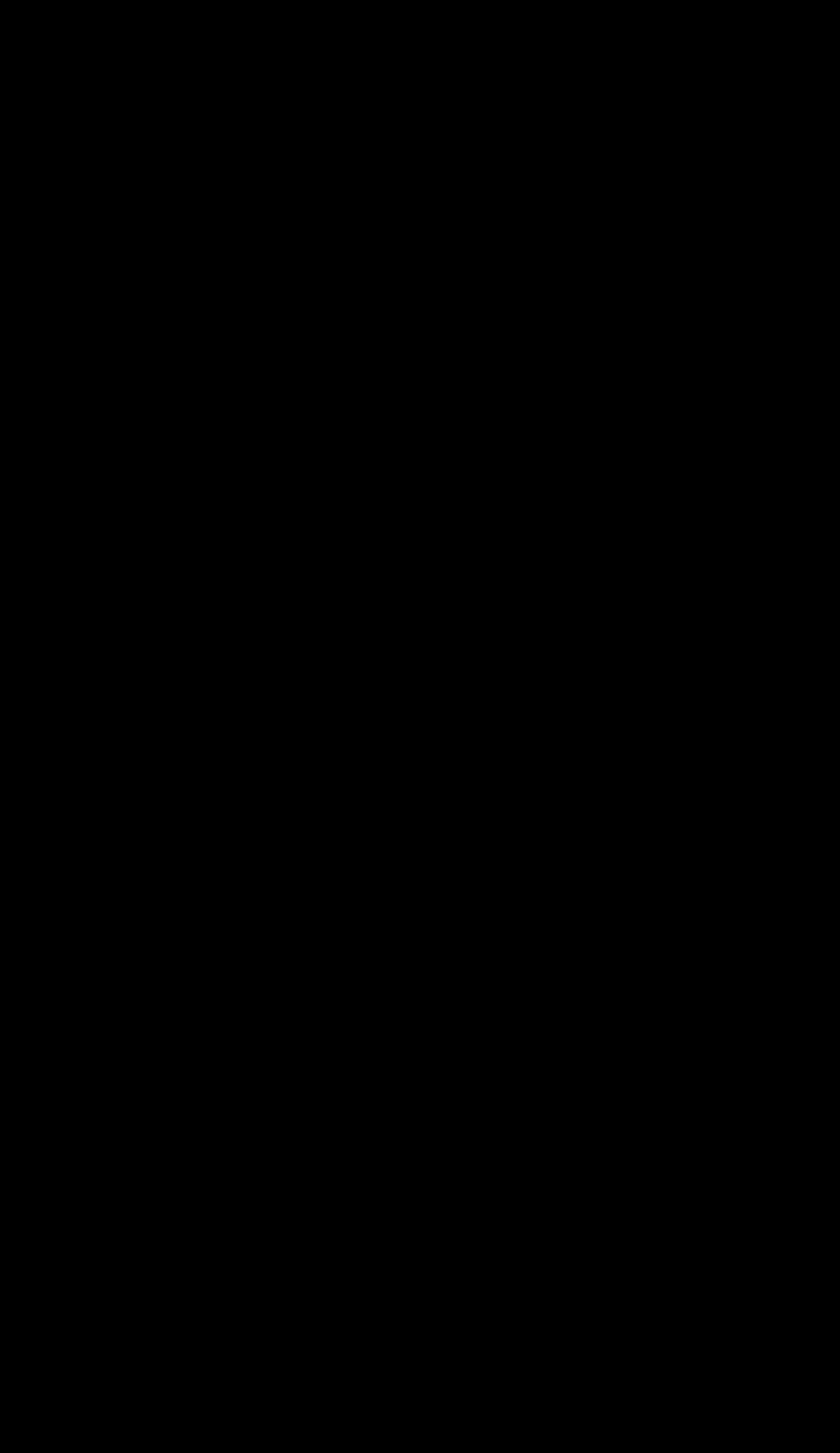
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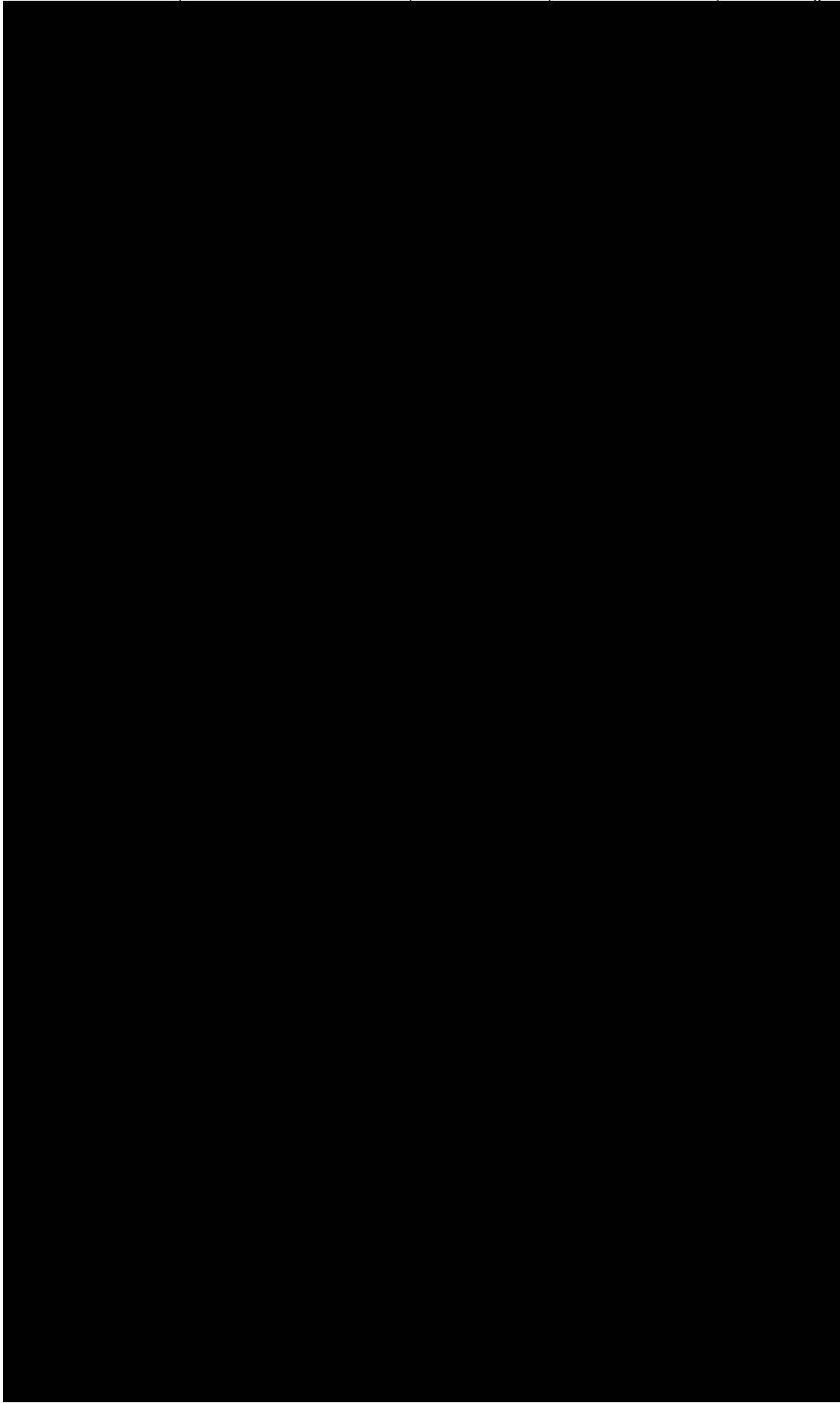
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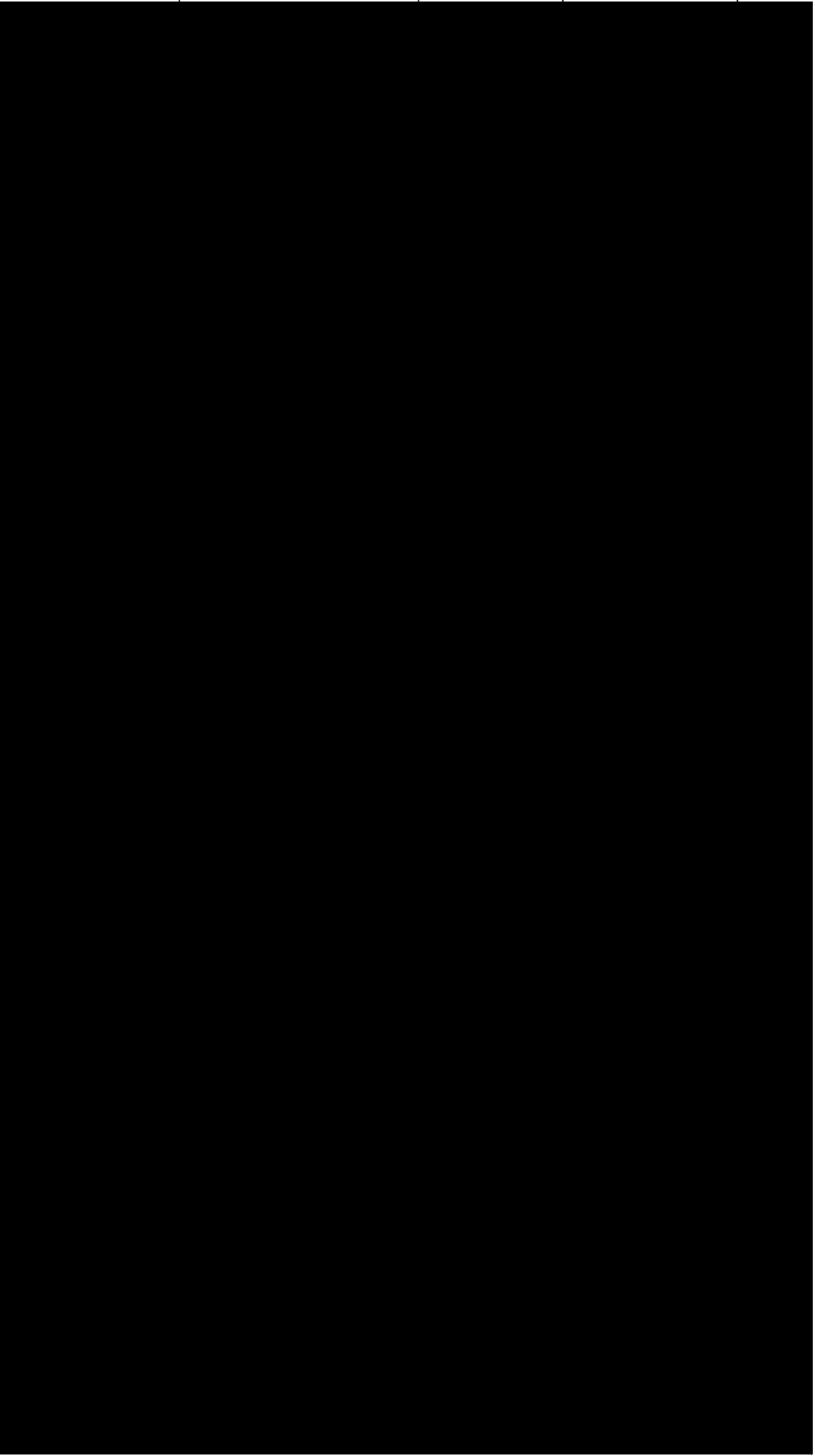
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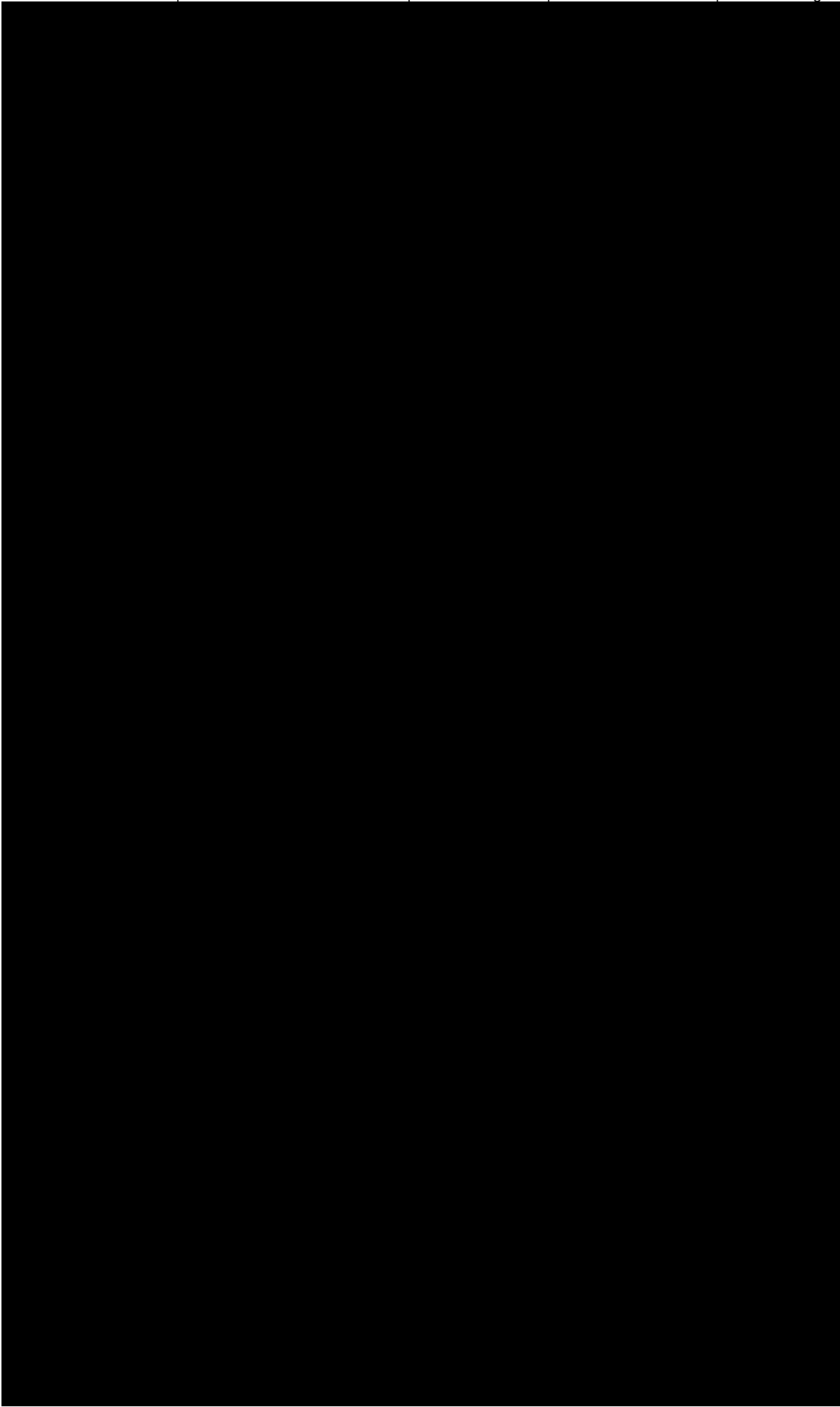
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# **PUBLIC EXHIBIT A-3**

## **PX3135**

*In Camera* Treatment Requested  
For Entirety Of Document

# **PUBLIC EXHIBIT A-4**

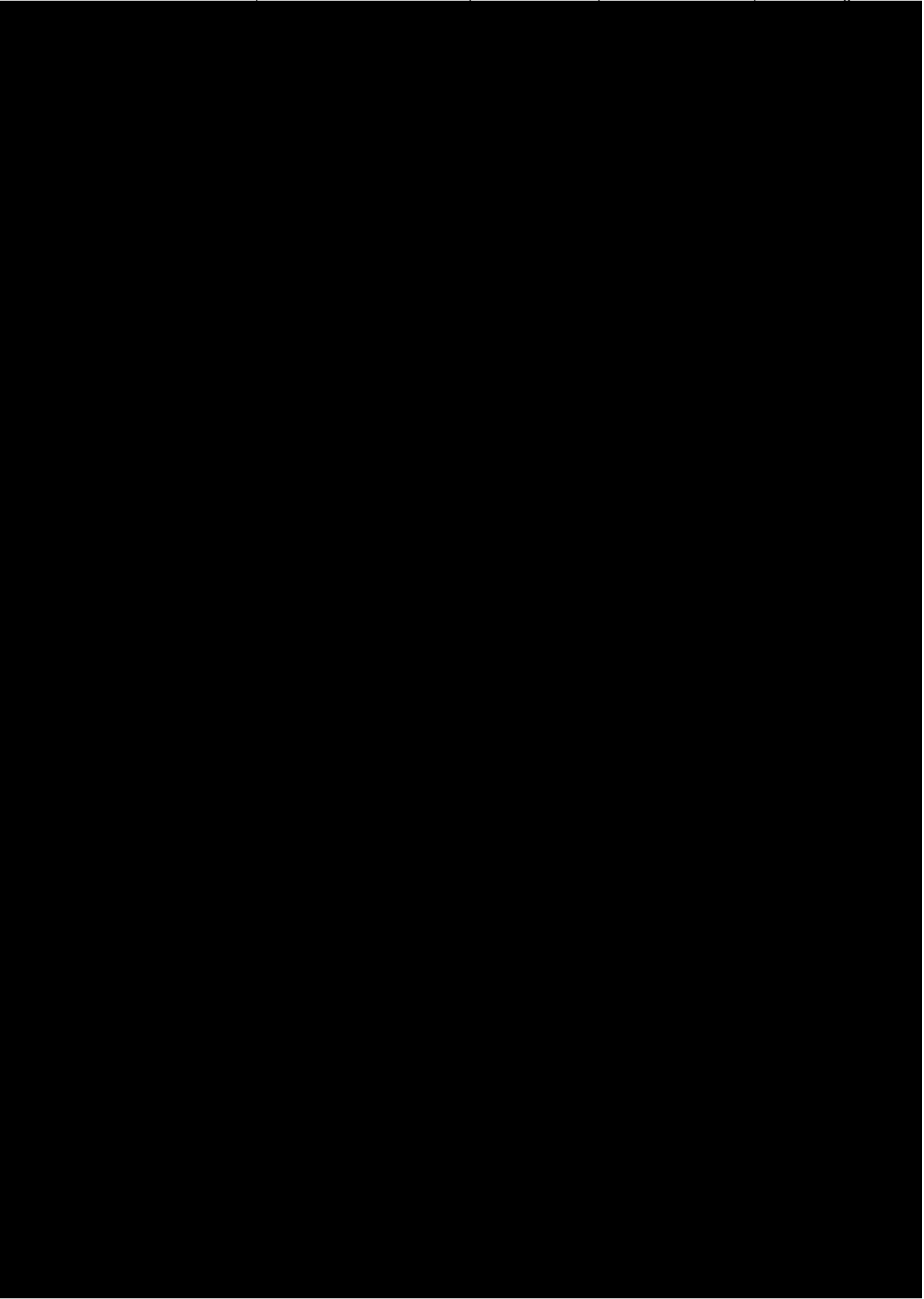
## **PX3145**

# IVG Business Presentation - September 2019



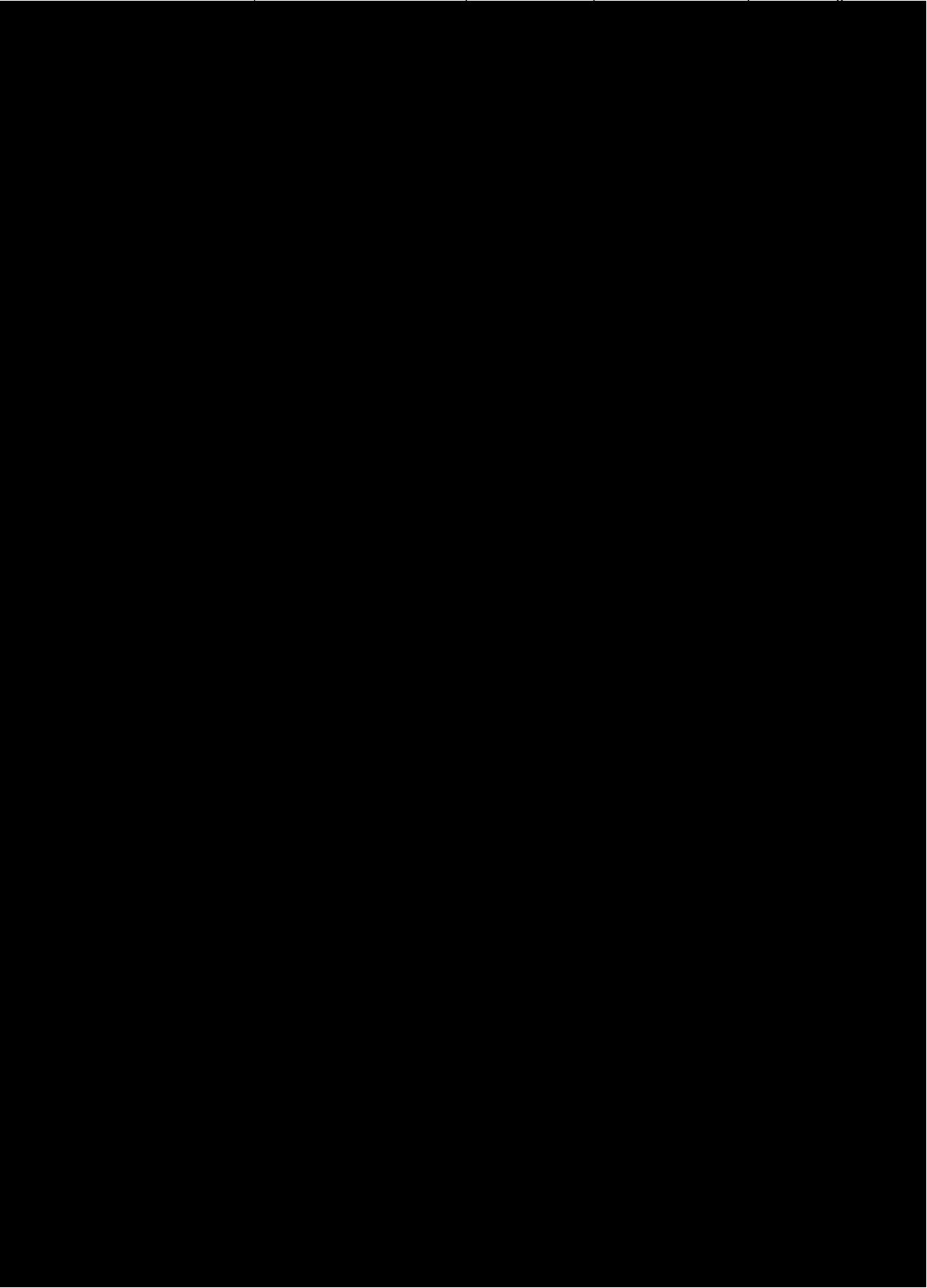


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# Wholesale Transition to Vapor Beast

- Vapor Supply Website has been shutdown.
- Direct Vapor wholesale site will be turned off this week. IT double checking that drop shippers will not be affected.
- All DV orders are being entered in Vapor Beast M2, with the exception of international orders. Currently M2 is not set up with country codes and we will NAV until that set up is complete.
- Training in California was completed last week. We now have a solid understanding of the sales and customer touch point processes



4

## Customer Service Update

- We saw a 3K increase in Contact Center cost to \$65,700. I audited the call and email costs and determined we had an increase in contacts due to inquiries into flavor bans. We had more agent entered sales as customers called in to order bulk E-Liquid. We currently trending at \$56K cost for the month of October.
- We have delayed the “No Back Order” test on Direct Vapor until the warehouse is transferred to KY.
- HDP/Subscriptions. We currently have 7950 subscriptions down from 10,400 in August. Most of the subscription loss is due to blocked states where we had cancel.



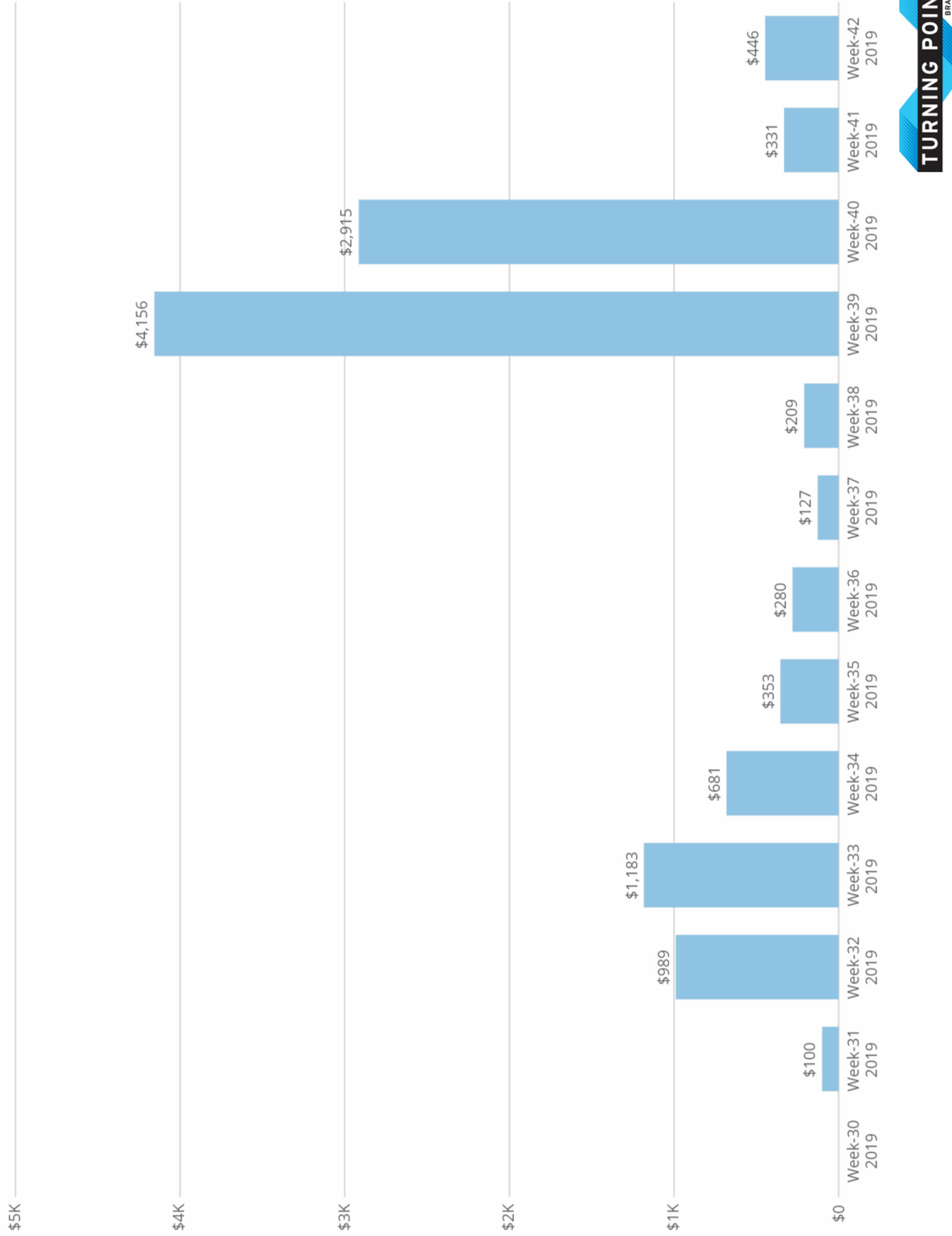
5

# Q4 Online Initiatives

- Go-forward process
- Wholesale Transition Supply → VB
  - IVG MKTG team to handle all VB marketing
- Department Restructure
- DirectCBD
  - Enhancements
    - Pending IT - delayed
  - Marketing
    - Leafly email – done
    - Leafly article – pending
    - Fractl content – pending
    - Adding more affiliates - WIP
- DV & VF
  - IT Enhancements - delayed
  - Display – continues
- SBS product mix analysis
- BF/ CM preparations



# Early Look at DirectCBD.com Sales (AUG 2019 Launch)



WK37 Ending 09/15/2019





# Brick & Mortar - State of the Stores

**Corporate Stores**

- Remodels Complete – OKC GO cancelled
- Edmund open - adding marketing programs to ramp visibility & sales
- Sign Spinners
- Ticket drop at location
- Enhancing CBD presence and pictures -- Google my business pages
- OKC: Sept to LY -20%; OCT fctst -8% -- Shark MIA: Sept to LY -39%; OCT fctst -39%; Fi MIA: Sept to LY -10%; OCT fctst -14%

**Vapor Shark Franchise**

Privileged

**VaporFi Franchise**

Privileged



# Rip Stick & Pod Test

- 9 questions ranking product attributes 1-5
- 200 Giveaways complete – received 15 responses
- Continuing to resend to obtain more responses

Q11 Please share any other comments you may have about your experience with the RipStick device below:

Answered: 7 Skipped: 8

## RESPONSES

Improve air flow a little, and I would happily purchase more.

awful

You guys really have to make sure that when you bring out a new product, make sure that it works properly. I love the size of the ripstick. That's the only positive I have to say about the ripstick. It's a shame because I was so looking forward to using the ripstick but using 2 ripsticks and both of them failed, I will not be purchasing any more ripsticks.

I really want to like this Pod system but it needs some work on the juice end

I loved the device itself! Small and compact, good daw, long battery life. If only wish you offered more menthol flavored pods. I enjoy the fruit but like the cool feeling of the menthol

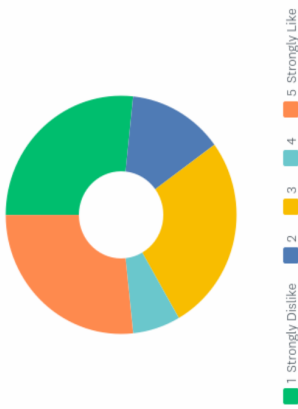
Gotta be honest, the juice is trash. It's so harsh and tastes like it's pre burnt. I tried both flavors and gave up immediately after 2 pulls. It's that bad. Sorry.

Also like the low nicotine choice I have love 1.2 level can't find other pods with low nicotine..

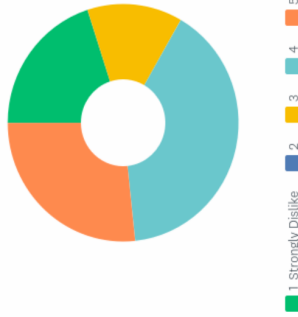


# Rip Stick Test Responses

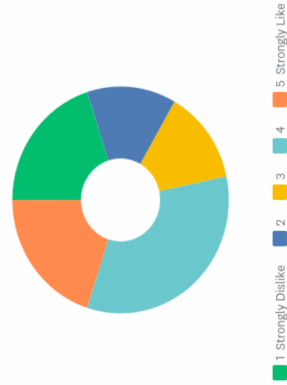
Q1: How would you rate the e-liquid flavors of the Rip Stick device?



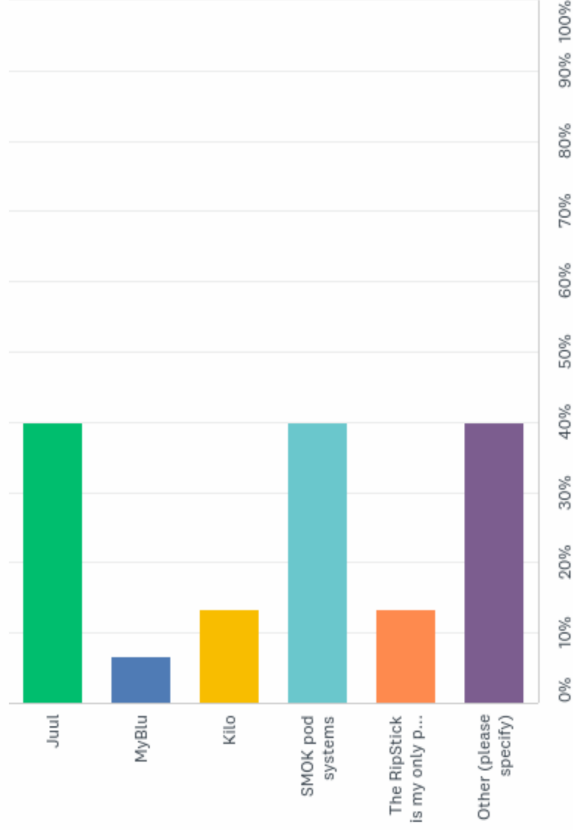
Q2: How would you rate the Rip Stick battery performance?



Q3: How would you rate the draw from the Rip Stick device?



Q4: What other pod system devices do you use? Select all you have tried:



# Rip Stick Test Responses

Q5: The flavor of the e-liquids when compared to other pod systems is:



■ Better ■ About the same ■ Worse ■ I have not tried other pod systems

Q7: The draw of the Rip Stick compared to other pod systems is:



■ Better ■ About the same ■ Worse ■ I have not tried other pod systems

Q6: Comparing the Rip Stick to other pod system's battery life and performance, the Ripstick is:



■ Better ■ About the same ■ Worse ■ I have not tried other pod systems

Q8: Compared to other pod systems, my overall satisfaction with the Rip Stick is:



■ Better ■ About the same ■ Worse ■ I have not tried other pod systems



# Rip Stick Test Responses

Q9: Will you be purchasing more Rip Tide pods for use with your Rip Stick device?



■ Yes ■ No

## RESPONSES

Battery life and pods are used up quickly

Good for every once in a while, for convenience

The Draw is awful. I should not have to give myself a hernia just to get a hit.

The flavors taste like tobacco with a very small hint of the advertised flavor gives u cancer right as u hit

Because I had 2 ripsticks and the batteries just died for no reason

The e-liquid tastes like smoke and not the flavor advertiser

Need more menthol fruit favors

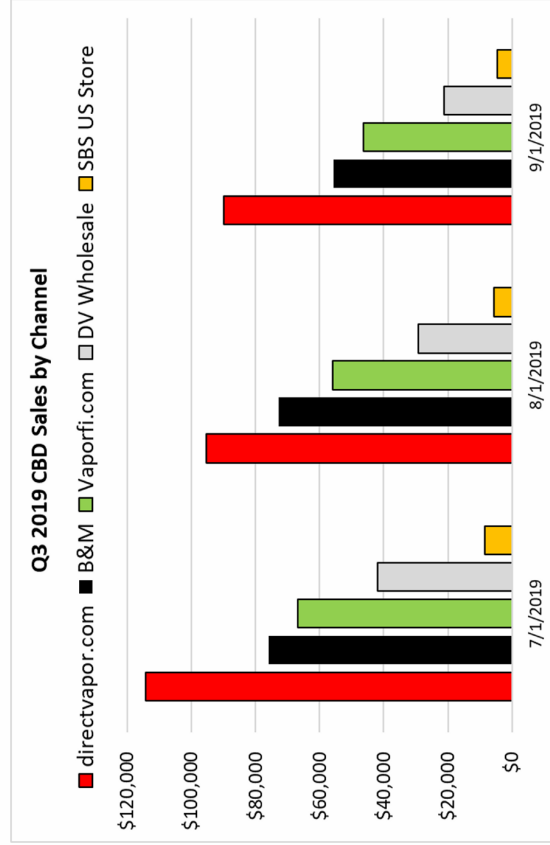
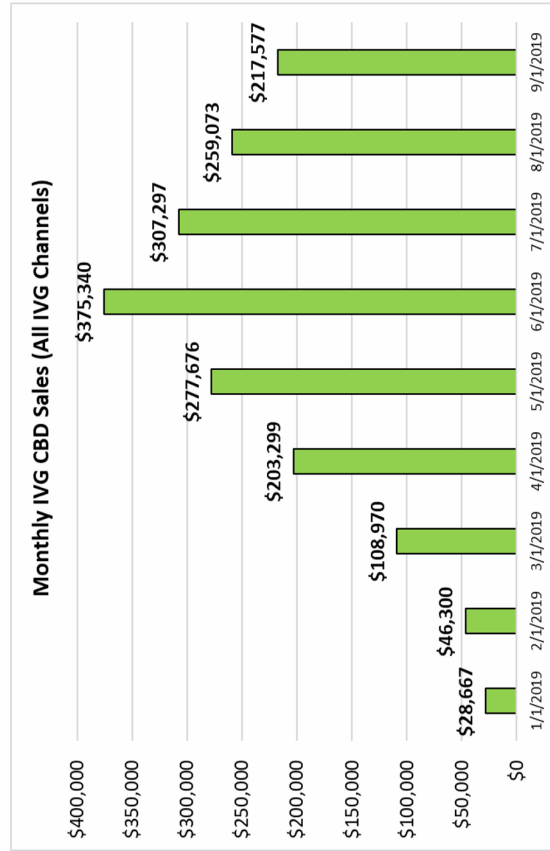
flavors are good

I really liked it. It was new and interesting.

Just like the hit it gives & like the flavor 😊

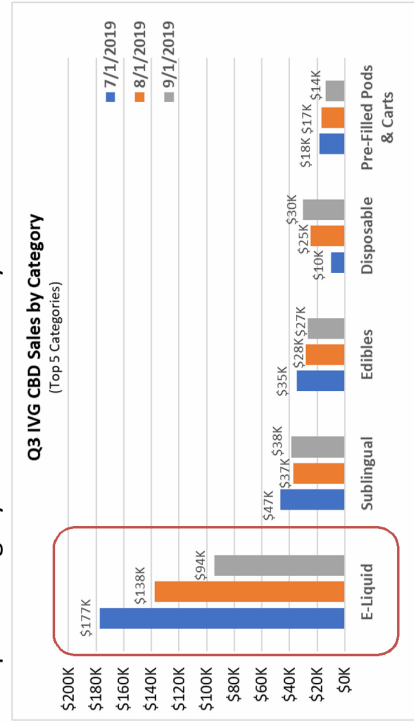
Flavor was not good

# CBD Trend Overview (All IVG Channels)



Sept. Recap: Total CBD Sales down -16% or -\$42.5k vs. Aug.  
 Overall Q3-19 CBD Sales down -8% or -\$72.4k vs. Q2-19  
 Oct. trending \$167k / -23% or -\$50.4k vs Sept.

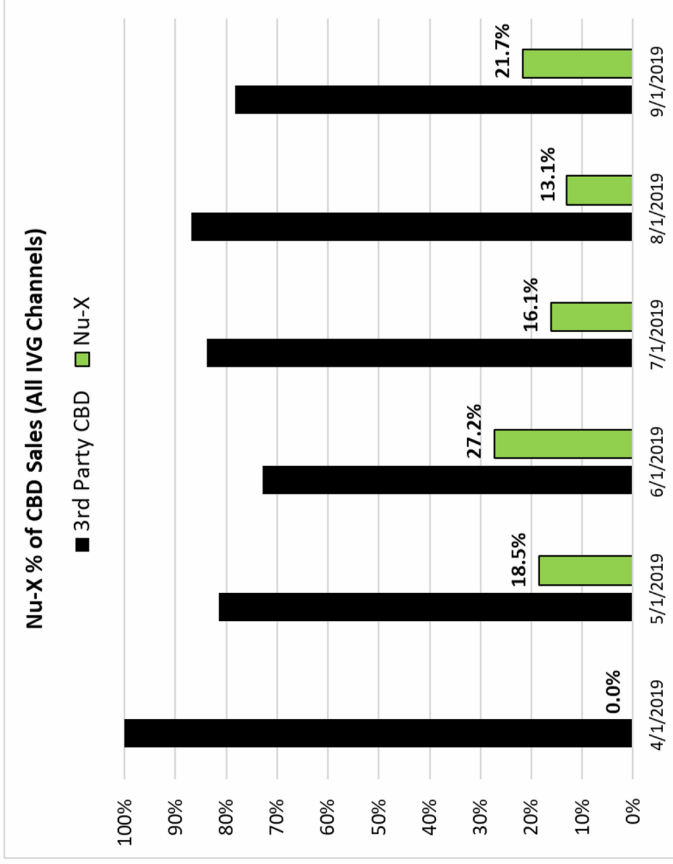
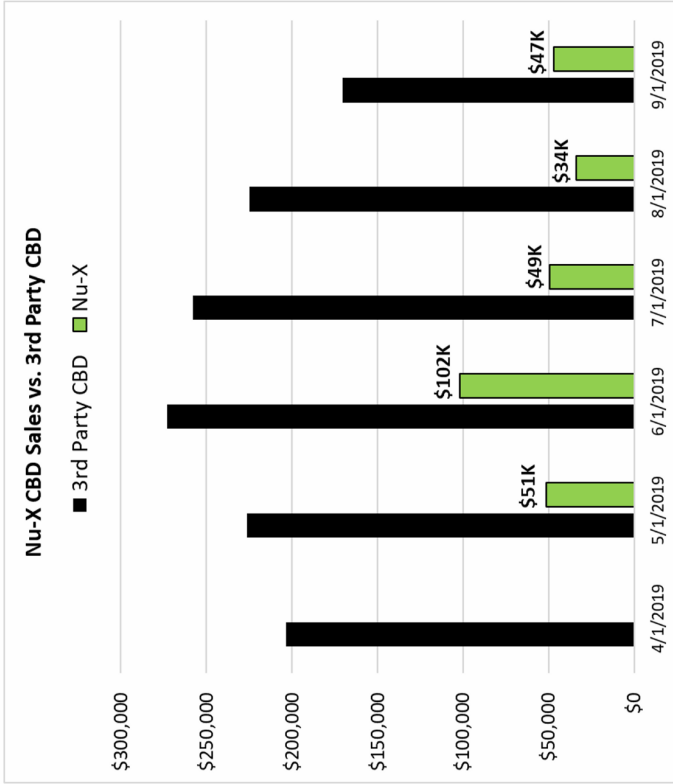
E-Liquid Category is most hard-hit by recent events:



Channel	Q2 2019	Q3 2019	% Change	\$ Change
DirectVapor	\$317,490	\$299,451	-6%	-\$18,038
Brick&Mortar	\$253,494	\$204,378	-19%	-\$49,116
VaporFi.com	\$161,670	\$169,155	5%	\$7,485
DV Wholesale	\$114,171	\$92,220	-19%	-\$21,951
South Beach Smoke	\$9,261	\$18,504	100%	\$9,243
<b>Total</b>	<b>\$856,085</b>	<b>\$783,707</b>	<b>-8%</b>	<b>-\$72,378</b>



# Nu-X CBD Overview



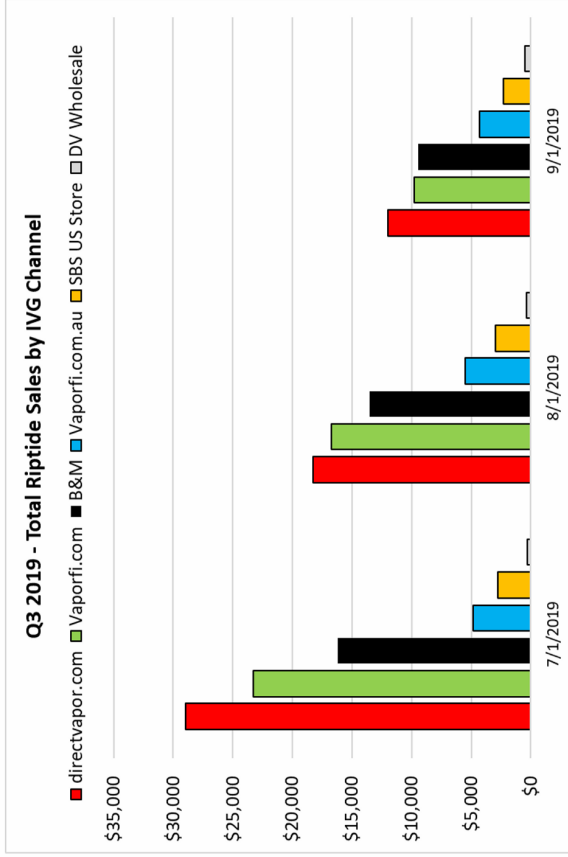
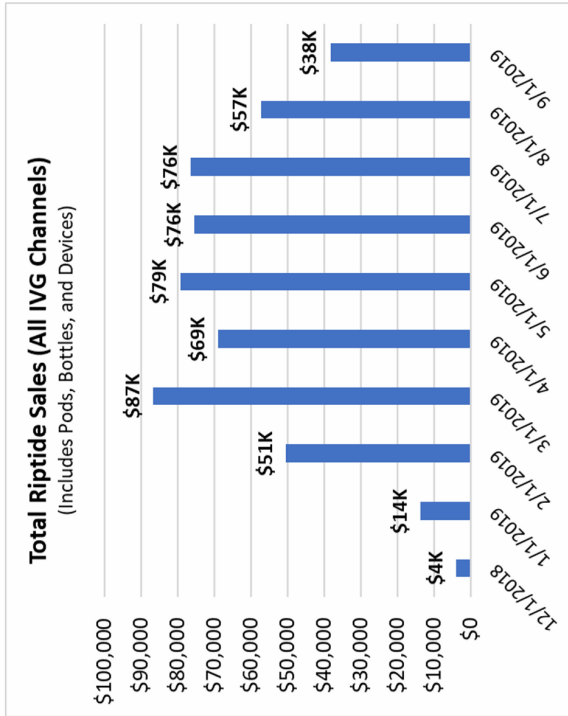
## Nu-X CBD Recap:

- CBD Sales increased 39% or \$13.3k vs. August
- % of total CBD share increased 8.6% in Sept. driven by promotions





# Riptide Trend Overview (All IVG Channels)



Channel	Q2 2019	Q3 2019	% Change	\$ Change
DirectVapor	\$72,380	\$59,229	-18%	-\$13,151
VaporFi.com	\$50,226	\$49,803	-1%	-\$423
Brick&Mortar	\$77,416	\$39,197	-49%	-\$38,219
VaporFi.com.AU	\$14,200	\$14,639	3%	\$438
South Beach Smoke	\$5,904	\$8,005	36%	\$2,101
DV Wholesale	\$3,778	\$1,171	-69%	-\$2,607
<b>Total</b>	<b>\$220,127</b>	<b>\$170,873</b>	<b>-22%</b>	<b>-\$49,254</b>

Sept. Recap: Total Riptide Sales down -19% or -\$19k vs. Aug.

Overall Q3 Riptide Sales down -22% or -\$49.3k vs. Q2-19

Oct. trending \$38k / flat vs Sept.



# **PUBLIC EXHIBIT A-5**

## **PX7030 RX0133**

Larry Wexler Confidential  
January 29, 2021

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

-----X

In the Matter of

ALTRIA GROUP, INC.,

a corporation,

-and-

Docket No. 9393

JUUL LABS, INC.,

a corporation,

Respondents.

-----X

\* \* \* C O N F I D E N T I A L \* \* \*

(Via remote videoconference)

January 29, 2021  
9:05 a.m. Eastern

Confidential Videoconference

Deposition of LARRY WEXLER, before

Kristi Cruz, a Notary Public of the State of

New York.

Larry Wexler Confidential  
January 29, 2021

Page 2

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2 A P P E A R A N C E S: (All appearing remotely)  
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Page 4

2 -----I N D E X-----  
3 WITNESS EXAMINATION BY PAGE  
4 LARRY WEXLER MR. SOWLATI 5, 185  
5 MR. LEE 147  
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8 EXHIBITS PREVIOUSLY MARKED/REFERRED TO:  
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10 Wexler 3 - page 52  
11 Wexler 13 - page 73  
12 Wexler 4 - page 80  
13 Wexler 5 - page 88  
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15 Wexler 8 - page 123  
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19 Wexler 11 - page 143  
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22  
23  
24  
25

Page 3

1  
2 A P P E A R A N C E S: (Cont'd)  
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20  
21 ALSO PRESENT:  
22 ZACH CZERENDA, Tech Support  
23 CAITLIN MALOFF, Turning Point Brands, Inc.  
24  
25

Page 5

1 PROCEEDINGS - CONFIDENTIAL  
2 THE COURT REPORTER: The attorneys  
3 participating in this deposition  
4 acknowledge that I am not physically  
5 present in the deposition room and that I  
6 will be reporting this deposition  
7 remotely. They further acknowledge that,  
8 in lieu of an oath administered in person,  
9 the witness will verbally declare his/her  
10 testimony in this matter is under penalty  
11 of perjury.  
12 The parties and their counsel  
13 consent to this arrangement and waive any  
14 objections to this manner of reporting.  
15 Please indicate your agreement by stating  
16 your name and your agreement on the record.  
17 (All parties consent to the  
18 stipulation.)  
19 L A R R Y W E X L E R,  
20 called as a witness, having been duly  
21 sworn by a Notary Public, was examined  
22 and testified as follows:  
23 EXAMINATION BY  
24 MR. SOWLATI:  
25 Q. Good morning, Mr. Wexler. Can you

Larry Wexler Confidential  
January 29, 2021

<p style="text-align: right;">Page 6</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 please state and spell your full name for the</p> <p>3 record?</p> <p>4 A. Including middle name?</p> <p>5 Q. Sure.</p> <p>6 A. Lawrence Stuart Wexler,</p> <p>7 L-A-W-R-E-N-C-E; middle name Stuart,</p> <p>8 S-T-U-A-R-T; last name Wexler, W-E-X-L-E-R.</p> <p>9 Q. Who is your employer?</p> <p>10 A. Turning Point Brands.</p> <p>11 Q. And what is your current title?</p> <p>12 A. President and CEO.</p> <p>13 Q. Okay. Thank you for that</p> <p>14 information. It's nice to meet you,</p> <p>15 Mr. Wexler. My name is Adam Sowlati, I'm one</p> <p>16 of the counsel representing Altria in this</p> <p>17 matter. Thank you so much for making yourself</p> <p>18 available today. I know you're very busy and</p> <p>19 you and your company are third parties to this</p> <p>20 dispute, so we really appreciate you being</p> <p>21 here today. We're going to try and make this</p> <p>22 as efficient and quick and painless as</p> <p>23 possible.</p> <p>24 A. Okay.</p> <p>25 Q. So, just by way of background, do</p>	<p style="text-align: right;">Page 8</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. I was not aware.</p> <p>3 Q. Are you aware, Mr. Wexler, that</p> <p>4 after the FTC started this administrative</p> <p>5 case, we, meaning Altria and JUUL's outside</p> <p>6 counsel, served a subpoena on Turning Point</p> <p>7 Brands asking for some documents?</p> <p>8 A. Yes.</p> <p>9 Q. Are you aware that Turning Point has</p> <p>10 produced documents, as a result of this</p> <p>11 process?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. Just a couple of questions</p> <p>14 about your history giving testimony.</p> <p>15 Have you ever testified in either a</p> <p>16 deposition or trial setting?</p> <p>17 A. Yes.</p> <p>18 Q. Was that testimony given in</p> <p>19 connection with your work at Turning Point?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. Can you briefly describe what</p> <p>22 you gave testimony about?</p> <p>23 A. I also gave testimony when I was at</p> <p>24 Philip Morris -- at Altria, sorry.</p> <p>25 Q. Okay. Well, if you could, just tell</p>
<p style="text-align: right;">Page 7</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 you understand you're here today to give</p> <p>3 testimony in a legal case between the Federal</p> <p>4 Trade Commission and Altria and JUUL, right?</p> <p>5 A. Yes.</p> <p>6 Q. And you understand that the FTC has</p> <p>7 sued Altria and JUUL saying that a 35 percent</p> <p>8 investment that Altria made in JUUL was</p> <p>9 anti-competitive; is that right?</p> <p>10 A. I can't speak to the specific legal</p> <p>11 issues involved, but I understand that the FTC</p> <p>12 is suing Philip Morris -- I'm sorry. I worked</p> <p>13 there 20 years, and I will slip and say Philip</p> <p>14 Morris pretty often -- Altria acquisition of a</p> <p>15 portion of JUUL.</p> <p>16 Q. Are you aware that before FTC filed</p> <p>17 this case, they conducted an investigation?</p> <p>18 A. Yes.</p> <p>19 Q. Are you also aware that you signed a</p> <p>20 Declaration that Turning Point Brand and its</p> <p>21 counsel gave to the FTC?</p> <p>22 A. Yes.</p> <p>23 Q. Are you aware, Mr. Wexler, that your</p> <p>24 colleague, Brittani Cushman, also submitted a</p> <p>25 Declaration to FTC?</p>	<p style="text-align: right;">Page 9</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 me about what you gave testimony at Philip</p> <p>3 Morris first.</p> <p>4 A. There was a dispute between Turning</p> <p>5 Point and one of its competitors, public</p> <p>6 tobacco.</p> <p>7 Q. Okay. Thanks for that information.</p> <p>8 Now, you're aware that this is a</p> <p>9 remote deposition. It's new for many of us,</p> <p>10 so we'll just try and cooperate and get</p> <p>11 through some technical glitches that may occur</p> <p>12 and be as efficient as possible.</p> <p>13 Just so you understand what's going</p> <p>14 to happen today, you've been in a deposition</p> <p>15 before. We're going to ask you a number of</p> <p>16 questions. I'll go first, then an attorney,</p> <p>17 Mr. Lee, an attorney representing the FTC,</p> <p>18 will have an opportunity to ask you questions.</p> <p>19 Do you understand that?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. I'm just going to go through</p> <p>22 a few more ground rules, understanding that</p> <p>23 you're experienced with depositions before.</p> <p>24 So, do you understand that you're</p> <p>25 testifying under oath today, just as you would</p>

Larry Wexler Confidential  
January 29, 2021

<p style="text-align: right;">Page 10</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 be testifying under oath in a court at trial?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. We should try not to speak</p> <p>5 over each other today. Although at times it</p> <p>6 might look like we're having a conversation,</p> <p>7 there's a court reporter here taking down</p> <p>8 everything we're saying. So to make her job</p> <p>9 easier, I ask that you let me finish asking</p> <p>10 questions before you answer, and I'll try and</p> <p>11 return the favor by letting you finish your</p> <p>12 answer before I ask another question.</p> <p>13 A. That is fair.</p> <p>14 Q. Similarly, in order for the court</p> <p>15 reporter to take down your answers, I ask that</p> <p>16 you please answer verbally with a yes or no</p> <p>17 rather than nodding or making some other</p> <p>18 gesture. Okay?</p> <p>19 A. Understood.</p> <p>20 Q. If a question I ask is unclear,</p> <p>21 please let me know. I'll try to restate it so</p> <p>22 it's clear.</p> <p>23 From time to time, your counsel may</p> <p>24 object to certain questions. Unless a</p> <p>25 question is asking you for privileged</p>	<p style="text-align: right;">Page 12</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. Do you have any form of</p> <p>3 communication with your attorneys at disposal,</p> <p>4 such as a chat function or text messaging?</p> <p>5 A. No. My phone is off.</p> <p>6 Q. Mr. Wexler, as we've just discussed,</p> <p>7 you prepared a Declaration in connection with</p> <p>8 this matter. I plan to go through and ask you</p> <p>9 questions about it. I'll show you some other</p> <p>10 documents, but I'll keep referring to that</p> <p>11 Declaration to organize our discussion today.</p> <p>12 So it would be great if you could keep it</p> <p>13 handy.</p> <p>14 A. I don't have anything on my desk. I</p> <p>15 don't have it handy. Maybe they should send</p> <p>16 it to the chat room so I can put it up on my</p> <p>17 screen.</p> <p>18 Q. I am going to share that right now</p> <p>19 with you via the Zoom chat. Hopefully this</p> <p>20 works.</p> <p>21 A. Okay. This will be a test.</p> <p>22 Q. Okay. It says that it sent</p> <p>23 successfully.</p> <p>24 A. Let's see if it made it. Sorry, I'm</p> <p>25 playing with two screens.</p>
<p style="text-align: right;">Page 11</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 information, your counsel is just making an</p> <p>3 objection for the record, and you should still</p> <p>4 answer the question after he or she makes the</p> <p>5 objection. Does that make sense?</p> <p>6 A. Understood.</p> <p>7 Q. We're going to take a look at some</p> <p>8 documents which will be marked as exhibits to</p> <p>9 your deposition. I understand you may have</p> <p>10 had an opportunity to practice the Zoom chat</p> <p>11 function, which is what I'll use to share</p> <p>12 documents.</p> <p>13 Today's deposition is not an</p> <p>14 endurance test. If there comes a time you</p> <p>15 need a break, just let me know. We'll take a</p> <p>16 quick break. But if there's a question</p> <p>17 pending, I ask that you please answer the</p> <p>18 question before we take the break. Does that</p> <p>19 work?</p> <p>20 A. Understood.</p> <p>21 Q. With those ground rules out of the</p> <p>22 way, Mr. Wexler, is there anything that may</p> <p>23 affect your ability to give truthful and</p> <p>24 complete testimony today?</p> <p>25 A. Not that I'm aware of.</p>	<p style="text-align: right;">Page 13</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. No problem. Once you have that</p> <p>3 open, I will suggest that you don't close it</p> <p>4 because I will be constantly referring to it.</p> <p>5 A. That's why I thought it would be a</p> <p>6 good idea to keep it open on my desk.</p> <p>7 Q. Did that work?</p> <p>8 A. Yeah, I have it open.</p> <p>9 Q. I'm going to go ahead and mark your</p> <p>10 Declaration as Wexler Exhibit 1. Is this a</p> <p>11 Declaration that you signed on March 26, 2020?</p> <p>12 A. I'll take a look at it.</p> <p>13 Yes, it does look like it.</p> <p>14 Q. How did you come to prepare and sign</p> <p>15 it?</p> <p>16 A. I was interviewed by the FTC. They</p> <p>17 asked me to give some insights from my</p> <p>18 experience of being in the tobacco business</p> <p>19 and selling products in C-stores. And I</p> <p>20 conducted an interview with them, and the</p> <p>21 document was prepared, and I made one small</p> <p>22 edit and signed it.</p> <p>23 Q. Okay. Did the FTC reach out to you</p> <p>24 initially?</p> <p>25 A. I was approached by my general</p>

Larry Wexler Confidential  
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<p style="text-align: right;">Page 14</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 counsel.</p> <p>3 Q. Can you tell me whom you spoke with</p> <p>4 at the FTC?</p> <p>5 A. I have an unbelievable facility for</p> <p>6 forgetting every name I've ever been told.</p> <p>7 No, I can't.</p> <p>8 Q. Can you tell me about the</p> <p>9 conversation? What did you discuss with them?</p> <p>10 A. It was a broad-ranging conversation,</p> <p>11 and we discussed a lot of elements about the</p> <p>12 vape business, he seemed to be interested in</p> <p>13 learning about the vape business, and also how</p> <p>14 one markets in C-stores, and a little bit</p> <p>15 about my experience at Philip Morris -- I</p> <p>16 guess it was Philip Morris then, so I'll call</p> <p>17 it Philip Morris because it's easier for me.</p> <p>18 Q. Recognizing that it's now --</p> <p>19 A. Altria.</p> <p>20 Q. -- Altria.</p> <p>21 How did you come to cover the</p> <p>22 particular subjects in your Declaration?</p> <p>23 A. I was asked questions.</p> <p>24 Q. Are there topics that the FTC asked</p> <p>25 you to address that are not reflected in the</p>	<p style="text-align: right;">Page 16</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. Are there any employers or job</p> <p>3 opportunities you've had that are not</p> <p>4 mentioned in Paragraph 1?</p> <p>5 A. Yeah, I had a lot of summer jobs</p> <p>6 when I was in college. I started up a company</p> <p>7 while I was in college that I didn't mention</p> <p>8 here, and it doesn't really specify each of my</p> <p>9 jobs at Philip Morris, nor does it specify the</p> <p>10 companies I worked with as a consultant.</p> <p>11 Q. Okay. Now, you left Philip Morris</p> <p>12 in 1998, right?</p> <p>13 A. Yes.</p> <p>14 Q. Why did you leave Philip Morris, in</p> <p>15 1998?</p> <p>16 A. I was being considered for the job</p> <p>17 of running Philip Morris USA. A guy named</p> <p>18 Mike Szymanczyk was given the job, and he</p> <p>19 decided that he did not want to work with me</p> <p>20 anymore. I was offered some opportunities in</p> <p>21 International, didn't want to move my family,</p> <p>22 and so I decided to leave.</p> <p>23 Q. Okay. So, the option was either go</p> <p>24 international or find another opportunity?</p> <p>25 A. As I remember it, yes.</p>
<p style="text-align: right;">Page 15</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Declaration?</p> <p>3 A. I don't remember. I don't remember</p> <p>4 anything of significance that was done with</p> <p>5 the Declaration.</p> <p>6 Q. And they prepared the first draft of</p> <p>7 the Declaration, you said?</p> <p>8 A. My general counsel walked it into my</p> <p>9 office and said, "This is the Declaration,"</p> <p>10 and that's as much as I know.</p> <p>11 Q. Okay. And you said you made one</p> <p>12 small change?</p> <p>13 A. Yeah. I don't remember what it was.</p> <p>14 It was pretty minor. It was just something</p> <p>15 that wasn't clear, so I changed the language.</p> <p>16 Q. Were there any discussions with the</p> <p>17 FTC, since you signed the Declaration?</p> <p>18 A. No, I do not remember any.</p> <p>19 Q. Why don't we start at the top of</p> <p>20 your Declaration, Mr. Wexler, the first</p> <p>21 paragraph.</p> <p>22 A. Okay.</p> <p>23 Q. Does Paragraph 1 correctly capture</p> <p>24 the entirety of your work experience?</p> <p>25 A. I'd say so.</p>	<p style="text-align: right;">Page 17</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. What did you do, as a consultant</p> <p>3 from 1998 to 2003?</p> <p>4 A. I worked with start-ups.</p> <p>5 Q. What type of start-ups?</p> <p>6 A. There were a number of them. I did</p> <p>7 the obligatory internet start-up. I worked</p> <p>8 with a cable company that was starting up an</p> <p>9 operation in Japan, interestingly selling a</p> <p>10 science fiction channel to Japan, which an</p> <p>11 emerging company selling a science fiction</p> <p>12 channel in Japan, which I find very amusing.</p> <p>13 I also worked with a company that,</p> <p>14 when you get your credit card bills, you get</p> <p>15 offers for free magazines, free magazine</p> <p>16 subscriptions. Did you ever notice that? Now</p> <p>17 they're called Synapse. I worked with that</p> <p>18 company.</p> <p>19 And I also worked with a commodity</p> <p>20 hedge fund.</p> <p>21 Q. Okay. Mr. Wexler, why don't we turn</p> <p>22 to Paragraph 2 of your Declaration.</p> <p>23 A. Okay.</p> <p>24 Q. So, just to confirm, is Turning</p> <p>25 Point Brands currently a public company?</p>



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<p style="text-align: right;">Page 18</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. Yes.</p> <p>3 Q. You say that Turning Point operates</p> <p>4 in three segments; smokeless tobacco products,</p> <p>5 smoking products, and NewGen products.</p> <p>6 Does Turning Point manufacture its</p> <p>7 own products in all three segments?</p> <p>8 A. The bulk of the products we sell are</p> <p>9 made by third parties.</p> <p>10 Q. Okay.</p> <p>11 A. We do make our moist snuff.</p> <p>12 Q. And you also make direct-type</p> <p>13 products, which we'll discuss later?</p> <p>14 A. It was produced by others for us.</p> <p>15 Q. Mr. Wexler, what are NewGen</p> <p>16 products?</p> <p>17 A. NewGen products -- NewGen is a</p> <p>18 division we started to put our products that</p> <p>19 we call new generation. They're nontobacco</p> <p>20 products. They could contain nicotine, but</p> <p>21 they're nontobacco products.</p> <p>22 Q. And NewGen products include closed</p> <p>23 system e-vapor products, right?</p> <p>24 A. Both closed and open, yes.</p> <p>25 Q. What closed system products has</p>	<p style="text-align: right;">Page 20</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. Liquid was made to our</p> <p>3 specifications.</p> <p>4 Q. Now, RipTide is a pod system, right?</p> <p>5 A. Yes. It also has open liquids, tank</p> <p>6 liquids.</p> <p>7 Q. What is a pod system?</p> <p>8 A. A pod system is a vapor device that</p> <p>9 has a battery, and it has pods that are sold</p> <p>10 separately. And when connected, they make one</p> <p>11 unit, and the consumer can just simply vape on</p> <p>12 it and get the vapor that they're looking for.</p> <p>13 Q. And just to be clear, RipTide is the</p> <p>14 only pod system that Turning Point currently</p> <p>15 manufactures, right?</p> <p>16 A. It is the only pod system that we</p> <p>17 manufacture, yes.</p> <p>18 Q. Okay.</p> <p>19 A. Well, we don't manufacture it.</p> <p>20 Q. Okay.</p> <p>21 A. It's manufactured under the</p> <p>22 contract.</p> <p>23 Q. Besides RipTide, has Turning Point</p> <p>24 manufactured, either itself or through a</p> <p>25 contractor, any other pod-based product in the</p>
<p style="text-align: right;">Page 19</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 NewGen either developed in-house or acquired</p> <p>3 or licensed?</p> <p>4 A. The principal one was RipTide.</p> <p>5 Q. And you said that RipTide was</p> <p>6 licensed?</p> <p>7 A. No, I did not say that.</p> <p>8 Q. Oh, it wasn't. Okay.</p> <p>9 But you have a contract manufacturer</p> <p>10 that produces that for you?</p> <p>11 A. Yes.</p> <p>12 Q. Who is that contract manufacturer?</p> <p>13 A. I'm drawing a blank right now. It</p> <p>14 is one of the major Chinese vape manufacturers.</p> <p>15 Q. Okay. Do you have an exclusive</p> <p>16 right -- sorry. Strike that.</p> <p>17 Did you develop the IP for RipTide,</p> <p>18 or that was developed by the Chinese</p> <p>19 manufacturer?</p> <p>20 A. When you're talking about "IP,"</p> <p>21 which component of the product IP are you</p> <p>22 talking about?</p> <p>23 Q. Well, I guess there's the liquid,</p> <p>24 right? So, did you develop the liquid</p> <p>25 in-house?</p>	<p style="text-align: right;">Page 21</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 past?</p> <p>3 A. Not that I can remember.</p> <p>4 Q. How about any other closed systems?</p> <p>5 A. Well, if you think about closed</p> <p>6 systems, we sell nutraceutical products that</p> <p>7 are closed systems. We also sold a product</p> <p>8 called V2 from a company called VMR that we</p> <p>9 did in partnership with VMR. We have been</p> <p>10 involved with other closed systems. Also --</p> <p>11 Q. Why don't we -- sorry. Why don't</p> <p>12 we --</p> <p>13 MR. FORD: Larry, you should</p> <p>14 complete your answer, if you had something</p> <p>15 else to add.</p> <p>16 THE WITNESS: Okay.</p> <p>17 A. So, I just want to be clear, we've</p> <p>18 talked about -- we do sell third-party</p> <p>19 products that are closed systems. It's just,</p> <p>20 those are the only two that we make to our</p> <p>21 specifications and sell.</p> <p>22 Q. I see.</p> <p>23 What is the difference between a</p> <p>24 closed system and a pod?</p> <p>25 A. In my way of thinking, a pod is a</p>

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2 subset of closed systems.

3 Q. Okay. I guess maybe we should take

4 a step back.

5 What are closed system e-vapor

6 products?

7 A. The way I term "closed systems" is

8 that the closed system is a system in which

9 the liquid is embedded in the capsule, in the

10 container, and it has the ability to either be

11 one single unit, which can be disposable;

12 where you buy the whole unit, including the

13 battery. We call those disposable. Or they

14 could be a cartridge system where you could

15 buy a cartridge that can be attached to a

16 battery. Or it can be a pod system, which

17 tends to be larger, and also liquid is

18 contained in it, and you can put it into it

19 and attach it.

20 Now, there are some pod systems on

21 the market that are also open systems. That

22 is, the pod can be opened and refilled by the

23 consumer.

24 Q. Now, you mentioned the V2 product.

25 What is the V2 product?

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2 A. V2 product was one of the original

3 e-cigs, e-vapor products. It is a

4 classification that we call Cigalikes. It

5 looks very much like a cigarette. It's

6 smaller than a pod system. It basically

7 resembles a cigarette.

8 Q. Do you still sell the V2?

9 A. No, we do not.

10 Q. Why did you stop selling the V2?

11 A. The JUUL company bought VMR. And

12 what they did is, we had a partnership with

13 VMR, and they basically terminated the

14 partnership.

15 Q. We're going to talk a little bit

16 more about Cigalikes a bit later. But if we

17 could, turn to Paragraph 3 of your

18 Declaration.

19 A. Okay. Hold on. Okay.

20 Q. You say the Vapor Beast is an

21 e-commerce sales engine and a vapor supply

22 wholesaler and line of vape shops. Do you see

23 that?

24 A. Yeah. It's principally a

25 third-party distributor of products to vape

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2 shops.

3 Q. What is an e-commerce sales engine?

4 A. Essentially, the marketing is not

5 done face to face; it's done over the

6 internet. We have a website. We also have a

7 group of salespeople who call vape shops to

8 generate orders.

9 Q. You note that Vapor Shark is a vapor

10 supply wholesaler and line of vape shops.

11 How is Vapor Shark's wholesale

12 business different than Vapor Beast's

13 distribution business?

14 A. It's a lot less successful.

15 Q. Okay. But is there anything

16 different between a distribution business and

17 a wholesale business, or are they the same

18 thing?

19 A. It is -- it's pretty much the same

20 thing. I think the terminology difference is

21 that Vapor Shark had some proprietary

22 products.

23 Q. Those proprietary products are open

24 system proprietary products or closed system?

25 A. I would classify that as open

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2 system.

3 Q. Can we turn to Paragraph 4 of your

4 Declaration?

5 A. Yes.

6 Q. You say that Turning Point operates

7 12 corporate stores and 40 franchise stores.

8 Do these stores sell closed system

9 e-vapor products?

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED].

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

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1 L. WEXLER - CONFIDENTIAL  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 Q. Understood. Did these stores sell  
 17 closed system e-vapor products?  
 18 A. Yes.  
 19 Q. Do you recall which closed system  
 20 e-vapor products?  
 21 A. In fact, if you go back to Vapor  
 22 Shark, Vapor Shark was one of the earliest  
 23 third parties to be able to sell JUUL. So,  
 24 until JUUL shut off Vapor Shark, it actually  
 25 was a significant part of Vapor Shark's

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 2 business in the stores, as an example.  
 3 Q. You mentioned that JUUL shut down  
 4 Vapor Shark.  
 5 Why did it -- what do you mean by it  
 6 shut down Vapor Shark?  
 7 MR. FORD: I think he said, "shut  
 8 off."  
 9 MR. SOWLATI: Shut off. Sorry.  
 10 THE WITNESS: Thank you.  
 11 MR. FORD: Go ahead.  
 12 A. I don't know why they did it. Vapor  
 13 Shark had an agreement to have access to JUUL.  
 14 They're one of the first third-party people to  
 15 engage with JUUL. And when JUUL became  
 16 popular, there was a rumor that they were  
 17 having some supply issues, there was a  
 18 shortage in the market, and they stopped  
 19 selling it to the Vapor Shark.  
 20 Q. Did that materially affect your  
 21 sales?  
 22 A. At the time, I think it was close to  
 23 17 percent of Vapor Shark's sales, if I  
 24 remember correctly. That's pretty  
 25 significant, yes.

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 2 Q. Did you sell any other pod-based  
 3 systems?  
 4 A. I believe that in the stores, there  
 5 were some other pod-based systems.  
 6 Q. Do you recall if you sold Vuse Alto?  
 7 A. It was never mentioned to me. We  
 8 never discussed -- it was never discussed in  
 9 my presence that we sold Vuse Alto. I didn't  
 10 review all the SKUs. There are 4,000 SKUs in  
 11 this business, so it takes a lot of time to  
 12 keep up on it.  
 13 Q. NJOY ACE or myblu INTENSE?  
 14 A. I can't say with certainty that any  
 15 of them were sold. It wouldn't surprise me,  
 16 if they were.  
 17 Q. Do you recall if your wholesale  
 18 business sells these products?  
 19 A. I think that one of our wholesale  
 20 businesses sold myblu, for a period of time.  
 21 It's the only thing I can remember of any  
 22 significance. As I said, we did sell JUUL, a  
 23 lot of JUUL at one time.  
 24 Q. And when did you stop selling JUUL  
 25 again? I don't think I got that.

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 2 A. Just after they told us they  
 3 wouldn't give it to us anymore. I don't  
 4 remember the date.  
 5 Q. Do you know if it was in 2018 or  
 6 2019?  
 7 A. I can't speculate.  
 8 Q. Why don't we turn to Paragraph 5 of  
 9 your Declaration. You say that your wholesale  
 10 figures include both closed and open systems,  
 11 although open systems account for a much  
 12 larger part.  
 13 When you say, "much larger part,"  
 14 are you able to give me a ballpark on what  
 15 percent of your total sales are open systems  
 16 versus closed?  
 17 A. Significantly over 50 percent.  
 18 Q. Do you know if it's about  
 19 80 percent?  
 20 A. That would be fair. It fluctuates,  
 21 from time to time. I never calculated the  
 22 average over time.  
 23 Q. Okay.  
 24 A. But it's very significant.  
 25 Q. And is it generally accurate to say

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<p style="text-align: right;">Page 30</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 that vape shops tend not to sell a large</p> <p>3 amount of closed systems while convenience</p> <p>4 stores tend to sell a significant amount of</p> <p>5 closed systems?</p> <p>6 MR. LEE: Objection to form.</p> <p>7 MR. FORD: Objection. Vague.</p> <p>8 A. Can you repeat the question, please?</p> <p>9 Q. Generally, closed systems are</p> <p>10 primarily sold at convenience stores as</p> <p>11 opposed to vape shops, right?</p> <p>12 A. I think our wholesale business'</p> <p>13 sales reflect the mix of products that were</p> <p>14 sold in vape shops, yes.</p> <p>15 Q. I'd like to turn to Paragraphs 6 and</p> <p>16 7 of your Declaration. We briefly discussed</p> <p>17 Cigalikes, just a second ago, and I have a few</p> <p>18 more questions about them.</p> <p>19 To begin, Mr. Wexler, what is a</p> <p>20 Cigalike?</p> <p>21 A. Cigalike is terminology that we use</p> <p>22 to describe a product that looks very much</p> <p>23 like a cigarette. It is cylinder, it's</p> <p>24 roughly about the same length of a cigarette,</p> <p>25 and it's decorated very similar to a</p>	<p style="text-align: right;">Page 32</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 reasons why people want to switch from</p> <p>3 cigarettes. I can't speak to any one</p> <p>4 individual's desire.</p> <p>5 Q. So, you don't see how Cigalikes can</p> <p>6 carry the stigma associated for some people of</p> <p>7 cigarettes?</p> <p>8 A. I imagine that there are some people</p> <p>9 who felt more comfortable with Cigalikes</p> <p>10 because they function like a cigarette; same</p> <p>11 shame and form. In fact, we still have a</p> <p>12 Cigalike business. We have a product called</p> <p>13 South Beach Smoke that still sells Cigalikes</p> <p>14 to people.</p> <p>15 I think people may be comfortable</p> <p>16 with them. Some people want to get as far</p> <p>17 away from cigarettes as possible, so they make</p> <p>18 choices. I think there's a lot of cigarette</p> <p>19 smokers and there's a lot of people who are</p> <p>20 associated with vape, and there's a lot of</p> <p>21 reasons for that.</p> <p>22 Q. Cigalikes have seen their share</p> <p>23 decrease pretty dramatically in recent years,</p> <p>24 right?</p> <p>25 A. Yes. In recent years, I don't know.</p>
<p style="text-align: right;">Page 31</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 cigarette.</p> <p>3 Q. Cigalikes have a number of</p> <p>4 drawbacks, right?</p> <p>5 A. Yes.</p> <p>6 Q. And you just said Cigalikes resemble</p> <p>7 the size and shape of a cigarette, right?</p> <p>8 A. Yes.</p> <p>9 Q. As a result, they carry the stigma</p> <p>10 of cigarettes, correct?</p> <p>11 A. I can't speak to that.</p> <p>12 Q. Okay. Well, for smokers looking to</p> <p>13 switch from cigarettes, the shape of a</p> <p>14 cigarette would, you know, might -- strike</p> <p>15 that.</p> <p>16 For many health-conscious people, a</p> <p>17 cigarette has a negative connotation, right?</p> <p>18 MR. FORD: Objection.</p> <p>19 MR. LEE: Same objection.</p> <p>20 A. Can be.</p> <p>21 Q. Many individuals looking to switch</p> <p>22 from smoking are looking to switch to a</p> <p>23 healthier alternative, right?</p> <p>24 MR. FORD: Objection.</p> <p>25 A. I think there's a whole variety of</p>	<p style="text-align: right;">Page 33</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 It happened more in the 2014, 2015, to 2018</p> <p>3 period.</p> <p>4 Q. And why is that?</p> <p>5 A. Cigalikes, as a product, had some</p> <p>6 drawbacks. The size of it didn't allow for</p> <p>7 large enough batteries, so it didn't deliver</p> <p>8 enough vapor. I think the decline of</p> <p>9 Cigalikes started when open systems appeared</p> <p>10 on the market. Open systems had larger</p> <p>11 batteries, had a bigger range of flavors.</p> <p>12 They gave the individual a way of customizing</p> <p>13 their vaping experience. You could get</p> <p>14 different nicotine strengths, a much greater</p> <p>15 variety of flavors, you could get devices that</p> <p>16 had more or less energy, create big plumes of</p> <p>17 smoke, small plumes of smoke. The open</p> <p>18 systems were the first thing that really</p> <p>19 started hurting the sales of Cigalikes.</p> <p>20 People started switching to open systems.</p> <p>21 Q. And pods have taken a significant</p> <p>22 share away of Cigalikes, too, right?</p> <p>23 A. Excuse me?</p> <p>24 Q. Pods have taken a significant share</p> <p>25 away from Cigalikes, right?</p>

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<p style="text-align: right;">Page 34</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. I believe that the sales of pods has</p> <p>3 grown much faster than Cigalikes, and Cigalike</p> <p>4 sales have actually declined. But I think</p> <p>5 that the first big hit to Cigalikes was the</p> <p>6 open systems, and then pods certainly replaced</p> <p>7 them, certainly in C-stores. Pods grew much</p> <p>8 larger than Cigalikes.</p> <p>9 Q. And you'd agree that the form factor</p> <p>10 of pods contributed to their success, right?</p> <p>11 A. I think there's a whole range of --</p> <p>12 MR. FORD: Hold on.</p> <p>13 Objection. Vague.</p> <p>14 A. What specifically are you asking?</p> <p>15 Q. You can answer.</p> <p>16 I was asking: You'd agree that the</p> <p>17 form factor of pods contributed to their</p> <p>18 success, right?</p> <p>19 A. I think there are many issues that</p> <p>20 contributed to the success of pods.</p> <p>21 Q. Including the form factor?</p> <p>22 A. I imagine there's some consumers who</p> <p>23 like the form factor. I can't speak to any</p> <p>24 individual.</p> <p>25 Q. Mr. Wexler, in Paragraph 7, you say</p>	<p style="text-align: right;">Page 36</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 level of satisfaction than the options you get</p> <p>3 from open systems and the options you get from</p> <p>4 some pod systems and disposable systems.</p> <p>5 Q. I don't want to jump around too</p> <p>6 much, but if we take a quick look at Paragraph</p> <p>7 11, you note there that JUUL's products</p> <p>8 contain relatively high levels of nicotine, as</p> <p>9 high as 5 percent. Do you see that?</p> <p>10 A. Yes.</p> <p>11 Q. Given the rise of products like JUUL</p> <p>12 with nicotine concentrations in the 5 percent</p> <p>13 range, a product with 1.8 percent to</p> <p>14 2.4 percent nicotine would have difficulty</p> <p>15 seeing the success of products like JUUL,</p> <p>16 right?</p> <p>17 MR. LEE: Objection to form.</p> <p>18 MR. FORD: Vague.</p> <p>19 A. There would be -- repeat the</p> <p>20 question, please.</p> <p>21 Q. Sure. So, given the rise of</p> <p>22 products like JUUL with a nicotine</p> <p>23 concentration in the 5 percent range, a</p> <p>24 product with 1.8 percent to 2.4 percent</p> <p>25 nicotine would have difficulty of seeing the</p>
<p style="text-align: right;">Page 35</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 that most Cigalikes were relatively low in</p> <p>3 nicotine concentration. Do you see that?</p> <p>4 A. Yes.</p> <p>5 Q. When you say the nicotine</p> <p>6 concentration was relatively low, you're</p> <p>7 comparing Cigalikes, in part, to pods like</p> <p>8 JUUL, right?</p> <p>9 A. Yes, in part. But there's a range</p> <p>10 of options in the vape market. And I think</p> <p>11 the real issue is that the ability of the</p> <p>12 Cigalikes to deliver the nicotine to the</p> <p>13 consumer, it didn't have as much impact.</p> <p>14 Q. Can you explain that further?</p> <p>15 A. Well, the small battery created less</p> <p>16 vape; less vape carries less nicotine. So,</p> <p>17 therefore, the consumer would get less</p> <p>18 satisfaction.</p> <p>19 Q. You would consider 1.8 percent to</p> <p>20 2.4 percent nicotine concentration to be at</p> <p>21 the low level that would contribute to low</p> <p>22 overall consumer satisfaction, right?</p> <p>23 A. I would consider the 1.8 to 2.4</p> <p>24 combined with the battery and the amount of</p> <p>25 vape produced to be a low level of -- a lower</p>	<p style="text-align: right;">Page 37</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 success of products like JUUL, right?</p> <p>3 MR. FORD: Objection.</p> <p>4 MR. LEE: Same objection.</p> <p>5 Q. You can answer.</p> <p>6 A. Okay. So, you're isolating on the</p> <p>7 percent of the nicotine, but you're not asking</p> <p>8 the right question. The right question is the</p> <p>9 combination of the battery, combination of the</p> <p>10 liquid, the combination of the amount of</p> <p>11 nicotine, the amount of vapor that's produced.</p> <p>12 There are open systems that have</p> <p>13 lower levels of nicotine that are very</p> <p>14 successful; that use liquids with lower levels</p> <p>15 of nicotine that are very successful because</p> <p>16 the amount of vapor is larger. And some</p> <p>17 consumers are looking for more vapor, but not</p> <p>18 necessarily for higher levels of nicotine.</p> <p>19 There's a range of consumers and</p> <p>20 nicotine, and there are all kinds of</p> <p>21 subsegments. You can't make it as a universal</p> <p>22 statement.</p> <p>23 Q. Right. But all else equal, a</p> <p>24 product with a 1.8 percent to 2.4 percent</p> <p>25 range would have less difficulty seeing</p>

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<p style="text-align: right;">Page 38</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 success as a product in the 5 percent range,</p> <p>3 right?</p> <p>4 MR. FORD: Objection. Asked and</p> <p>5 answered.</p> <p>6 MR. LEE: Objection.</p> <p>7 A. I don't know that I could add</p> <p>8 anything more than I already said.</p> <p>9 Q. Okay. Why don't we turn to</p> <p>10 Paragraph 8 of your Declaration.</p> <p>11 A. Which one?</p> <p>12 Q. Paragraph 8 of your Declaration.</p> <p>13 A. Okay. Hold on.</p> <p>14 Yes.</p> <p>15 Q. Okay. In the second to last</p> <p>16 sentence, you say, "Open systems provide a</p> <p>17 larger nicotine hit than Cigalikes."</p> <p>18 What is a nicotine hit?</p> <p>19 A. It is an expression that some vapers</p> <p>20 have used with me, and it is the way they feel</p> <p>21 the nicotine when it goes into their body.</p> <p>22 Q. Why is a nicotine hit important to</p> <p>23 smokers?</p> <p>24 A. Apparently, in the way -- I'm</p> <p>25 talking about vapers, not smokers.</p>	<p style="text-align: right;">Page 40</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. The nicotine hit provided by an</p> <p>3 e-vapor product is important in determining</p> <p>4 whether it will see commercial success, right?</p> <p>5 MR. LEE: Objection to form.</p> <p>6 A. You keep on isolating on the</p> <p>7 nicotine, the nicotine hit. Nicotine is,</p> <p>8 obviously, a very important component of why</p> <p>9 people buy vapor products, but there's also</p> <p>10 factors such as the amount of vapor, the</p> <p>11 flavors, the range of flavors, the taste.</p> <p>12 It's, basically, the whole experience. It's</p> <p>13 not just one thing. It's an important -- it</p> <p>14 is an element, but it is part of a larger</p> <p>15 package of elements. In other words, coming</p> <p>16 out with the highest nicotine product would</p> <p>17 not necessarily make you the biggest success.</p> <p>18 Q. I want to go back to Paragraph 7,</p> <p>19 Mr. Wexler. You talk about the drawbacks</p> <p>20 there of Cigalikes, and you mention a few</p> <p>21 things; you mention battery puffs, you mention</p> <p>22 flavors, and the mention the nicotine</p> <p>23 strength.</p> <p>24 So, clearly the nicotine strength</p> <p>25 was one of the three factors you thought was</p>
<p style="text-align: right;">Page 39</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. To a vaper.</p> <p>3 A. According to the consumers that I</p> <p>4 talk to, that is one of the things they look</p> <p>5 for; they look for the way the product makes</p> <p>6 them feel. That's why they're using the</p> <p>7 product.</p> <p>8 Q. And most of the vapers you speak to</p> <p>9 are vapers that frequent vape shops, right?</p> <p>10 A. I'm a very curious guy, and I will</p> <p>11 ask -- whenever I see a vaper, I'll ask him,</p> <p>12 whether he's on the street, in a vape shop, in</p> <p>13 a C-store, at a party. It doesn't matter.</p> <p>14 I'll talk to anybody.</p> <p>15 Q. Right. But most of your direct</p> <p>16 knowledge through your business is through</p> <p>17 vape shops, right?</p> <p>18 MR. FORD: Objection. Vague.</p> <p>19 A. I have a very broad background in</p> <p>20 tobacco and nicotine and vaping, so I can't</p> <p>21 say that the majority of my knowledge comes</p> <p>22 from vape shops. I spent 20 years at Philip</p> <p>23 Morris.</p> <p>24 Q. And that was 22 years ago, right?</p> <p>25 A. I left in 1998.</p>	<p style="text-align: right;">Page 41</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 important and contributed to low, overall,</p> <p>3 consumer satisfaction, right?</p> <p>4 A. The amount of nicotine in the</p> <p>5 product combined with the battery and the</p> <p>6 amount of vapor produced delivered less</p> <p>7 satisfaction to consumers. These consumers,</p> <p>8 when they had alternatives, chose other</p> <p>9 products, and I believe that was one of the</p> <p>10 factors, yes.</p> <p>11 Q. Mr. Wexler, can we turn to</p> <p>12 Paragraph 10 of your Declaration? You mention</p> <p>13 that because of their small size, closed</p> <p>14 systems are more discreet than open systems.</p> <p>15 What is the importance for consumers</p> <p>16 of a product being discreet?</p> <p>17 A. I think there's two reasons for</p> <p>18 consumers seeking out discreetness. One,</p> <p>19 generally, if they're smaller and more</p> <p>20 discreet, they're more portable. You can slip</p> <p>21 them in your pocket. They're just more</p> <p>22 accessible.</p> <p>23 The other thing is that, some people</p> <p>24 talk about how they, at times, are embarrassed</p> <p>25 about being a vaper; society has made them</p>

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<p style="text-align: right;">Page 42</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 embarrassed about being a vaper, being a</p> <p>3 smoker, and they don't want to create big</p> <p>4 plumes of smoke and call attention to</p> <p>5 themselves when they're vaping.</p> <p>6 Q. And let's turn to Paragraph 11 of</p> <p>7 your Declaration.</p> <p>8 A. Okay.</p> <p>9 Q. You mentioned earlier that there</p> <p>10 were a number of reasons for the rise of pods</p> <p>11 and the increase in their popularity.</p> <p>12 Can you expound on that?</p> <p>13 A. Yeah. Pod systems had a number of</p> <p>14 advantages, compared to open systems. They're</p> <p>15 smaller, more compact, easier to transport.</p> <p>16 Re-supplying a pod system is a little easier</p> <p>17 than re-supplying an open system. And</p> <p>18 compared to Cigalikes, they had larger</p> <p>19 batteries, more effective batteries, they are</p> <p>20 more effective at taking the liquid and</p> <p>21 turning it into vapor and giving consumers an</p> <p>22 experience that they desire.</p> <p>23 Q. Okay. One of the other factors you</p> <p>24 mention in your Declaration is that "JUUL's</p> <p>25 products contain relatively high levels of</p>	<p style="text-align: right;">Page 44</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 uptake is even more rapid than JUUL's.</p> <p>3 Q. Right. And you're referring to a PK</p> <p>4 curve; is that right?</p> <p>5 A. That's the nomenclature, yes.</p> <p>6 Q. And so, in your view, it's important</p> <p>7 for a product to seek commercial success for</p> <p>8 it to have satisfaction closer to that of a</p> <p>9 cigarette?</p> <p>10 MR. FORD: Objection.</p> <p>11 A. Yeah. I think, as I said, the</p> <p>12 studies I read were from JUUL. And I know</p> <p>13 that they've attributed a lot of their</p> <p>14 success with their ability to imitate a</p> <p>15 cigarette. I have no reason to disbelieve</p> <p>16 that.</p> <p>17 Q. And you actually note, in Paragraph</p> <p>18 11 of your Declaration, that this was a,</p> <p>19 quote, "innovation," right?</p> <p>20 A. Yeah. They were the first on the</p> <p>21 market to get as close to a cigarette as they</p> <p>22 did. The first in the market that I know of,</p> <p>23 anyway.</p> <p>24 Q. Mr. Wexler, you mention benzoic</p> <p>25 acid. What is benzoic acid?</p>
<p style="text-align: right;">Page 43</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 nicotine, as high as 5 percent, and use</p> <p>3 benzoic acid to increase the body's nicotine</p> <p>4 absorption rate, creating satisfaction closer</p> <p>5 to that of a cigarette."</p> <p>6 Why was it important for JUUL's rise</p> <p>7 that it create a satisfaction closer to a</p> <p>8 cigarette?</p> <p>9 A. Well, a lot of that information came</p> <p>10 from JUUL. They published these studies that</p> <p>11 showed the nicotine-uptake curve for JUUL</p> <p>12 versus other vapor products. When you smoke a</p> <p>13 cigarette, what happens is that the</p> <p>14 bloodstream gets a fairly sharp rise in</p> <p>15 nicotine and then starts retreating over time.</p> <p>16 And the curve on JUUL more closely resembled</p> <p>17 the curve of a cigarette, whereas open system</p> <p>18 products and some other vapor products don't</p> <p>19 really have as high a spike in the beginning.</p> <p>20 And essentially, it builds over time more than</p> <p>21 having a spike.</p> <p>22 They all wind up pretty much at the</p> <p>23 same place because consumers tend to seek out</p> <p>24 a certain level of nicotine over time. But</p> <p>25 JUUL's uptake was much more rapid. Cigarette</p>	<p style="text-align: right;">Page 45</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. Benzoic acid is an additive that</p> <p>3 JUUL spoke a lot about. I'm not a scientist,</p> <p>4 so I can't speak to the exact mechanism and</p> <p>5 the way it works, but in talks to my</p> <p>6 scientists, what they tell me is that the</p> <p>7 addition of benzoic acid allowed the consumer</p> <p>8 to get more nicotine into their system faster.</p> <p>9 But I'm not a scientist, so I don't know if I</p> <p>10 got that exactly right.</p> <p>11 Q. So, that would help create</p> <p>12 satisfaction closer to that of a cigarette,</p> <p>13 right?</p> <p>14 A. To get the PK curve closer to a</p> <p>15 cigarette, yes.</p> <p>16 Q. And that's something that a lot</p> <p>17 of -- that many cigarette smokers looking to</p> <p>18 switch from cigarettes are looking for, right?</p> <p>19 MR. LEE: Objection to form.</p> <p>20 A. I can't speak to what -- smokers in</p> <p>21 general, there are a couple people I talked to</p> <p>22 who vape JUUL and said, "This is the closest</p> <p>23 thing that I've gotten to a cigarette, I found</p> <p>24 to a cigarette." But that's a sample of a</p> <p>25 handful. It's not a scientific sample.</p>



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2 Q. Okay. Do you think that the

3 discreet format, the pod shape, was also

4 necessary for JUUL to see the success it's

5 seen?

6 A. I can't say whether it was necessary

7 or not.

8 Q. Do you think it helped?

9 A. Consumers talked about it a lot, so

10 it must have had some appeal.

11 Q. Mr. Wexler, you say in Paragraph 11

12 that pods have seen rapid growth in the last

13 two years. Do you see that?

14 A. Yes.

15 Q. When you're referring to the last

16 two years, you're referring to 2018 until when

17 you signed the Declaration in March 2020,

18 right?

19 A. I believe that's what I was thinking

20 there, yes.

21 Q. What do you mean by, "rapid growth"?

22 A. Their share in the measured market,

23 which is C-stores, the share of pod systems

24 went up significantly, and the volume went up

25 significantly.

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2 Q. Okay. And they've also taken share

3 away of other closed system and Cigalikes,

4 right?

5 A. Yes. If they're growing share --

6 open systems are not really sold in C-stores,

7 for the most part. But if they're taking

8 share in C-stores, it had to come from the

9 Cigalikes.

10 Q. Mr. Wexler, are you familiar with

11 other pod-based products that utilize either

12 benzoic acid or nicotine salts, like Vuse

13 Alto, NJOY ACE, or myblu?

14 A. I don't believe NJOY uses benzoic

15 acid, but I think they use something that has

16 some of the same functions as benzoic acid.

17 Q. Can you explain to me what you mean

18 by that there are other -- strike that.

19 So, there are other substances that

20 provide an experience similar to benzoic acid,

21 is what you're saying?

22 A. I can only say what the

23 manufacturers say. I'm not a vaper. I do

24 vape -- I pick up a vape every once in a

25 while, but I don't consider myself an expert

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2 vaper, and I couldn't speak from my own

3 experience.

4 Q. Mr. Wexler, for the pod-based

5 products that Turning Point has sold, how did

6 it set the price of those products?

7 MR. FORD: Objection. I just want

8 it clear for the record, when you say

9 "pod-based products that Turning Point has

10 sold," do you mean Turning Point branded

11 products versus third-party products that

12 may be sold through distribution channels?

13 Just to clarify the record.

14 MR. SOWLATI: Right. I'm referring

15 to third-party products, generally.

16 MR. FORD: Okay.

17 A. And you're talking about third-party

18 products?

19 Q. Yes. Third-party pod-based

20 products.

21 MR. FORD: I object to the question

22 on vagueness grounds.

23 But go ahead and answer to the

24 extent you can, Mr. Wexler.

25 A. Okay. So, you're asking for us --

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2 for how we establish markups, our markups on

3 third-party products that we sold?

4 Q. Well, let me be a little more clear.

5 When you set the prices for

6 third-party pod systems, did you take into

7 account the price of other pod-based systems?

8 MR. FORD: Objection.

9 A. Look, there's a whole mechanism for

10 setting prices, and in general, the market

11 would determine that. For instance, if there

12 was a shortage of JUUL in the marketplace and

13 we had an inventory of JUUL, we might raise

14 the price of JUUL relative to other products.

15 It's basically, you know, supply and demand

16 actually works. So, pricing is dictated in a

17 lot of cases. If there is fair competition

18 and if there is free competition, then you

19 will get pricing that is set by supply and

20 demand.

21 Q. Okay. So, when you're setting the

22 price of JUUL, would you take a look at the

23 price of another pod-based product?

24 MR. FORD: Objection.

25 A. I think, going back to the -- if

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<p style="text-align: right;">Page 50</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 it's an open market and it's a fair-priced</p> <p>3 market, we get a sense of what our customers</p> <p>4 are willing to pay, and we try to extract as</p> <p>5 much economic rent as we can with our pricing</p> <p>6 without -- while still maintaining our</p> <p>7 long-term relationships. In other words, we</p> <p>8 don't try to -- I know this is on the record,</p> <p>9 so the word I was going to use is probably not</p> <p>10 appropriate. We don't try to take advantage</p> <p>11 of our customers, but we do try to extract as</p> <p>12 much economic rent.</p> <p>13 And so, the market, there's all</p> <p>14 kinds of prices for all kinds of pod products,</p> <p>15 but they all have different levels of supply</p> <p>16 and demand. And it also is a function of how</p> <p>17 much the pod system is charging us. If</p> <p>18 someone's charging us more and we have to get</p> <p>19 a certain amount of margin in order to pay for</p> <p>20 our overhead and shipping, fulfillment and</p> <p>21 selling costs and all that to make a profit,</p> <p>22 then that price would tend to be higher. But</p> <p>23 it's, basically, the market dictates the</p> <p>24 price.</p> <p>25 Q. In setting the pod price of</p>	<p style="text-align: right;">Page 52</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 MR. FORD: Sounds good.</p> <p>3 THE WITNESS: Fine by me.</p> <p>4 MR. SOWLATI: Maybe we can return at</p> <p>5 10:10. Off the record.</p> <p>6 (Recess was taken.)</p> <p>7 BY MR. SOWLATI:</p> <p>8 Q. Mr. Wexler, I am going to send you a</p> <p>9 document right now through Zoom chat.</p> <p>10 A. And you're going to ask me to</p> <p>11 perform my technological --</p> <p>12 Q. Right. Can you please let me know</p> <p>13 when you've received the document?</p> <p>14 A. I have received the document. I'm</p> <p>15 assuming you want me to open it, right?</p> <p>16 Q. Yes. Mr. Wexler, this document is</p> <p>17 Turning Point's Q1 2019 Earnings Call dated</p> <p>18 May 1, 2019. The document is stamped Wexler</p> <p>19 EX 3. I can give you a minute to review the</p> <p>20 document.</p> <p>21 A. Okay. Hold on.</p> <p>22 You said this is a transcript?</p> <p>23 Q. Right. This is your Q1 2019 -- I</p> <p>24 should say, Turning Point's Q1 2019 Earnings</p> <p>25 Call dated May 1, 2019.</p>
<p style="text-align: right;">Page 51</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 pod-based systems, you don't take into account</p> <p>3 the price of Cigalikes, do you?</p> <p>4 A. It would never occur to me to look</p> <p>5 at the price of Cigalikes.</p> <p>6 Q. Okay. Would you say, generally,</p> <p>7 that Cigalike users are different than pod</p> <p>8 users?</p> <p>9 A. I think if you look at the</p> <p>10 demographics of Cigalike users today, the</p> <p>11 average age of a Cigalike user, at least in</p> <p>12 our B2C environment, is probably over the age</p> <p>13 of 50. I think the average age is about 55.</p> <p>14 That number has been about six months old.</p> <p>15 Pod systems are significantly younger in our</p> <p>16 particular database. They'd be -- 30 and</p> <p>17 under somewhere is around the average.</p> <p>18 Q. So, it sounds like they're pretty</p> <p>19 different demographics, then?</p> <p>20 A. I believe that they're very</p> <p>21 different demographics.</p> <p>22 Q. Okay.</p> <p>23 MR. SOWLATI: So, we've been going</p> <p>24 for almost an hour. Do we want to take a</p> <p>25 ten-minute break?</p>	<p style="text-align: right;">Page 53</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Mr. Wexler, have you had a chance to</p> <p>3 review the document?</p> <p>4 A. Yes.</p> <p>5 Q. Okay, great.</p> <p>6 Mr. Wexler, do you recognize this</p> <p>7 document to be Turning Point's Q1 2019</p> <p>8 Earnings Call transcript?</p> <p>9 A. I've never seen this document</p> <p>10 before, but it does appear to be a transcript</p> <p>11 of a first quarter call.</p> <p>12 Q. Okay. As CEO of Turning Point, you</p> <p>13 participate in quarterly earning calls with</p> <p>14 investors, right?</p> <p>15 A. Yes.</p> <p>16 Q. I'd like to turn to the page stamped</p> <p>17 3005. You'll see the stamps on the bottom</p> <p>18 right corner.</p> <p>19 A. Okay. I'm on that page.</p> <p>20 Q. In the paragraph that's third from</p> <p>21 the bottom, you say, "While still small but</p> <p>22 getting bigger, our traditional" --</p> <p>23 A. On 3005?</p> <p>24 Q. Right. The third paragraph from the</p> <p>25 bottom, do you see that? It starts with,</p>

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<p style="text-align: right;">Page 54</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 "When looking at the company as a whole."</p> <p>3 A. Yes, sorry. You started with a</p> <p>4 different sentence, so you confused me.</p> <p>5 Q. I'm focused on the second sentence</p> <p>6 where you say, "While still small but getting</p> <p>7 bigger, our traditional retail sales force is</p> <p>8 exceptionally effective. We expect the sales</p> <p>9 force to provide a meaningful differentiation</p> <p>10 as compared to our competitors in the place of</p> <p>11 not only RipTide, but also mainstream CBD</p> <p>12 distribution."</p> <p>13 Do you see that?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. Mr. Wexler, it's your</p> <p>16 practice to be truthful and accurate when you</p> <p>17 speak to your investors, whether in an</p> <p>18 earnings transcript or a press release or any</p> <p>19 other public filing, right?</p> <p>20 A. I try to be truthful in my entire</p> <p>21 life.</p> <p>22 Q. And especially when speaking to your</p> <p>23 investors, right?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. What did you mean, when you</p>	<p style="text-align: right;">Page 56</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 this sales force has helped you in your</p> <p>3 ability to offer RipTide in 4,000 to 6,000</p> <p>4 stores, as you note in your Declaration?</p> <p>5 A. It is the mechanism we use to get</p> <p>6 into stores.</p> <p>7 Q. Would you say the sales force has</p> <p>8 been instrumental?</p> <p>9 A. Yeah. If we didn't have a sales</p> <p>10 force, we probably would not have gotten into</p> <p>11 nearly as many stores.</p> <p>12 Q. Can you turn to the page stamped</p> <p>13 3006 of your remarks. That's the next page.</p> <p>14 A. I'm on 6.</p> <p>15 Q. I'm looking at the third paragraph</p> <p>16 from the top.</p> <p>17 A. Can you just give me what the first</p> <p>18 couple of words are, so I know I'm on the</p> <p>19 right part?</p> <p>20 Q. "Most recently, consumers are</p> <p>21 fiercely adopting vapor products."</p> <p>22 A. Yes.</p> <p>23 Q. You say in that paragraph that</p> <p>24 "Closed system or e-cigarette market is</p> <p>25 already a \$6 billion segment at retail.</p>
<p style="text-align: right;">Page 55</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 said, your retail sales force is exceptionally</p> <p>3 effective?</p> <p>4 A. I use the phrase -- when I talk</p> <p>5 about -- I'm very proud of my sales force, and</p> <p>6 I often use the phrase that it punches well</p> <p>7 above its weight. We have a relatively small</p> <p>8 sales force. It's getting bigger, but it's</p> <p>9 significantly smaller than most of our</p> <p>10 competitors, but it certainly differentiates</p> <p>11 us against the smaller companies that we</p> <p>12 [inaudible].</p> <p>13 Q. Okay. Now, in your Declaration, in</p> <p>14 Paragraph 11, you say that you've been able to</p> <p>15 offer RipTide in 4,000 -- or it's currently</p> <p>16 offered in 4,000 to 6,000 convenience stores.</p> <p>17 Has this sales force helped you</p> <p>18 achieve that sort of distribution?</p> <p>19 MR. LEE: Well, objection as to</p> <p>20 form.</p> <p>21 And, also, I don't think that that's</p> <p>22 in Paragraph 11.</p> <p>23 MR. FORD: I think it's Paragraph</p> <p>24 12, for the record.</p> <p>25 Q. So, Mr. Wexler, would you say that</p>	<p style="text-align: right;">Page 57</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 However, the technology is changing and</p> <p>3 consumers are actively searching out new</p> <p>4 alternatives in the vapor space. A select</p> <p>5 number of brands have realized good commercial</p> <p>6 success in this environment." Do you see</p> <p>7 that?</p> <p>8 A. Yes.</p> <p>9 Q. Mr. Wexler, the new alternatives you</p> <p>10 were referring to were pod systems like JUUL,</p> <p>11 right?</p> <p>12 A. I can't say today what I was</p> <p>13 thinking back then.</p> <p>14 Q. Okay. But do you agree that there</p> <p>15 were a number of new alternatives at the time?</p> <p>16 A. In this space, there's new</p> <p>17 alternatives every month across open systems</p> <p>18 and closed systems and Cigalikes.</p> <p>19 Q. Right. So, it seems like a fairly</p> <p>20 competitive market, then, right?</p> <p>21 MR. FORD: Objection.</p> <p>22 MR. LEE: Objection. Vague.</p> <p>23 Q. You can answer.</p> <p>24 A. I'd like you to specify what you</p> <p>25 mean by, "competitive."</p>

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<p style="text-align: right;">Page 58</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. All right. Well, you said, "In this</p> <p>3 space, there's new players every day"; is that</p> <p>4 right?</p> <p>5 A. Yeah, it would particularly be true</p> <p>6 before the PMTA rules were put in place.</p> <p>7 There was a lot of people coming out with</p> <p>8 innovations. I'm talking about the whole</p> <p>9 space, not just pods, but across open systems</p> <p>10 and e-vapor, in general.</p> <p>11 Q. Can you tell me which products</p> <p>12 you're referring to when you say, "A select</p> <p>13 number of brands have realized good commercial</p> <p>14 success in this environment"?</p> <p>15 A. As I said, I can't remember what I</p> <p>16 was thinking at that time. It's back in 2019.</p> <p>17 A lot has happened since then.</p> <p>18 Q. You stated that you believe that</p> <p>19 there's room for other brands and better</p> <p>20 products like RipTide from Nu-X.</p> <p>21 You said there's room for other</p> <p>22 brands and better products because there's</p> <p>23 rooms for other brands to enter the market,</p> <p>24 correct?</p> <p>25 A. Yes. Okay. So, let's go back to</p>	<p style="text-align: right;">Page 60</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 and didn't have all the contracts that you</p> <p>3 have with cigarettes and moist snuff. And you</p> <p>4 were still able to get in independent displays</p> <p>5 and you can get promotions and you get signage</p> <p>6 up, because there was no offsetting signage</p> <p>7 required by the majors because you didn't have</p> <p>8 contracts in this area. And it was a market</p> <p>9 where you could compete. It was a much fairer</p> <p>10 open market.</p> <p>11 Then what happened in the second</p> <p>12 phase of the evolution of the vape market, and</p> <p>13 I mentioned this before, open systems came</p> <p>14 along. Now, there were some inherent</p> <p>15 limitations to Cigalikes; the battery, the</p> <p>16 amount of vapor it produced, the way the vapor</p> <p>17 got into your system, the amount of</p> <p>18 satisfaction that you got. When open systems</p> <p>19 came along, all of a sudden, you got this</p> <p>20 plethora; this whole range of products. A lot</p> <p>21 of innovation. There were products that were</p> <p>22 geared towards delivering concentrated streams</p> <p>23 of vapor that delivered more nicotine; there</p> <p>24 were others that were there to deliver big</p> <p>25 plumes of smoke and you got your nicotine just</p>
<p style="text-align: right;">Page 59</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 what I remember about 2019. This is -- the</p> <p>3 e-vapor market has been in continuous</p> <p>4 evolution since it appeared in the market, and</p> <p>5 we had different phases. We had the Cigalike</p> <p>6 phase, which was the first entry into the</p> <p>7 market. And there were a number of products</p> <p>8 that came out by different competitors, and</p> <p>9 some products grew and got bigger and other</p> <p>10 products did not.</p> <p>11 As an example, when we introduced</p> <p>12 V2, there were 180 products, branded products</p> <p>13 that preceded us in the market. Within 18</p> <p>14 months, we were the number five player, and we</p> <p>15 were number five behind Altria. I'm trying</p> <p>16 really hard to say Altria and not Philip</p> <p>17 Morris. Altria, a Reynolds product, a product</p> <p>18 called Logic that was eventually bought by</p> <p>19 Japan Tobacco and a product being put out by</p> <p>20 Imperial. And we were number five in the</p> <p>21 market.</p> <p>22 At that time, it was somewhat, I'll</p> <p>23 call it, less organized than some of the other</p> <p>24 tobacco categories. So, you didn't really</p> <p>25 have the established merchandising fixtures</p>	<p style="text-align: right;">Page 61</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 by quantity. There actually became, like,</p> <p>3 clubs and competitions where they were called</p> <p>4 smoke chases where they'd sit there and blow</p> <p>5 vape at each other. It was kind of hilarious,</p> <p>6 when you think about it.</p> <p>7 Then it started going into when the</p> <p>8 pod systems started coming out, and since</p> <p>9 then, there's been disposables and other</p> <p>10 things. This is a segment that, again, up</p> <p>11 until the PMTA, which slowly has put a</p> <p>12 dramatic halt to some of the innovation, this</p> <p>13 is a category that changed fairly rapidly.</p> <p>14 When you think about it, it first showed up in</p> <p>15 2008 and 2009. And the number of SKUs that</p> <p>16 have been introduced from 2009, we carry</p> <p>17 something like 4,000 SKUs for the vape shops.</p> <p>18 That gives you an idea of the amount of</p> <p>19 innovation and introductions and how dynamic</p> <p>20 the market was at the time. It was a fairly</p> <p>21 open market.</p> <p>22 Q. So, just to be clear, in May 2019,</p> <p>23 you still believed the market was dynamic,</p> <p>24 right?</p> <p>25 MR. FORD: Objection. Vague.</p>

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<p style="text-align: right;">Page 62</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. Yeah. When you say open market, I</p> <p>3 think in May of 2019, it was starting to close</p> <p>4 off; the majors were starting to get more and</p> <p>5 more of the market share. I don't believe</p> <p>6 there -- I don't remember there being any</p> <p>7 contracts at that point, but it was starting</p> <p>8 to get much tougher to get into the C-stores.</p> <p>9 Compare our experience with V2, when</p> <p>10 within 18 months we were the number five</p> <p>11 player. And then, our experience with</p> <p>12 RipTide, distribution was -- you know, was</p> <p>13 decent, but it was extremely expensive, and it</p> <p>14 really limited our ability to do much else</p> <p>15 with the product because the cost of getting</p> <p>16 distribution was so high.</p> <p>17 Q. But just to be clear, you told your</p> <p>18 investors that you believe there's room for</p> <p>19 other brands and better products like RipTide,</p> <p>20 in May 2019, right?</p> <p>21 A. I'm a believer that there's always</p> <p>22 room for better products.</p> <p>23 Q. Mr. Wexler, earlier you testified</p> <p>24 that Turning Point provided the specifications</p> <p>25 for the e-liquid to the Chinese manufacturer</p>	<p style="text-align: right;">Page 64</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. The range of products that were</p> <p>3 available at that time. I don't think I was</p> <p>4 specifying any particular company in that</p> <p>5 statement.</p> <p>6 Q. Were you referring to JUUL?</p> <p>7 A. JUUL would be one of the companies I</p> <p>8 would have been referring to.</p> <p>9 Q. And what did you mean by "impact"?</p> <p>10 A. The way the consumer responds to the</p> <p>11 product.</p> <p>12 Q. It sounds like you all were pretty</p> <p>13 excited about RipTide. Can you tell me why?</p> <p>14 A. Yeah. We had done -- you know, we</p> <p>15 don't have the resources to do really</p> <p>16 extensive, high priced, quantitative studies,</p> <p>17 but we had spent a lot of time on -- let me</p> <p>18 draw a parallel.</p> <p>19 So, in moist snuff, when we decided</p> <p>20 to enter the moist snuff market, we sat down,</p> <p>21 and we have a group of people who truly love</p> <p>22 the products. In fact, I have some moist</p> <p>23 snuff in here. I should have asked you if it</p> <p>24 was okay. I didn't want to -- some people</p> <p>25 don't particularly like watching other people</p>
<p style="text-align: right;">Page 63</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 for RipTide, right?</p> <p>3 A. Yes.</p> <p>4 Q. It sounds like RipTide has a lot of</p> <p>5 features that vapers are looking for. We'll</p> <p>6 talk about that more in a minute.</p> <p>7 And it sounds like you must have a</p> <p>8 very capable in-house innovation team,</p> <p>9 wouldn't you say?</p> <p>10 A. I'd like it to be better. It is</p> <p>11 pretty good.</p> <p>12 Q. Now, you said that RipTide flavor</p> <p>13 delivery and impact is superior to competitive</p> <p>14 entries, and consumers are ready to adapt.</p> <p>15 Which competitive entries are you</p> <p>16 referring to?</p> <p>17 A. I'm sorry. Repeat the question? I</p> <p>18 thought you were going someplace else with it,</p> <p>19 so I --</p> <p>20 Q. No problem. In the fourth paragraph</p> <p>21 from the top in your earnings transcript, you</p> <p>22 said that RipTide flavor delivery and impact</p> <p>23 is superior to competitive entries, and I'm</p> <p>24 asking which competitive entries you are</p> <p>25 referring to.</p>	<p style="text-align: right;">Page 65</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 consume moist snuff, so I'll ask that now.</p> <p>3 But we spent months and months going</p> <p>4 through getting samples, trials, tinkering,</p> <p>5 going back and forth to get a product that we</p> <p>6 thought was differentiated, and we actually</p> <p>7 invented a different way -- not really</p> <p>8 invented. We used a totally different</p> <p>9 methodology to prepare the tobacco and moist</p> <p>10 snuff for consumption, and we got a product</p> <p>11 that is very differentiated. It's softer, it</p> <p>12 feels better in the mouth, it delivers</p> <p>13 nicotine over a longer period of time, at</p> <p>14 least for me. Consumers saw it as being</p> <p>15 something different, and the way we found that</p> <p>16 out is, giving it out to consumers and getting</p> <p>17 them to respond and giving us feedback.</p> <p>18 Again, we don't have the resources</p> <p>19 to do the -- if I was at Philip Morris -- when</p> <p>20 I was at Philip Morris, we had focus groups;</p> <p>21 we'd do some quant studies; we'd have -- we</p> <p>22 would have spent millions of dollars on market</p> <p>23 research just to understand how consumers</p> <p>24 relate to the product. I'm telling this story</p> <p>25 because I relate it to RipTide. And we came</p>

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<p style="text-align: right;">Page 66</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 up with a product that was unique, and it's</p> <p>3 been growing fairly consistently since we</p> <p>4 entered the market.</p> <p>5 We use the same sort of process with</p> <p>6 RipTide. We had a lot of in-house people use</p> <p>7 it, give their reactions. We adjusted it and</p> <p>8 changed it. We went outside and gave it to</p> <p>9 consumers; not quant studies that we could say</p> <p>10 that we gave it to 5,000 consumers and it got</p> <p>11 preference on X percent and all that.</p> <p>12 And what we found, there was a</p> <p>13 subsegment of vaper that is we gave did to</p> <p>14 that said, "Yeah, I really like this. This is</p> <p>15 better than the other products I've tried in</p> <p>16 the market." We wouldn't have lunched it</p> <p>17 unless we had that kind of response. So,</p> <p>18 yeah, we had some confidence that there was a</p> <p>19 subset of consumers that liked the product</p> <p>20 better.</p> <p>21 I don't think we were in a position</p> <p>22 to say -- and if my words implied that, then I</p> <p>23 probably should have clarified them -- that it</p> <p>24 was better than any other product on the</p> <p>25 market, or 100 percent of consumers thought</p>	<p style="text-align: right;">Page 68</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 there, and what I was trying to communicate --</p> <p>3 the reason I chose those words, I was trying</p> <p>4 to communicate that we were fairly</p> <p>5 enthusiastic about the product and that we had</p> <p>6 gotten some pretty good feedback from the</p> <p>7 people that we gave it to when they tried it.</p> <p>8 Q. So, it sounds like you were saying</p> <p>9 that RipStick provided a better nicotine</p> <p>10 experience than other products like JUUL,</p> <p>11 right?</p> <p>12 MR. FORD: Objection. Vague.</p> <p>13 A. I wasn't -- I don't think I was</p> <p>14 specifying any particular product or any other</p> <p>15 company, when I was saying that. I think I</p> <p>16 was just speaking to the reaction that</p> <p>17 consumers had to our products.</p> <p>18 Q. Well, you did say it provides an</p> <p>19 incomparable nicotine experience.</p> <p>20 A. Yes, I think that it was -- as I</p> <p>21 said, I may have had my marketing hat on</p> <p>22 there, yes.</p> <p>23 Q. The incomparable nicotine experience</p> <p>24 comes, in part, from the use of NicTech,</p> <p>25 right?</p>
<p style="text-align: right;">Page 67</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 this was a better product. I don't think you</p> <p>3 ever find a product like that where</p> <p>4 100 percent of the consumers will give you</p> <p>5 preference on it. That just doesn't happen.</p> <p>6 It would be nice. I'd like to develop one.</p> <p>7 That would be wonderful, but I think it's</p> <p>8 somewhat unrealistic.</p> <p>9 Q. You mention that -- first of all,</p> <p>10 what is RipStick, and how is that different</p> <p>11 than RipTide? Just so I'm clear.</p> <p>12 A. That may have been a -- we may have</p> <p>13 created some confusion. We tried to</p> <p>14 differentiate the technology of the device</p> <p>15 itself from the pod. So, RipTide was the pod,</p> <p>16 and RipStick was the actual device. I think</p> <p>17 that was -- looking back, I think that may</p> <p>18 have been a source of confusion.</p> <p>19 Q. You said that they delivered a</p> <p>20 smoother draw for an incomparable nicotine</p> <p>21 experience.</p> <p>22 Can you tell me why it was important</p> <p>23 to tell investors that it provided an</p> <p>24 incomparable nicotine experience?</p> <p>25 A. I think I had my marketing hat on</p>	<p style="text-align: right;">Page 69</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. Yes, we believe that the technology</p> <p>3 helped people enjoy the product.</p> <p>4 Q. How does NicTech help RipTide</p> <p>5 provide an incomparable nicotine experience?</p> <p>6 A. I don't know. That's proprietary</p> <p>7 knowledge, and I'd rather do it -- can I just</p> <p>8 talk in broad terms?</p> <p>9 Q. We have a protective order here, so</p> <p>10 I'd like to know how it provides an</p> <p>11 incomparable nicotine experience.</p> <p>12 MR. FORD: We've designated the</p> <p>13 transcript confidential. Why don't you</p> <p>14 give your high-level answer and see if he</p> <p>15 wants to get more technical? He may not</p> <p>16 want to get more technical.</p> <p>17 Q. And I'm not a chemist. I probably</p> <p>18 won't, but I'd love to hear.</p> <p>19 A. I was going to say, you'll have to</p> <p>20 get my chemist. So, I think we'll probably be</p> <p>21 talking on the same level.</p> <p>22 Okay. So, essentially what NicTech</p> <p>23 is, is a nicotine technology. By</p> <p>24 "technology," it's a combination of nicotine</p> <p>25 with other ingredients that makes it more</p>

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<p style="text-align: right;">Page 70</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 efficient, in terms of how people respond to</p> <p>3 each level of nicotine, so that by combining</p> <p>4 nicotine with other, I guess, chemicals, for</p> <p>5 lack of a better word -- it sounds very harsh.</p> <p>6 And as a consumer I'd rather not hear that,</p> <p>7 but by combining nicotine with other elements,</p> <p>8 the consumer can experience a different level</p> <p>9 of satisfaction that lasts a different length</p> <p>10 of time.</p> <p>11 Q. I see. So, in that way, it acts</p> <p>12 similarly to a benzoic acid or a nicotine</p> <p>13 salt?</p> <p>14 A. I can't speak to the exact chemistry</p> <p>15 of benzoic acid versus this. I don't know.</p> <p>16 There's a series of things that I've heard</p> <p>17 about benzoic acid that I can't speak to, as</p> <p>18 an expert, and I don't know if it's worth</p> <p>19 repeating. But what it does, it works with</p> <p>20 the body chemistry -- the NicTech works with</p> <p>21 the body chemistry to give the consumers more</p> <p>22 enjoyment.</p> <p>23 Q. Okay. So, would you agree that, all</p> <p>24 else equal, the nicotine that's at, let's say,</p> <p>25 5 percent concentration with NicTech, the</p>	<p style="text-align: right;">Page 72</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 helps the entire experience. The experience</p> <p>3 is not just a single point. It's not just,</p> <p>4 you know, if you're at 4.8, you know, that's</p> <p>5 the magic number, and 3.6 or 5.5 you can't --</p> <p>6 different consumers have different tastes and</p> <p>7 different ways of relating to the product, so</p> <p>8 it's -- and we believe that the combination of</p> <p>9 NicTech, which covers a number of different</p> <p>10 elements, was an experience that we found that</p> <p>11 consumers -- a portion of consumers enjoy and</p> <p>12 said they liked it.</p> <p>13 Q. RipTide's incomparable nicotine</p> <p>14 experience also comes from the fact that it</p> <p>15 has an offering at 5 percent nicotine</p> <p>16 strength, right?</p> <p>17 MR. FORD: Objection.</p> <p>18 A. I think -- I'll go back to my former</p> <p>19 answers. It is an element of the experience.</p> <p>20 I don't know that there's magic in 5 versus</p> <p>21 4.8 versus 4.6 versus 5.2. But the</p> <p>22 combination of all the elements, put together,</p> <p>23 impacts different consumers differently. And</p> <p>24 some like that combination of elements, and</p> <p>25 some like other combination of elements.</p>
<p style="text-align: right;">Page 71</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 other product doesn't have NicTech, NicTech is</p> <p>3 going to give a better experience?</p> <p>4 MR. FORD: Objection to form.</p> <p>5 MR. LEE: Objection to form.</p> <p>6 A. Better for who? You have to ask the</p> <p>7 consumer which one was better. Again,</p> <p>8 particularly in vape, there's just a range of</p> <p>9 experiences that people are looking at. And</p> <p>10 as I said before in my answers to a previous</p> <p>11 question, you know we went out there. We did</p> <p>12 not get 100 percent of the people that said</p> <p>13 this is better than anything else -- I wish</p> <p>14 they did, but that this is better than every</p> <p>15 other product in the market.</p> <p>16 We did get a subsegment of consumers</p> <p>17 that said, "This is a better experience." And</p> <p>18 a lot of the people in-house said, "This is</p> <p>19 what I would use."</p> <p>20 Q. And you said that that's in part</p> <p>21 because of nicotine -- strike that.</p> <p>22 You would say that that's, in part,</p> <p>23 because of NicTech, right?</p> <p>24 A. We believe that the combination of</p> <p>25 all the elements combined with the battery</p>	<p style="text-align: right;">Page 73</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 I think Stoker's has an incomparable</p> <p>3 taste -- for me, has an incomparable taste of</p> <p>4 moist snuff, but there's plenty of people who</p> <p>5 use Copenhagen.</p> <p>6 MR. SOWLATI: I just sent a</p> <p>7 document. Hopefully it doesn't take too</p> <p>8 long. This is Wexler EX 13.</p> <p>9 Q. This is a RipTide e-liquid</p> <p>10 advertisement that we found in your</p> <p>11 production. If you could turn to the page</p> <p>12 stamped 13009.</p> <p>13 MR. FORD: Larry, you should feel</p> <p>14 free to look through the whole thing.</p> <p>15 THE WITNESS: Just so I can maybe</p> <p>16 frame it how we might have used it.</p> <p>17 MR. FORD: Yes.</p> <p>18 A. Is this a finished document? I see</p> <p>19 things crossed out and...</p> <p>20 Q. It was in your files like that.</p> <p>21 A. Okay. So, do we know if this was a</p> <p>22 draft or a final product?</p> <p>23 Q. It doesn't have a draft stamp on it.</p> <p>24 A. What's that?</p> <p>25 MR. FORD: He can make any</p>



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<p style="text-align: right;">Page 74</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 representation, one way or the other. You</p> <p>3 can only testify about what you know,</p> <p>4 Larry.</p> <p>5 THE WITNESS: Okay.</p> <p>6 A. And you want me on Page 13?</p> <p>7 Q. 13-009</p> <p>8 Do you see that? It says,</p> <p>9 "Breakthrough Nicotine Technology."</p> <p>10 A. Yeah, I'm just looking at the rest</p> <p>11 of the document.</p> <p>12 Okay. 009?</p> <p>13 Q. Yes.</p> <p>14 A. Okay. It has bottles on it? Just</p> <p>15 so I know I'm on the right page.</p> <p>16 Q. Yes. And it says, "Breakthrough</p> <p>17 Nicotine Technology" on the top of the page.</p> <p>18 A. Yes.</p> <p>19 Q. You're referring to NicTech here,</p> <p>20 right?</p> <p>21 A. That's what it says.</p> <p>22 Q. Okay. It says, "higher in nicotine</p> <p>23 satisfaction." Do you see that?</p> <p>24 A. Yes.</p> <p>25 Q. And that comes from the NicTech,</p>	<p style="text-align: right;">Page 76</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 good; the way it fits in your hand, the way</p> <p>3 you could use it, keep it pretty discreet. It</p> <p>4 had a different sort of feel and texture. We</p> <p>5 tried to give it a different sort of feel and</p> <p>6 texture on the outside. That's what I</p> <p>7 remember.</p> <p>8 Q. I'm going to stick with Page 6, but</p> <p>9 I want to turn to the remarks of Graham A.</p> <p>10 Purdy, which starts at the bottom of the page.</p> <p>11 Mr. Wexler, who is Mr. Purdy?</p> <p>12 A. Mr. Purdy is someone who works for</p> <p>13 me. He is currently the COO of Turning Point</p> <p>14 Brands.</p> <p>15 Q. Mr. Purdy is someone you trust and</p> <p>16 you know to give truthful and accurate</p> <p>17 information in these calls just like you do,</p> <p>18 right?</p> <p>19 A. Yes.</p> <p>20 Q. In the first paragraph of</p> <p>21 Mr. Purdy's remarks, at the very bottom he</p> <p>22 says, "RipTide RipStick device and pod system</p> <p>23 is like no other entry into the marketplace</p> <p>24 before it."</p> <p>25 RipTide, at this time, was like no</p>
<p style="text-align: right;">Page 75</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 right?</p> <p>3 A. NicTech is part of the reason why it</p> <p>4 has -- yes.</p> <p>5 Q. Okay. Why don't we turn back to the</p> <p>6 last document that we were on. This is,</p> <p>7 again, Wexler EX 3. This is your Q1 2019</p> <p>8 Turning Point Earnings Call dated May 1st,</p> <p>9 2019. I'll give you a second to get back to</p> <p>10 that document.</p> <p>11 A. I'm on that document.</p> <p>12 Q. Again, on the page stamped 3006,</p> <p>13 fourth from the top, you said that RipStick</p> <p>14 device is a superior small form factor --</p> <p>15 A. Okay. Can you just tell me the</p> <p>16 first words of the paragraph?</p> <p>17 Q. "RipTide is a proprietary pod-based</p> <p>18 vapor system."</p> <p>19 A. Okay.</p> <p>20 Q. And I'm looking at the last</p> <p>21 sentence. You said, "The RipStick device is a</p> <p>22 superior small form factor."</p> <p>23 What about RipStick gives it a</p> <p>24 superior small form factor?</p> <p>25 A. We thought the ergonomics was pretty</p>	<p style="text-align: right;">Page 77</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 other entry into the market before it, in</p> <p>3 part, because of NicTech, right?</p> <p>4 MR. FORD: Objection.</p> <p>5 A. Okay. So, exactly how are you</p> <p>6 framing, like no entry before it? If you're</p> <p>7 saying it's a pod system, there were other pod</p> <p>8 systems. But what we're saying is that, the</p> <p>9 combination of features was unique. There's</p> <p>10 no other product that had the combination of</p> <p>11 features that RipTide had.</p> <p>12 Q. Okay. If we look at the next page</p> <p>13 on the top, we're on 3007, so the next page of</p> <p>14 Mr. Purdy's remarks.</p> <p>15 A. Okay. Hold on.</p> <p>16 And where are you?</p> <p>17 Q. At the very top.</p> <p>18 A. It starts, "1.4 milliliters"? Am I</p> <p>19 on the right page?</p> <p>20 Q. Yes, it starts at 1.4 milliliters.</p> <p>21 A. Okay.</p> <p>22 Q. Mr. Purdy says that RipTide was an</p> <p>23 exceptional adult consumer value proposition.</p> <p>24 What about RipTide made it an</p> <p>25 exceptional adult value proposition?</p>

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<p style="text-align: right;">Page 78</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. Well, what we were trying to do was</p> <p>3 give greater value to the consumer, and value</p> <p>4 comes in many different forms. So, we made</p> <p>5 our pods, the size of our pods larger. It was</p> <p>6 1.4 milliliters rather than -- if I remember</p> <p>7 correctly, JUUL was somewhere around</p> <p>8 1 milliliter, at the time. It also had this</p> <p>9 technology that we had with it.</p> <p>10 And so, we felt as though we were</p> <p>11 putting together a great set of value. Value</p> <p>12 comes in many different forms; it comes in</p> <p>13 price, it comes in product quality, it comes</p> <p>14 in flavors, it comes in quantities, it comes</p> <p>15 in convenience. There's all sorts of elements</p> <p>16 of value.</p> <p>17 Q. And also the price?</p> <p>18 A. Price is one element of value,</p> <p>19 certainly, yeah.</p> <p>20 Q. Mr. Purdy notes that the soft launch</p> <p>21 for RipTide was especially compelling.</p> <p>22 In what way was it compelling?</p> <p>23 A. Can I read the context in which he</p> <p>24 said it?</p> <p>25 Q. Yes, of course. He says, "The</p>	<p style="text-align: right;">Page 80</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 paragraph that starts, "Our long-term guidance</p> <p>3 on the NewGen margin has been 25 to 30 percent.</p> <p>4 Will stay as the RipTide products, the CBDs</p> <p>5 flow through, those margins are going to</p> <p>6 hold." Do you see that?</p> <p>7 A. I do.</p> <p>8 Q. Mr. Wexler, the profitability of</p> <p>9 your products is important, right?</p> <p>10 A. That's why we exist.</p> <p>11 Q. Fair enough. And you were telling</p> <p>12 your investors that RipTide was going to</p> <p>13 maintain positive profitability targets,</p> <p>14 right?</p> <p>15 MR. FORD: Objection.</p> <p>16 MR. LEE: Objection. Vague.</p> <p>17 A. Yeah, I think you've got to put it</p> <p>18 within the context of as it flows through,</p> <p>19 meaning over time, that this is where we</p> <p>20 expect RipTide targets to be.</p> <p>21 Q. Mr. Wexler, we can put that document</p> <p>22 to the side. I am going to be loading a new</p> <p>23 document.</p> <p>24 A. Is this Exhibit 4?</p> <p>25 Q. Yes. It's stamped Wexler EX 4, and</p>
<p style="text-align: right;">Page 79</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 exceptional adult consumer value proposition</p> <p>3 coupled with what I believe to be superior</p> <p>4 satisfaction have proven to be especially</p> <p>5 compelling during our soft launch in the first</p> <p>6 quarter."</p> <p>7 A. Okay. What is your question?</p> <p>8 Q. My question is: In what way was it</p> <p>9 an especially compelling soft launch?</p> <p>10 A. You'd have to ask him for the</p> <p>11 context in which he made that remark. These</p> <p>12 are not my words; these are his.</p> <p>13 Q. Okay. Let's stick with this</p> <p>14 document, and let's turn to the page stamped</p> <p>15 3010.</p> <p>16 A. And we're still in the earnings</p> <p>17 call?</p> <p>18 Q. Yes.</p> <p>19 A. 3010?</p> <p>20 Q. Yes.</p> <p>21 A. Okay. Hold on.</p> <p>22 The Q and A?</p> <p>23 Q. Yes.</p> <p>24 A. Okay. I'm there.</p> <p>25 Q. In the middle of the page, there's a</p>	<p style="text-align: right;">Page 81</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 it's your Q2 2019 earnings transcript --</p> <p>3 A. Let me get it downloaded first so I</p> <p>4 can be with you.</p> <p>5 MR. SOWLATI: Just for the record,</p> <p>6 I'm going to state what document is. This</p> <p>7 is Wexler EX 4, and it's Turning Point's</p> <p>8 Q2 2019 Earnings Transcript dated July 31,</p> <p>9 2019.</p> <p>10 MR. FORD: As with the other</p> <p>11 documents, feel free to skim through just</p> <p>12 to get context.</p> <p>13 THE WITNESS: Yeah, I just want to</p> <p>14 get some context.</p> <p>15 MR. SOWLATI: No problem. Please</p> <p>16 let me know when you're done.</p> <p>17 THE WITNESS: Okay.</p> <p>18 Q. Mr. Wexler, do you recognize this to</p> <p>19 be your Q2 2019 earnings transcript?</p> <p>20 A. As I've said before, I've never seen</p> <p>21 it in this format, but it does appear to be my</p> <p>22 second quarter transcript.</p> <p>23 Q. Can we turn to the page stamped</p> <p>24 4005? I'm looking at the paragraph that's</p> <p>25 fourth from the bottom. It starts, "Let's</p>

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<p style="text-align: right;">Page 82</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 start with a fresh look at Nu-X portfolio of</p> <p>3 products."</p> <p>4 Do you see that?</p> <p>5 A. I do.</p> <p>6 Q. Right after that, there is a</p> <p>7 sentence where you note that "RipTide was</p> <p>8 positioned to meet former smoker preferences</p> <p>9 at a value price point."</p> <p>10 Why was it important for RipTide to</p> <p>11 be positioned to meet former smoker</p> <p>12 preferences?</p> <p>13 A. We believe that the vast, vast</p> <p>14 majority of vapers are former smokers. We</p> <p>15 don't really market to get for initiation. We</p> <p>16 really target against people who are</p> <p>17 experienced with smoke and they want to go to</p> <p>18 vapor. That's where our corporate efforts are</p> <p>19 focused.</p> <p>20 Q. Got it. And you said, "RipTide was</p> <p>21 at a value price point."</p> <p>22 Is that because it was priced</p> <p>23 competitively with JUUL and other pod-based</p> <p>24 products?</p> <p>25 MR. FORD: Objection. Vague.</p>	<p style="text-align: right;">Page 84</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. "Including a product that," and I'm</p> <p>3 quoting you, "that provided uncompromised</p> <p>4 satisfaction"?</p> <p>5 MR. FORD: Objection.</p> <p>6 A. I don't even know how to address</p> <p>7 that question. We believe we put together a</p> <p>8 package consumers told us -- a package of</p> <p>9 attributes that would be good for consumers.</p> <p>10 We had a subsegment of consumers who told us</p> <p>11 they really liked it and this was something</p> <p>12 that they would use. So yeah, we wouldn't</p> <p>13 introduce a product if we didn't think that</p> <p>14 consumers would like that.</p> <p>15 Q. And one of the things you thought</p> <p>16 consumers would like was the uncompromised</p> <p>17 satisfaction?</p> <p>18 MR. FORD: Objection. Vague.</p> <p>19 A. If you're asking me what I think</p> <p>20 consumers like, I think consumers like the</p> <p>21 whole range of attributes that basically --</p> <p>22 that that particular combination creates</p> <p>23 satisfaction with the consumer. That's why</p> <p>24 they buy the product. Consumers don't</p> <p>25 generally buy products they don't -- they're</p>
<p style="text-align: right;">Page 83</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. I don't remember what the market</p> <p>3 situation was there. But when we say it's a</p> <p>4 value price, it may have been an exact same</p> <p>5 price, but it had more liquid in the pods. I</p> <p>6 just don't remember the specifics of value, in</p> <p>7 this context.</p> <p>8 Q. You also say in this paragraph that,</p> <p>9 "The leading brand was doing 60 million pods</p> <p>10 per month."</p> <p>11 You're referring to JUUL, right?</p> <p>12 A. I would presume that I was, yes.</p> <p>13 Q. Now, despite JUUL's performance, in</p> <p>14 the middle of 2019, you believed there was a</p> <p>15 meaningful opportunity in the market, right?</p> <p>16 A. This was a segment that was growing</p> <p>17 rapidly, and we felt that consumers would want</p> <p>18 to have additional competitors in there</p> <p>19 because, as I've said many times during this</p> <p>20 deposition, there's a whole range of consumer</p> <p>21 desires. People get satisfied differently</p> <p>22 with different combination and package of</p> <p>23 attributes. And so, we felt given people</p> <p>24 we've talked to, that there was room for a</p> <p>25 product like RipTide among those consumers.</p>	<p style="text-align: right;">Page 85</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 not satisfied with.</p> <p>3 And that's -- but it's a whole range</p> <p>4 of things. It could be the packaging; it</p> <p>5 could be the brand positioning; it could be</p> <p>6 the taste; it could be the flavor; it could be</p> <p>7 the size; it could be the feel; it could be</p> <p>8 how it performs. You know, brands are complex</p> <p>9 things; products are complex things.</p> <p>10 Q. Right. And you specifically told</p> <p>11 shareholders that NicTech yields uncompromised</p> <p>12 satisfaction, and you thought it was important</p> <p>13 to tell shareholders that, right?</p> <p>14 MR. LEE: Objection to form.</p> <p>15 A. I obviously used those words, so I</p> <p>16 used those words.</p> <p>17 Q. Okay. Let's turn to the next page,</p> <p>18 where you'll see Mr. Purdy's remarks start at</p> <p>19 the bottom. I'm actually, sorry, not going to</p> <p>20 focus on this page. I just wanted to identify</p> <p>21 that now Mr. Purdy, the President of Nu-X</p> <p>22 Ventures, would be speaking.</p> <p>23 I want to turn to the following</p> <p>24 page, which is the page stamped 4007. In the</p> <p>25 first full paragraph which starts, "But rest</p>

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<p style="text-align: right;">Page 86</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 assured there are a myriad of other</p> <p>3 opportunities in the product development</p> <p>4 pipeline," I wanted to focus you on</p> <p>5 Mr. Purdy's remarks where he says, "RipTide</p> <p>6 and our NicTech technology delivered</p> <p>7 compelling results in the quarter."</p> <p>8 In what way did they provide</p> <p>9 compelling results?</p> <p>10 A. We're starting to turn to our sales</p> <p>11 forces, and we were making some headway in</p> <p>12 getting distribution, and we spent a large</p> <p>13 bushel full of money in order to get</p> <p>14 distribution in Speedway. I believe that -- I</p> <p>15 can't speak for exactly what he was talking</p> <p>16 about, but for us, having a new product and</p> <p>17 getting into a major chain that early was</p> <p>18 something different; something that we hadn't</p> <p>19 really done in the past. But it cost us a ton</p> <p>20 of money.</p> <p>21 More importantly, the way we got</p> <p>22 into Speedway was, they had a problem. They</p> <p>23 had bought a product called Mystic, which was</p> <p>24 made by an independent manufacturer, and they</p> <p>25 had a lot of inventory with it, and they</p>	<p style="text-align: right;">Page 88</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 shipments into stores.</p> <p>3 Q. I see.</p> <p>4 A. You put an initial distribution in,</p> <p>5 then the store would order product and it</p> <p>6 would be shipped in, and we monitor that.</p> <p>7 That's how I would use that term, in</p> <p>8 particular.</p> <p>9 Q. Mr. Wexler, you can put this</p> <p>10 earnings transcript to the side. Just give me</p> <p>11 one second while I get the next document</p> <p>12 ready. This is a large document,</p> <p>13 15 megabytes, so it's going to take a second</p> <p>14 to load.</p> <p>15 Have you been able to load that</p> <p>16 document?</p> <p>17 A. I'm about to open it.</p> <p>18 MR. SOWLATI: Just for the record,</p> <p>19 this document is stamped Wexler EX 5, and</p> <p>20 it's a RipTide product launch sales</p> <p>21 training deck that was in your files.</p> <p>22 THE WITNESS: Okay.</p> <p>23 Q. I'm just going to focus on a few</p> <p>24 slides, but I'm going to give you a second --</p> <p>25 A. Yeah, can I just --</p>
<p style="text-align: right;">Page 87</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 couldn't get it out of their system. They</p> <p>3 basically came to us and said, "Can you fix</p> <p>4 this problem for us?" And since we had more</p> <p>5 experience handling vape products which had</p> <p>6 restricted disposal requirements and things of</p> <p>7 that nature, we stepped in and helped them --</p> <p>8 we solved their problem and gave them a bunch</p> <p>9 of money, and they helped solve our problem by</p> <p>10 giving us distribution on RipTide.</p> <p>11 Q. Mr. Purdy says that "Reorder rates</p> <p>12 are proving encouraging."</p> <p>13 Reorder rates refers to purchases of</p> <p>14 cartridges or pods, right?</p> <p>15 A. Reorder rates, when he talks about</p> <p>16 reorder rates -- again, he's saying this, I'm</p> <p>17 speculating, I guess, which maybe I shouldn't</p> <p>18 do --</p> <p>19 MR. FORD: You should not speculate.</p> <p>20 A. I can't speak to what he meant by</p> <p>21 that.</p> <p>22 Q. What do you understand reorder rates</p> <p>23 to be?</p> <p>24 A. Okay. If I were to use reorder</p> <p>25 rates, I would be saying that it's the new</p>	<p style="text-align: right;">Page 89</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. No problem.</p> <p>3 MR. FORD: You should skim through</p> <p>4 it. It's a large deck. You don't have to</p> <p>5 read every slide, but you can skim through</p> <p>6 it.</p> <p>7 It's still loading for me, so before</p> <p>8 you ask any questions, let me make sure I</p> <p>9 can open it.</p> <p>10 A. When I look at these slides, it</p> <p>11 reminds me to remind my employees to make the</p> <p>12 typeface larger so I can read it.</p> <p>13 MR. FORD: I'm ready when you are,</p> <p>14 Larry, but skim through it.</p> <p>15 THE WITNESS: This is a large file.</p> <p>16 A. Okay.</p> <p>17 Q. Mr. Wexler, do you recognize this</p> <p>18 deck?</p> <p>19 A. It appears to be a sales training</p> <p>20 document.</p> <p>21 Q. Have you seen this deck before?</p> <p>22 A. Excuse me?</p> <p>23 Q. Have you seen this deck before?</p> <p>24 A. I probably did. I see a lot of</p> <p>25 sales training documents.</p>

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<p style="text-align: right;">Page 90</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. Can we turn to Wexler EX 5-005.</p> <p>3 A. Okay.</p> <p>4 Q. Now, this page discusses NicTech.</p> <p>5 It was important to highlight</p> <p>6 NicTech very early on in this deck, right?</p> <p>7 MR. FORD: Objection. Vague. Lacks</p> <p>8 foundation.</p> <p>9 MR. LEE: Same objection.</p> <p>10 Q. You can answer.</p> <p>11 A. I'm not sure what you mean by</p> <p>12 "important."</p> <p>13 Q. Well, the discussion of NicTech is</p> <p>14 fairly early on in this sales training deck,</p> <p>15 wouldn't you say?</p> <p>16 A. It's on Page 5.</p> <p>17 Q. And the slide says, "NicTech</p> <p>18 provides heightened nicotine satisfaction."</p> <p>19 Is that right?</p> <p>20 A. That's what the slide says, yes.</p> <p>21 Q. And do you agree with that?</p> <p>22 A. Yeah, compared to a lot of other</p> <p>23 products, NicTech provides heightened nicotine</p> <p>24 satisfaction.</p> <p>25 Q. Can we turn to the page stamped</p>	<p style="text-align: right;">Page 92</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 them, and price is one of the elements of</p> <p>3 competition.</p> <p>4 Q. Now, the presentation shows that the</p> <p>5 RipStick device was being priced at 99 cents,</p> <p>6 the intro price. Do you see that?</p> <p>7 A. Yes.</p> <p>8 Q. So, there's really no comparison.</p> <p>9 RipTide was being priced much lower</p> <p>10 than JUUL, right?</p> <p>11 MR. FORD: Objection. Vague.</p> <p>12 A. In this particular comparison,</p> <p>13 that's what it shows.</p> <p>14 Q. And if we look at NJOY ACE, for</p> <p>15 example, its device kit intro was also 99</p> <p>16 cents, right?</p> <p>17 A. Yes.</p> <p>18 Q. That's a pretty compelling price for</p> <p>19 consumers, wouldn't you say?</p> <p>20 MR. LEE: Objection to form.</p> <p>21 MR. FORD: Objection. Vague.</p> <p>22 A. I can't speak to what consumers -- I</p> <p>23 can only speak to what we do.</p> <p>24 Q. But it's significantly lower than</p> <p>25 JUUL, right?</p>
<p style="text-align: right;">Page 91</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 5-0021.</p> <p>3 A. 5-002?</p> <p>4 Q. 5-021. I'm sorry, I misspoke.</p> <p>5 A. 5-021. Okay.</p> <p>6 Q. There's "Pod system typical consumer</p> <p>7 retail pricing." It's at the top.</p> <p>8 A. Yes.</p> <p>9 Q. Well, this shows a number of</p> <p>10 different products; RipTide, JUUL, Vuse Alto,</p> <p>11 myblu, and Leap.</p> <p>12 These products are each other's</p> <p>13 competitors, right?</p> <p>14 A. Yeah, they're -- you know, these</p> <p>15 types of products also compete with -- they're</p> <p>16 competing for consumers. But yeah, these are</p> <p>17 the largest nationally distributed pod</p> <p>18 systems --</p> <p>19 Q. Now, RipTide was -- I'm sorry, you</p> <p>20 can speak.</p> <p>21 A. -- at the time. Sorry.</p> <p>22 Q. RipTide was being priced to compete</p> <p>23 with these pod-based products, including JUUL,</p> <p>24 Vuse Alto, and myblu, right?</p> <p>25 A. Well, RipTide was competing with</p>	<p style="text-align: right;">Page 93</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. It is obvious that it's lower than</p> <p>3 JUUL, yes.</p> <p>4 Q. In fact, just looking at this chart,</p> <p>5 it looks like all of these products are</p> <p>6 undercutting JUUL on price; isn't that right?</p> <p>7 MR. FORD: Objection. Vague.</p> <p>8 A. Well, I think what -- you've got to</p> <p>9 look at the context of what this pricing is.</p> <p>10 You're focusing on the pricing of the device.</p> <p>11 In a pod system, you've really got a two-step</p> <p>12 selling process. First you've got to get the</p> <p>13 consumer to buy the device. Then they can buy</p> <p>14 pods. These pods are not interchangeable.</p> <p>15 You can't use a JUUL pod on a RipTide device</p> <p>16 or an NJOY pod on a myblu device.</p> <p>17 And so, since the -- so,</p> <p>18 essentially, what these were priced at was</p> <p>19 because people didn't have our devices, so</p> <p>20 they couldn't buy our pods. Our pods is where</p> <p>21 the product is delivered. So we're trying to</p> <p>22 get as many devices into people's hands as</p> <p>23 possible so they can try our pods.</p> <p>24 Q. Okay. I'm going to go back to my</p> <p>25 question.</p>

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<p style="text-align: right;">Page 94</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 But all of the devices are priced</p> <p>3 significantly lower -- all of the devices of</p> <p>4 the products on this page are priced</p> <p>5 significantly lower than JUUL, right?</p> <p>6 MR. LEE: Objection.</p> <p>7 MR. FORD: Objection. Vague.</p> <p>8 Q. Sorry. Did you answer?</p> <p>9 A. Okay. If the question you're</p> <p>10 asking, in looking at this page and looking at</p> <p>11 the line on each box where it says, "device</p> <p>12 price," then it appears that each of the</p> <p>13 prices are lower than the price of JUUL.</p> <p>14 Q. And you just mentioned pods and the</p> <p>15 importance of pods. RipTide's price was</p> <p>16 lower -- RipTide's pod price was priced lower</p> <p>17 than JUUL's pod price, right?</p> <p>18 A. Yeah, I don't know they're</p> <p>19 one-and-one comparable. I don't know that it</p> <p>20 -- because they're different quantities of</p> <p>21 nicotine, JUUL sold in multipacks, we sold</p> <p>22 singles. Looking at the prices and comparing</p> <p>23 them, it takes much more thought and analysis</p> <p>24 before you can say anything about the relative</p> <p>25 pricing.</p>	<p style="text-align: right;">Page 96</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. Yes.</p> <p>3 Q. Okay.</p> <p>4 A. There's nothing unusual about a new</p> <p>5 product coming out and some promotional prices</p> <p>6 in order to attract new consumers. That's a</p> <p>7 classic marketing approach. There's nothing</p> <p>8 surprising about that.</p> <p>9 I mean, you're trying to get people</p> <p>10 away from their brand preference and bring</p> <p>11 them to a new experience, and you've got to</p> <p>12 give them some inducement to do that.</p> <p>13 MR. SOWLATI: I think we've been</p> <p>14 going for about an hour. Should we take a</p> <p>15 ten-minute break?</p> <p>16 MR. FORD: Yes. Sounds good.</p> <p>17 MR. SOWLATI: Should we reconvene at</p> <p>18 11:20?</p> <p>19 MR. FORD: Yes.</p> <p>20 MR. LEE: Sure.</p> <p>21 MR. SOWLATI: Great. We can go off</p> <p>22 the record.</p> <p>23 (Recess was taken.)</p> <p>24 BY MR. SOWLATI:</p> <p>25 Q. Mr. Wexler, you can put the press</p>
<p style="text-align: right;">Page 95</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. Well, to be clear, RipTide, each pod</p> <p>3 has more liquid than JUUL, right?</p> <p>4 A. Yes, I believe that's true, yes.</p> <p>5 Q. So, when you compare the pricing of</p> <p>6 the two, it looks like RipTide's pod price is</p> <p>7 lower, right?</p> <p>8 A. No, you cannot say that. And as I</p> <p>9 just said, JUUL sold their pods in multipacks.</p> <p>10 So, you have to add up all the quantity of the</p> <p>11 nicotine and then divide by the price. Even</p> <p>12 that doesn't tell you what the relative value</p> <p>13 is because these devices could potentially use</p> <p>14 different quantities of the liquid on each</p> <p>15 product. I mean, they probably do depending</p> <p>16 on the pod anyway. So, the price was the</p> <p>17 price, and the list price is lower, but it's</p> <p>18 comparing apples and oranges.</p> <p>19 Q. Okay, right. So I'm looking at this</p> <p>20 JUUL two pack .7-milliliter pod, 9.99. If</p> <p>21 we're going to compare apples to apples, we'll</p> <p>22 say, okay, in total, you get 1.4 milliliters</p> <p>23 in total with the JUUL pack for 9.99.</p> <p>24 And that compares to 3.99 for</p> <p>25 RipTide, right?</p>	<p style="text-align: right;">Page 97</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 release aside. I just have a quick question</p> <p>3 about --</p> <p>4 A. Wait, wait, wait. We were on a</p> <p>5 sales training document.</p> <p>6 Q. Oh, I'm sorry. Yes, we were on a</p> <p>7 training transcript. You can put that aside.</p> <p>8 I'm going to be turning now to your</p> <p>9 Declaration.</p> <p>10 A. Okay. Let me go back to it.</p> <p>11 Okay.</p> <p>12 Q. If I could focus you for a minute on</p> <p>13 Paragraph 22.</p> <p>14 A. I'm sorry. Did you say Paragraph</p> <p>15 22?</p> <p>16 Q. Yes. Are you there?</p> <p>17 A. I'm getting there.</p> <p>18 Okay.</p> <p>19 Q. You referred to a significant number</p> <p>20 of customers who would not expect to switch to</p> <p>21 open tank systems if there were a 5 percent</p> <p>22 increase in the price of pods.</p> <p>23 What is the significance of the 5</p> <p>24 percent number?</p> <p>25 A. I have no reason to believe that</p>

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<p style="text-align: right;">Page 98</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 5 percent is anything other than that's what I</p> <p>3 was asked.</p> <p>4 Q. What do you consider significant or</p> <p>5 not significant?</p> <p>6 A. Different markets have --</p> <p>7 MR. FORD: Objection. Vague.</p> <p>8 A. Different markets have different</p> <p>9 thresholds.</p> <p>10 Q. Okay. What I'm referring to is what</p> <p>11 you said in your Declaration. You said, "I</p> <p>12 would not expect such an increase to drive a</p> <p>13 significant number of customers to switch to</p> <p>14 open tank systems."</p> <p>15 A. Oh, I'm sorry, I thought you were</p> <p>16 still talking about the 5 percent. So you're</p> <p>17 talking about the significance -- okay. So</p> <p>18 let me -- maybe it would be best if I just</p> <p>19 explained what I'm trying to say here and you</p> <p>20 can ask questions on that.</p> <p>21 Q. Well, can I just restate the</p> <p>22 question for the record.</p> <p>23 A. Sure.</p> <p>24 Q. Okay. I'm asking you: What do you</p> <p>25 consider significant or not significant, in</p>	<p style="text-align: right;">Page 100</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Open systems is a totally different</p> <p>3 brand, totally different process. With open</p> <p>4 systems, there's vast combinations of</p> <p>5 different things. You have batteries; you</p> <p>6 have coils; you have tanks; you have liquids;</p> <p>7 you have liquids of different strengths. A</p> <p>8 lot of the open systems, you can actually</p> <p>9 adjust the amount of air you can get from the</p> <p>10 outside and the temperatures. And there's</p> <p>11 almost infinite variety in open systems. So,</p> <p>12 it's a very different experience.</p> <p>13 And somebody who is going to switch,</p> <p>14 who is a closed system consumer who is going</p> <p>15 to switch to an open system, it's a totally</p> <p>16 different process. They've got to buy it at a</p> <p>17 different place. You generally can't find</p> <p>18 open systems in C-stores. It's a process</p> <p>19 where we have to take a ton of decisions.</p> <p>20 It's not just buying a device and then picking</p> <p>21 a flavor; you've got to decide what kind of</p> <p>22 battery you want, what kind of size battery</p> <p>23 you want, how much power you want, how much</p> <p>24 flexibility you want over different features</p> <p>25 on the battery system.</p>
<p style="text-align: right;">Page 99</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 terms of switching behavior to open tank</p> <p>3 systems?</p> <p>4 MR. FORD: Larry, if you do have to</p> <p>5 explain the context in order to answer</p> <p>6 that question, you should feel free to do</p> <p>7 so.</p> <p>8 THE WITNESS: Thank you.</p> <p>9 A. Okay. So when I look at the open</p> <p>10 and closed systems, I see them as very</p> <p>11 different margins. It's a very different user</p> <p>12 experience. We talked a little bit about this</p> <p>13 during this deposition, but let me try to</p> <p>14 bring it all together.</p> <p>15 So, the closed systems, particularly</p> <p>16 the closed systems we've been talking about,</p> <p>17 you know, the JUULs, the NJOYs, and RipTides,</p> <p>18 it's a smaller product. It's discreet. They</p> <p>19 generally have -- at the high end of nicotine</p> <p>20 deliveries, it's battery based. It's very</p> <p>21 convenient. You walk into a C-store, and if</p> <p>22 you have a device, you can buy a device, you</p> <p>23 can put it right in, you click it, you walk</p> <p>24 out the C-store, and one step outside the</p> <p>25 C-store, you know, you're vaping away. Okay?</p>	<p style="text-align: right;">Page 101</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Then you go to tanks. There's all</p> <p>3 kinds of different tanks. Then you go to</p> <p>4 coils. There's different types of coils. And</p> <p>5 that's even before you get to the liquids,</p> <p>6 because on the liquids, you have even more</p> <p>7 variety. You have a much broader range of</p> <p>8 flavors, because closed systems go through</p> <p>9 distribution lanes where they can only have a</p> <p>10 limited number of SKUs. But in a vape shop</p> <p>11 where the vape shop is dedicated to it, they</p> <p>12 can have hundreds of SKUs, and maybe even some</p> <p>13 of the large ones, maybe even more.</p> <p>14 So, it was my understanding that</p> <p>15 with a small price adjustment, which is</p> <p>16 actually -- in some markets would be</p> <p>17 significant price change of 5 percent. That</p> <p>18 would be not enough to motivate a large number</p> <p>19 of people to switch from a closed system to an</p> <p>20 open system because of all the other hurdles</p> <p>21 that are involved, including most of the</p> <p>22 closed system devices are a lot bigger; you</p> <p>23 lose your discreetness, you have to carry</p> <p>24 around the bottle with you, if you want to</p> <p>25 refill your -- it's hard to carry around some</p>



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<p style="text-align: right;">Page 102</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 of these bottles in your pocket like you can</p> <p>3 carry an extra pod in your pocket. There's a</p> <p>4 lot of hurdles.</p> <p>5 And then, you know, on top of it,</p> <p>6 it's just a different experience. You know,</p> <p>7 you have to decide to get an open system that</p> <p>8 provides a lot of vapor. You tend to use</p> <p>9 less -- lower nicotine on that. Or you can</p> <p>10 get some other ones where you can have a</p> <p>11 higher nicotine in it.</p> <p>12 And quite frankly, I've watched a</p> <p>13 large number of consumers walk into vape</p> <p>14 stores to start the experience of using open</p> <p>15 systems, and they spend a lot of time. It can</p> <p>16 be a-half-an-hour, 45 minutes with the sales</p> <p>17 clerk. That's another hurdle for a closed</p> <p>18 system person to switch over.</p> <p>19 Now, having said all that, there are</p> <p>20 some people who use both open systems and</p> <p>21 closed systems. And what they do is, they</p> <p>22 enjoy the open system experience. They</p> <p>23 generally do it at home. Where when they're</p> <p>24 walking around, they may carry around a closed</p> <p>25 system because they like to have the nicotine</p>	<p style="text-align: right;">Page 104</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 And has Turning Point conducted any</p> <p>3 studies to determine whether or not certain</p> <p>4 percentage of customers of pod products would</p> <p>5 switch to open tank systems if there were a</p> <p>6 5 percent increase in pod prices?</p> <p>7 A. We have not done an econometric</p> <p>8 study on that.</p> <p>9 Q. Okay. Mr. Wexler, a question for</p> <p>10 you: You would agree that word of mouth</p> <p>11 matters for a product's success, right?</p> <p>12 A. Yes. It's one of the many factors</p> <p>13 that have to do with brand success.</p> <p>14 Q. JUUL had a lot of word of mouth when</p> <p>15 it was first introduced, right?</p> <p>16 MR. LEE: Objection. Foundation.</p> <p>17 Q. You can answer.</p> <p>18 A. I mean, I heard about it.</p> <p>19 Q. You would also agree that the</p> <p>20 quality of a product matters for its</p> <p>21 commercial success, too, right?</p> <p>22 A. It's one of the many factors.</p> <p>23 Q. Okay. And it's an important factor,</p> <p>24 right?</p> <p>25 MR. LEE: Objection.</p>
<p style="text-align: right;">Page 103</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 more ready for them.</p> <p>3 Now, well on the margin, some of</p> <p>4 them shift some of their preference and use</p> <p>5 the open system more because of relative</p> <p>6 prices? Maybe. But in reality, the cost of a</p> <p>7 draw, call it, the per-draw cost in open</p> <p>8 systems is so much lower already than the</p> <p>9 per-draw cost of a pod system, that I don't</p> <p>10 see 5 percent being material given the hurdles</p> <p>11 that you have to do to get over to the open</p> <p>12 systems.</p> <p>13 Now, they're both vape users. They</p> <p>14 are both using vape, but consumers tend to</p> <p>15 congregate and to go where they're</p> <p>16 comfortable. And I don't know that they go</p> <p>17 switching back and forth, again, on marginal</p> <p>18 changes in price.</p> <p>19 Q. Mr. Wexler, I was just asking what</p> <p>20 you meant by "significant," the word</p> <p>21 "significant" in your Declaration.</p> <p>22 Do you have a number you can give</p> <p>23 me?</p> <p>24 A. No.</p> <p>25 Q. Is it 20 percent? No? Okay.</p>	<p style="text-align: right;">Page 105</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. Okay. So, I can only speak for</p> <p>3 myself, as a consumer, that if a product had</p> <p>4 shoddy quality, I probably would tend not to</p> <p>5 use it.</p> <p>6 Q. Would you agree that a product that</p> <p>7 consumers don't like won't be successful, even</p> <p>8 if it has access to shelf space?</p> <p>9 MR. LEE: Objection to form.</p> <p>10 A. That's a -- you might want to unpack</p> <p>11 that question. Repeat the question again,</p> <p>12 because it seemed like a very odd question.</p> <p>13 Q. I just asked, would you agree that a</p> <p>14 product that consumers don't like won't be</p> <p>15 successful, even if it has access to shelf</p> <p>16 space?</p> <p>17 MR. LEE: Objection to form.</p> <p>18 A. Okay. So, if you're asking me do</p> <p>19 products that people don't like, are they</p> <p>20 successful or not successful? I think that in</p> <p>21 itself says everything you need to know about</p> <p>22 that question. The second clause has no</p> <p>23 bearing on it. If people don't like the</p> <p>24 product, they're not going to buy the product.</p> <p>25 That's kind of an absurd question.</p>

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2 Q. Fair enough.

3 Mr. Wexler, I'm going turn to

4 Paragraphs 25 and 26 of your Declaration.

5 Mr. Wexler, in these paragraphs, you speak

6 quite a bit about what Philip Morris did and

7 how it contracts work, including what those

8 contracts required with respect to shelf

9 space.

10 But to be clear, you last worked at

11 Philip Morris 22 years ago, right?

12 A. Well, to be clear, I did leave

13 Philip Morris in 1998, and I guess, depending

14 on your calculations, it's either 22 or 23

15 years.

16 I think I can speak to this because

17 you cannot compete in tobacco without trying

18 to understand Philip Morris' contracts. And

19 by the way, Reynolds' contracts, as well,

20 because combined, they carve up so much of the

21 shelf space that you cannot sell products, you

22 cannot operate in C-stores unless you

23 understand that.

24 And also, I think I have some

25 particular expertise here because I was at

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2 Altria, Philip Morris, when these were

3 created, and I participated in thinking

4 through some of the principles. I can,

5 honestly, say I wasn't overly involved in the

6 exact details of writing the contracts. And

7 those contracts have changed over time, so I

8 can't speak to each element of the contract,

9 but I can speak to the principles behind

10 the -- and let me be of some help here because

11 I think it's kind of helpful to understand the

12 principles behind the contracts.

13 There's a lot of discussion and

14 there were a lot of talks with lawyers, and I

15 won't speak to that because I've been advised

16 that those discussions are privileged, but I

17 will talk about some of the discussions that I

18 had, that we had away from the lawyers, in

19 digesting what the lawyers told us. So this

20 is not communications directly from the

21 lawyers; this is conversations among people.

22 So, we had a lot of these

23 conversations with the lawyers that set out

24 guidelines about what you can't do, what you

25 can do, bright lines of what you're willing to

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2 do. So, it was the intention of Philip Morris

3 to go as far as possible to put their products

4 in a superior position relative to other

5 products and to inhibit other companies from

6 being able to introduce products into the

7 C-store space, particularly low priced

8 products.

9 And to do that, essentially what

10 they did is, they created this club. The

11 original concept of these contracts, I think

12 they were called masters. I seem to remember

13 they're called masters, the masters contracts.

14 So, essentially, they formed this club where

15 retailers have the option of joining or not

16 joining.

17 So, there was no tie to saying, you

18 can't sell Marlboro unless you join this club.

19 But then they set up a pricing regimen and a

20 promotion regimen where it became very

21 difficult for retailers to market Marlboro

22 unless they were a member in the club at some

23 level.

24 So as an example, before these

25 masters programs were put together, most

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2 merchandising in the C-store space was basic-

3 -- think of it as a leasing program. So, a

4 company would come in with a display. And I

5 seem to remember these numbers, and I could be

6 wrong on these numbers, and we would have what

7 we call our B rack, which is a wire display

8 which displayed packs. At that time you can

9 keep packs on the counter. So, it was

10 incredibly important to lease counter space.

11 And we would pay the retailers \$35 a month

12 whether they sold three packs or whether they

13 sold 300 packs. They would get the same \$35 a

14 month. And other competitors would do the

15 same thing, and you'd have this whole wall of

16 racks on the C-store counters.

17 Philip Morris' innovation, Philip

18 Morris' change was, they essentially went much

19 further to align the retailers' interest with

20 their interest. They started compensating the

21 retailer not for leasing space, but for the

22 amount of product that they sold. And what

23 they did there is, they had these tiers of

24 product -- of programs so that as you get

25 deeper into those tiers, the economic rewards

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<p style="text-align: right;">Page 110</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 are greater. You get more per pack sold or</p> <p>3 you can get a higher level of promotional</p> <p>4 dollars.</p> <p>5 Now, what became important is,</p> <p>6 because Philip Morris was basically</p> <p>7 subsidizing the profitability on the sale of</p> <p>8 each pack and because promotional dollars were</p> <p>9 allocated to people who were inside the club</p> <p>10 and not outside the club, that if you were</p> <p>11 outside the club, it was very, very difficult</p> <p>12 to have any level of profitability and be</p> <p>13 marketing and selling Marlboro products. So,</p> <p>14 if you want to be in the retail sale --</p> <p>15 Q. Mr. Wexler, I'm sorry to stop you,</p> <p>16 but the pending question is: You last worked</p> <p>17 at Philip Morris 22 years ago, right? And</p> <p>18 that's all I'm asking.</p> <p>19 MR. FORD: You can complete what you</p> <p>20 were going to say, Larry.</p> <p>21 A. Because you were saying that I</p> <p>22 haven't been there in 22 years, so I don't</p> <p>23 know anything about this, and I'm telling you</p> <p>24 that I do.</p> <p>25 Q. I just asked you if you worked there</p>	<p style="text-align: right;">Page 112</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 contract, it had different elements to it. It</p> <p>3 wasn't exactly the same. It had somewhat</p> <p>4 different elements.</p> <p>5 So, if retail had both those</p> <p>6 contracts and almost every retailer had to</p> <p>7 have them if they wanted to be in the business</p> <p>8 of selling packs of cigarettes, if a</p> <p>9 competitor came in and got a sign to announce</p> <p>10 a new product, they had to give Philip Morris</p> <p>11 another sign and Reynolds another sign, so it</p> <p>12 would cost them space for three signs for the</p> <p>13 one sign.</p> <p>14 Q. Mr. Wexler, thank you very much. I</p> <p>15 think you've answered my question quite a</p> <p>16 while ago about when you last worked at Philip</p> <p>17 Morris. I can ask you another question.</p> <p>18 When you worked at Philip Morris,</p> <p>19 e-vapor products did not exist, right?</p> <p>20 A. No.</p> <p>21 Q. Okay. And you were last involved in</p> <p>22 drafting a Philip Morris retail contract 22</p> <p>23 years ago, right?</p> <p>24 A. To be specific, I never drafted a</p> <p>25 Philip Morris contract. I was just involved</p>
<p style="text-align: right;">Page 111</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 22 years ago.</p> <p>3 MR. FORD: Let me just interject</p> <p>4 here. You can complete your thought,</p> <p>5 Larry.</p> <p>6 If you want to move to strike,</p> <p>7 Counsel, you can, and then we'll proceed.</p> <p>8 THE WITNESS: Okay.</p> <p>9 A. So getting back to where I was, so a</p> <p>10 retailer would have a very difficult time</p> <p>11 being in the business of selling packs of</p> <p>12 cigarettes unless they were inside the club.</p> <p>13 And part of the requirement was, Philip Morris</p> <p>14 asked for their share of the space for selling</p> <p>15 packs of cigarettes that were equal to the</p> <p>16 market share.</p> <p>17 Now, what became interesting -- and</p> <p>18 they also said that they would have to get a</p> <p>19 certain number of signs. And the most curious</p> <p>20 thing about it was that, if any other company</p> <p>21 came in with a sign, other than those allowed</p> <p>22 to, R. J. Reynolds, they would have to get</p> <p>23 another sign. So, in other words, if a</p> <p>24 retailer signed contracts with Philip Morris</p> <p>25 and then Reynolds came out with a very similar</p>	<p style="text-align: right;">Page 113</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 in creating the principles for those</p> <p>3 contracts.</p> <p>4 Q. Okay. Have you reviewed contract</p> <p>5 between an Altria subsidiary and a retailer,</p> <p>6 in 22 years?</p> <p>7 A. Yes.</p> <p>8 Q. Which contract?</p> <p>9 A. I can't say exactly. I wouldn't</p> <p>10 even know how to name them. I couldn't</p> <p>11 describe it. I have seen cigarette contracts;</p> <p>12 I've seen moist snuff contracts.</p> <p>13 Q. When did you last review such a</p> <p>14 contract?</p> <p>15 A. I cannot remember the date.</p> <p>16 Q. Mr. Wexler, was it more than a year</p> <p>17 since you last reviewed an Altria contract</p> <p>18 with a retailer?</p> <p>19 A. It was probably more than a year</p> <p>20 ago.</p> <p>21 Q. Was it more than two years?</p> <p>22 A. You're getting to the point where I</p> <p>23 have to figure out the date and look at the</p> <p>24 calendar.</p> <p>25 Q. Okay. Mr. Wexler, I'm going to turn</p>

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2 to Paragraph 28. You say that convenience

3 stores are reluctant to give space to other

4 companies such as Turning Point.

5 A. It is my belief that C-stores are in

6 a position where they can't give enough space

7 to Turning Point because the contracts do not

8 have enough space left over for all the

9 competitors in the industry.

10 Q. I am going to load a document, or

11 send a document via Zoom chat.

12 A. Is it Number 7?

13 Q. Yes. For the record, this is your

14 Q32019 earnings call transcript. It's dated

15 November 1, 2019, and it's stamped Wexler EX 7.

16 Mr. Wexler, do you recognize this to

17 be Turning Point's Q3 2019 Earnings Call

18 Transcript?

19 A. As I've said before, on these

20 transcripts, I've never seen this form before,

21 but let me scroll through. If I read some of

22 my comments, I'll remember it.

23 Okay.

24 Q. Mr. Wexler, we can turn to the page

25 stamped 7-006. Mr. Purdy, the Chief Operating

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2 Officer of Turning Point, says, in the

3 paragraph in the middle of the point that

4 starts, "Moving to RipTide."

5 Do you see that?

6 A. Yes. This was the third quarter

7 call November '19?

8 Q. Yes. And in the middle of the page,

9 there's a paragraph where Mr. Purdy says,

10 "Moving to RipTide." Do you see that?

11 A. Yes.

12 Q. Mr. Purdy says that "U.S. retail's

13 footprint of RipTide has expanded by

14 approximately 7,000 stores, including two

15 large leading convenience store chains in just

16 the quarter." Do you see that?

17 A. Yes.

18 Q. So, Mr. Wexler, Turning Point,

19 despite your concern that you express in your

20 Declaration about access to space, Turning

21 Point was able to get RipTide into 7,000

22 additional stores in just a quarter, right?

23 A. Right, and about half of those

24 stores came from our introducing into

25 Speedway, in which we had to take the

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2 extraordinary step of taking a product off

3 their hand that they couldn't dispose of at

4 great cost, and also offer them extremely high

5 levels of promotional dollars and rebates that

6 basically made the -- took away any

7 profitability we possibly could get from

8 RipTide in order to do that.

9 And I'd also add that we have a

10 tried and true experience with our sales

11 force. As I think I said earlier, sales force

12 punches above its weight. We generally get

13 about a 40 percent hit rate on new products,

14 and RipTide was slower than that in getting

15 into C-stores. But we were able, through

16 spending a lot of money at fairly unprofitable

17 levels, get into Speedway, and we also got

18 into another major chain.

19 Q. Mr. Purdy didn't tell shareholders

20 about these concerns about getting the product

21 into Speedway or the fact that it was fairly

22 unprofitable, did he?

23 MR. FORD: Objection. Lacks

24 foundation.

25 You can answer, Larry.

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2 A. There are no words here to that

3 effect.

4 Q. In fact, he says -- if we look at

5 the third paragraph from the bottom, he says,

6 "All of us at TPB are especially excited with

7 not only our Nu-X products to date, but more

8 so with building momentum and enthusiasm of

9 our trade partners. Results to date are

10 encouraging, but only a shadow of what's to

11 come."

12 That sounds pretty positive, right?

13 MR. FORD: Objection. Vague.

14 MR. LEE: Objection to form.

15 Q. You can answer. I can repeat the

16 question.

17 Mr. Purdy sounds positive, right?

18 A. He's a fairly positive guy.

19 MR. FORD: Objection.

20 Q. Well, he was telling your

21 shareholders that the results to date are

22 encouraging. Is that not right?

23 A. Yeah, I don't know whether he's

24 talking about the CBD line or -- I can't speak

25 to what he's actually talking about in that

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<p style="text-align: right;">Page 118</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 paragraph.</p> <p>3 Q. Okay. And he says that the trade</p> <p>4 partners are also excited.</p> <p>5 Who are the trade partners?</p> <p>6 A. Wholesalers and retailers.</p> <p>7 Q. Including convenience stores?</p> <p>8 A. They're one of our trade classes we</p> <p>9 sell in.</p> <p>10 Q. I want to go back to the paragraph</p> <p>11 we started in, the paragraph starting "Moving</p> <p>12 to RipTide." Mr. Purdy is talking about</p> <p>13 RipTide there, and he says, "Early traction</p> <p>14 has been good."</p> <p>15 That's also a positive statement,</p> <p>16 right?</p> <p>17 MR. LEE: Objection to form.</p> <p>18 A. I don't know exactly what he's</p> <p>19 talking about in terms of, I don't know if</p> <p>20 that was in distribution, consumer comments.</p> <p>21 I don't know exactly where he stood there.</p> <p>22 Q. He didn't mention anything about</p> <p>23 troubles getting access to space at retailers,</p> <p>24 did he?</p> <p>25 MR. FORD: Objection. Vague.</p>	<p style="text-align: right;">Page 120</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 continuing --</p> <p>3 MR. FORD: Counsel, Counsel,</p> <p>4 Counsel, Counsel, no one is entitled to</p> <p>5 cut off my witness under any rule under</p> <p>6 any law. I'm never going to allow it.</p> <p>7 MR. SCHWARTZ: No one's trying to</p> <p>8 cut off your witness, but he's entitled to</p> <p>9 ask the question and to pursue getting an</p> <p>10 answer to his question. No one's trying</p> <p>11 to stop him from answering.</p> <p>12 You also shouldn't be speaking more</p> <p>13 than objection to form. No other coaching</p> <p>14 or otherwise is appropriate from any</p> <p>15 counselors in any deposition. We all know</p> <p>16 that. Thank you.</p> <p>17 I'll turn it back to Mr. Sowlati.</p> <p>18 MR. FORD: Go ahead with your</p> <p>19 answer, Larry.</p> <p>20 Q. Why don't I repeat the question</p> <p>21 because there was quite a bit of colloquy.</p> <p>22 My question was: Mr. Purdy did not</p> <p>23 mention to shareholders any concerns about</p> <p>24 getting access to space, did he?</p> <p>25 MR. FORD: Objection.</p>
<p style="text-align: right;">Page 119</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. Okay. So, let's back up.</p> <p>3 Q. I can repeat the question because I</p> <p>4 know there was an objection.</p> <p>5 He didn't mention anything about</p> <p>6 difficulty getting access to shelf space, did</p> <p>7 he?</p> <p>8 MR. FORD: Objection.</p> <p>9 A. But let's go back and derive the</p> <p>10 context --</p> <p>11 Q. Mr. --</p> <p>12 MR. FORD: Hold on. Don't interrupt</p> <p>13 him. He heard your question, and he's</p> <p>14 going to answer, and he's always entitled</p> <p>15 to provide context.</p> <p>16 Go ahead, Mr. Wexler.</p> <p>17 MR. SCHWARTZ: Just to be clear, we</p> <p>18 really have to stop the speaking</p> <p>19 objections. That's not appropriate; you</p> <p>20 know that. The person taking the</p> <p>21 deposition is entitled to ask the</p> <p>22 questions and direct the witness to answer</p> <p>23 them. You can object to form. He can ask</p> <p>24 the questions. That's all we should be</p> <p>25 saying here, and it should stop from</p>	<p style="text-align: right;">Page 121</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 MR. LEE: Objection to form.</p> <p>3 A. So again, let me try to give a</p> <p>4 context. We -- it is not unusual -- in fact,</p> <p>5 it is normal for us to have troubles getting</p> <p>6 shelf space in C-stores. In fact, we have a</p> <p>7 product, our Stoker's chew -- our Stoker's</p> <p>8 moist, that is the fastest growing product in</p> <p>9 moist snuff. It has growing continuously for</p> <p>10 the 10, 12 years that it has been in</p> <p>11 existence. And despite that and despite that</p> <p>12 we keep on gaining share, we have trouble</p> <p>13 getting shelf space.</p> <p>14 So, the fact that he didn't mention</p> <p>15 it is because that is our reality. That is</p> <p>16 what we live with every day. We have trouble</p> <p>17 breaking into the racks, we have trouble</p> <p>18 breaking into the stores because most of the</p> <p>19 space is contracted out, and we're fighting</p> <p>20 over the crumbs with the other competitors.</p> <p>21 So he didn't mention it, but I</p> <p>22 imagine it's certainly within the context of</p> <p>23 what he thought. But he wouldn't mention it</p> <p>24 because that is our reality.</p> <p>25 Q. Mr. Wexler, looking at the</p>

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<p style="text-align: right;">Page 122</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 transcript right in front of you, you can't</p> <p>3 point to a single statement by Mr. Wexler</p> <p>4 concerning shelf space, can you?</p> <p>5 MR. LEE: Objection to form.</p> <p>6 MR. FORD: Objection.</p> <p>7 MR. SOWLATI: I didn't even hear the</p> <p>8 witness speak.</p> <p>9 A. I don't think I said this.</p> <p>10 Q. Did Mr. Purdy say anything about</p> <p>11 shelf space, in the transcript right in front</p> <p>12 of you?</p> <p>13 MR. FORD: Objection.</p> <p>14 A. I can read it. Hold on. I'll have</p> <p>15 to go back to the beginning of this to make</p> <p>16 sure he didn't cover it earlier.</p> <p>17 It appears he didn't mention</p> <p>18 anything about shelf space.</p> <p>19 Q. In fact, he said, "Early traction</p> <p>20 has been good."</p> <p>21 That's what he says, right?</p> <p>22 A. Those are the words he used. I</p> <p>23 don't know the context in which he used them.</p> <p>24 He can speak to that.</p> <p>25 Q. Let's go to another document. I'm</p>	<p style="text-align: right;">Page 124</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 2019." So just to confirm --</p> <p>3 A. Where are you in the chart?</p> <p>4 Q. I am not in the chart. I am in the</p> <p>5 middle of the page. It says, "Programs</p> <p>6 Currently Running," and the second to the top</p> <p>7 says, "RipTide promo through 2019."</p> <p>8 Do you see that?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. So, just to confirm, at this</p> <p>11 time, RipTide was at Speedway?</p> <p>12 A. I'm sorry. You broke up.</p> <p>13 Q. Just to confirm that in October</p> <p>14 2019, RipTide was being sold at Speedway?</p> <p>15 A. Yes.</p> <p>16 Q. And Speedway is -- sorry.</p> <p>17 A. Apparently, that's the case.</p> <p>18 Q. And Speedway is a leading</p> <p>19 convenience store chain, right?</p> <p>20 A. Yes.</p> <p>21 Q. Can we turn to the page stamped</p> <p>22 8-024.</p> <p>23 A. Yes. Yes.</p> <p>24 Q. Mr. Wexler, RipTide is a leading</p> <p>25 convenience store chain, right -- sorry.</p>
<p style="text-align: right;">Page 123</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 going to load that up. It's also a large</p> <p>3 document, 17 megabytes, so it's going to take</p> <p>4 a minute.</p> <p>5 While that loads up for you, I'm</p> <p>6 going to state for the record, this is the</p> <p>7 National Account Review dated October 23,</p> <p>8 2019. It's stamped Wexler EX 8.</p> <p>9 Again, I'm only going to be going</p> <p>10 through a few slides, but you can definitely</p> <p>11 scan through it. If you can, please let us</p> <p>12 know when you're done.</p> <p>13 A. I just got it downloaded. Let me</p> <p>14 just take a look at it.</p> <p>15 Okay.</p> <p>16 Q. Mr. Wexler, are you familiar with</p> <p>17 this document?</p> <p>18 A. It looks like what the National</p> <p>19 Account guys do from time to time;</p> <p>20 presentations they do from time to time. I</p> <p>21 don't remember this specific document.</p> <p>22 Q. Okay. Can we turn to the page</p> <p>23 stamped 8-003.</p> <p>24 A. Okay. I'm there.</p> <p>25 Q. So, it says, "RipTide promo through</p>	<p style="text-align: right;">Page 125</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. RipTide?</p> <p>3 Q. Strike that. RipTide may be in the</p> <p>4 future. Strike that.</p> <p>5 My question is: QuikTrip is a</p> <p>6 leading convenience store chain, right?</p> <p>7 A. Yes.</p> <p>8 Q. Can we turn to the next page?</p> <p>9 That's the page stamped 8-025.</p> <p>10 A. Yes.</p> <p>11 Q. Now, in the right, I think what</p> <p>12 you're doing here is -- or the people that put</p> <p>13 this together is, they're circling in yellow</p> <p>14 Turning Point's products. And on the one on</p> <p>15 the right, it's in small letters, but it says,</p> <p>16 "RipTide 99 cents."</p> <p>17 Do you see that?</p> <p>18 A. To be honest, I think I need a new</p> <p>19 prescription for my glasses, and my sales guys</p> <p>20 tend to use pictures that are far too small</p> <p>21 for people with my eyesight. I cannot read</p> <p>22 that at all.</p> <p>23 Q. Okay. Let's go to the far left.</p> <p>24 There is a picture of a door.</p> <p>25 Do you see that?</p>

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<p style="text-align: right;">Page 126</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. Yeah, I do.</p> <p>3 Q. And do you see there, it says,</p> <p>4 "RipTide" in the middle of the page, and on</p> <p>5 the door there's an advertisement for that,</p> <p>6 "99 cents"?</p> <p>7 A. Yes.</p> <p>8 Q. So, at this time in October 2019,</p> <p>9 RipTide was being sold at QuikTrip; is that</p> <p>10 right?</p> <p>11 A. Apparently, yes.</p> <p>12 Q. Okay.</p> <p>13 A. Do we have a date when this was</p> <p>14 created?</p> <p>15 Q. This is October 2019.</p> <p>16 A. Okay.</p> <p>17 Q. Actually, I could have made this</p> <p>18 easier for you if we go to the next page, the</p> <p>19 page stamped 8-026. It says, "Currently</p> <p>20 QuikTrip is carrying RipTide Blue Razz,</p> <p>21 Tropical, Berry Crunch, Mango, and Mint, in</p> <p>22 both 2.4 percent and 5 percent."</p> <p>23 Do you see that?</p> <p>24 A. Yes.</p> <p>25 Q. So, let's go to the next page. It's</p>	<p style="text-align: right;">Page 128</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 it moves a little east from there, as well.</p> <p>3 Q. You were selling RipTide at Buc-ee's</p> <p>4 at this time, right?</p> <p>5 A. Yes.</p> <p>6 Q. Okay. Actually, if we look at it,</p> <p>7 you can see on the right, there's a photo that</p> <p>8 shows you, RipTide, and on the left of it, on</p> <p>9 the very exact same level of shelf space, we</p> <p>10 see that Reynolds Ciro product is on there.</p> <p>11 Do you see that?</p> <p>12 A. Which picture are you looking at?</p> <p>13 Q. I'm looking at the picture on the</p> <p>14 right. You can see the RipTide product on the</p> <p>15 left, and then on the shelf over on the same</p> <p>16 level, you see Ciro. Do you see that?</p> <p>17 A. You may be able to see it; I can't.</p> <p>18 Q. I'll represent to you that that's</p> <p>19 Ciro, which is a Vuse product.</p> <p>20 Let's turn to 8-031.</p> <p>21 A. Okay.</p> <p>22 Q. The note on Buc-ee's says, "Our year</p> <p>23 commitment with them will be up in April and</p> <p>24 we will need to show a strong enough share to</p> <p>25 continue to have the products in the account."</p>
<p style="text-align: right;">Page 127</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 the page stamped 8-027.</p> <p>3 A. Okay.</p> <p>4 Q. The slide says that you currently</p> <p>5 have a commitment from QuikTrip for RipTide</p> <p>6 and Stoker's to be in the stores until August</p> <p>7 2020. Do you see that?</p> <p>8 A. Yes.</p> <p>9 Q. After that, the slide says, "Your</p> <p>10 arrangement for the following would be highly</p> <p>11 driven by the performance of both products."</p> <p>12 Do you see that, as well?</p> <p>13 A. Yes.</p> <p>14 Q. Mr. Wexler, for a retailer like</p> <p>15 QuikTrip that's deciding whether to stock an</p> <p>16 e-vapor product and renew a contract, the</p> <p>17 product's performance matters, right?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. Can we turn to the page</p> <p>20 stamped 8-029.</p> <p>21 What is Buc-ee's?</p> <p>22 A. What is Buc-ee's?</p> <p>23 Q. Yes.</p> <p>24 A. It's a high-volume chain generally</p> <p>25 located between -- in the Texas and -- I think</p>	<p style="text-align: right;">Page 129</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Do you see that?</p> <p>3 A. Yes.</p> <p>4 Q. Mr. Wexler, you can put that</p> <p>5 document to the side.</p> <p>6 A. Okay.</p> <p>7 Q. I'd like to send you another</p> <p>8 document. It should be available to you now.</p> <p>9 A. It just came in. Hold on.</p> <p>10 Q. Just for the record, this document</p> <p>11 is stamped Wexler Exhibit 9. This is actually</p> <p>12 RipTide's website, which I'll represent to you</p> <p>13 I accessed last week and took a screenshot of</p> <p>14 my computer.</p> <p>15 A. It didn't open, so let me just go</p> <p>16 back and see if I can get it open.</p> <p>17 Okay.</p> <p>18 Q. Just to repeat, this is actually</p> <p>19 RipTide's website, which I'll represent that I</p> <p>20 accessed last week and took a screenshot of.</p> <p>21 You guys have a handy-store locator, and I</p> <p>22 decided to put my New York zip code in there,</p> <p>23 which is 10128, which is the Upper East Side</p> <p>24 of Manhattan.</p> <p>25 This shows that you were able to</p>

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<p style="text-align: right;">Page 130</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 secure space at 7-Eleven and Duane Reade,</p> <p>3 right?</p> <p>4 A. That's what it says.</p> <p>5 Q. I'm going to load one more</p> <p>6 document --</p> <p>7 A. This was just recently?</p> <p>8 Q. I accessed this last week.</p> <p>9 A. Okay.</p> <p>10 Q. Mr. Wexler, you can put that</p> <p>11 document to the side.</p> <p>12 Mr. Wexler, JUUL was able to break</p> <p>13 through, in part, due to its innovative</p> <p>14 products, right?</p> <p>15 A. JUUL was out in front of the market.</p> <p>16 Q. Right. And so my question was:</p> <p>17 JUUL was able to break through, in part, due</p> <p>18 to its innovative products, right?</p> <p>19 A. Well, it was innovative in the</p> <p>20 context that JUUL is one of the first pod</p> <p>21 systems to get widespread distribution. So</p> <p>22 yeah, I would call that, in that context,</p> <p>23 innovative.</p> <p>24 Q. It had a better product for a lot of</p> <p>25 consumers than what was out in the market at</p>	<p style="text-align: right;">Page 132</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 that.</p> <p>3 Q. Mr. Wexler, I thought you are -- I</p> <p>4 mean, you testified earlier that you have</p> <p>5 experience with convenience stores. Is that</p> <p>6 not right?</p> <p>7 MR. FORD: Objection.</p> <p>8 Argumentative.</p> <p>9 A. I'm sorry. I'm trying to be helpful</p> <p>10 here, but you're confusing me because you</p> <p>11 asked me if JUUL had early success in vape</p> <p>12 shops, and then you just said that I know a</p> <p>13 lot about C-stores.</p> <p>14 Q. I'll repeat my question. You're</p> <p>15 aware that JUUL saw significant success in</p> <p>16 vape stores before it saw significant success</p> <p>17 in convenience stores, right?</p> <p>18 MR. FORD: Objection.</p> <p>19 MR. LEE: Objection.</p> <p>20 A. And I'm saying that I don't have</p> <p>21 data that tells me that JUUL was very</p> <p>22 successful in the broad class of vape shops</p> <p>23 before it was successful in the broad class of</p> <p>24 C-stores. The only thing I can speak to is</p> <p>25 that I know that Vapor Shark was one of the</p>
<p style="text-align: right;">Page 131</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 that time, right?</p> <p>3 MR. FORD: Objection.</p> <p>4 MR. LEE: Objection to form.</p> <p>5 A. I can't answer for every consumer.</p> <p>6 I can say there were a lot of consumers buying</p> <p>7 the product.</p> <p>8 Q. I'm sure you're aware of this, but</p> <p>9 JUUL was first introduced in vape stores,</p> <p>10 right?</p> <p>11 A. I cannot speak to whether it was</p> <p>12 first introduced in vape stores. I do know</p> <p>13 that Vapor Shark was pretty early in JUUL's</p> <p>14 evolution, in terms of getting the product,</p> <p>15 and they had vape shops.</p> <p>16 Q. You're aware that JUUL saw</p> <p>17 significant success in vape shops before it</p> <p>18 saw significant success in convenience stores,</p> <p>19 right?</p> <p>20 MR. LEE: Objection to form.</p> <p>21 MR. FORD: Objection.</p> <p>22 A. I can't answer that question.</p> <p>23 Q. Why can't you answer that question?</p> <p>24 A. I don't have any data that says</p> <p>25 that. I've never seen any data that said</p>	<p style="text-align: right;">Page 133</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 companies that had an agreement with the --</p> <p>3 they had it before we bought them. They had</p> <p>4 an agreement with JUUL. They were selling</p> <p>5 JUUL inside their stores, and at one point</p> <p>6 JUUL represented about 17 percent of their</p> <p>7 sales. That's the only data that I have that</p> <p>8 I can speak to.</p> <p>9 Q. Mr. Wexler, scrutiny around</p> <p>10 e-vaping, regulatory scrutiny around e-vaping</p> <p>11 really started to grow in late 2018, right?</p> <p>12 A. I don't know at what point it -- I</p> <p>13 don't know how to measure scrutiny and whether</p> <p>14 it grew or didn't grow. I've been in the</p> <p>15 tobacco business, and there's been scrutiny in</p> <p>16 the tobacco business ever since I've been in</p> <p>17 it. And yes, there was scrutiny in vape. I</p> <p>18 don't know when it started growing. I don't</p> <p>19 know when it influxed.</p> <p>20 Q. Well, I'm just looking at Paragraph</p> <p>21 29 of your Declaration where you say, "at the</p> <p>22 time that JUUL took off there was not much</p> <p>23 regulatory scrutiny." So, I'm just asking you</p> <p>24 when that scrutiny began.</p> <p>25 A. And I can't put a date on it. It</p>



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<p style="text-align: right;">Page 134</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 just, you know -- look, when vape products</p> <p>3 first started, people perceived them as being</p> <p>4 an alternative to cigarettes that had a</p> <p>5 difference in perceived health. There was not</p> <p>6 a lot of history on them.</p> <p>7 I think as they became popular,</p> <p>8 there was some correlation with their</p> <p>9 popularity and the scrutiny that they</p> <p>10 received. I don't remember if it was 2018 or</p> <p>11 2016 or when. I don't know what thresholds</p> <p>12 we're talking about. I'm trying to be</p> <p>13 helpful. I just don't know how to answer that</p> <p>14 question.</p> <p>15 Q. Are you aware that in</p> <p>16 September 2018, Commissioner Scott Gottlieb</p> <p>17 sent a letter to various e-vapor</p> <p>18 manufacturers?</p> <p>19 A. I couldn't tell you that it was</p> <p>20 September '18. I do remember there was a</p> <p>21 letter that was sent out.</p> <p>22 Q. Now, even after that date, we just</p> <p>23 reviewed, you were able to get access to shelf</p> <p>24 space at major retailers, right?</p> <p>25 A. We were able to get access -- we</p>	<p style="text-align: right;">Page 136</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 franchise in some cases almost like an</p> <p>3 independent. It wasn't really chain</p> <p>4 authorized. It was simply that one of our</p> <p>5 sales reps sold into one franchisee the</p> <p>6 product.</p> <p>7 MR. SOWLATI: I'm just loading a</p> <p>8 document, Wexler Exhibit 10.</p> <p>9 Q. This is a screenshot of RipTide's</p> <p>10 website that I actually took this week, two</p> <p>11 days ago actually. Do you have that open?</p> <p>12 A. I'm trying.</p> <p>13 Yes.</p> <p>14 Q. Okay. 5201 Interchange Way,</p> <p>15 Louisville, Kentucky is the headquarters of</p> <p>16 Turning Point, right?</p> <p>17 A. Yes.</p> <p>18 Q. And what I see here is that you were</p> <p>19 being sold -- or RipTide's being sold at</p> <p>20 Circle K and Dollar General, right?</p> <p>21 A. They're on the list, yes.</p> <p>22 Q. We can put that document aside.</p> <p>23 Mr. Wexler, are you familiar with</p> <p>24 the NJOY product?</p> <p>25 A. I've heard of it.</p>
<p style="text-align: right;">Page 135</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 went through that chart. It was interesting.</p> <p>3 You skipped through all the other major</p> <p>4 retailers that we didn't get access to. But</p> <p>5 yes, there were two major retailers that we</p> <p>6 were able to get access to. Speedway was a</p> <p>7 very specific example where we had to go to</p> <p>8 enormous lengths to take care of their problem</p> <p>9 in order to get that access.</p> <p>10 Q. To be clear, you also got access to</p> <p>11 Buc-ee's, in addition to QuikTrip and</p> <p>12 Speedway, right?</p> <p>13 A. Yeah, we did.</p> <p>14 Q. And then we just saw a document</p> <p>15 which shows that your products are being sold</p> <p>16 at a 7-Eleven on the Upper East Side, right?</p> <p>17 A. Yeah, but 7-Eleven is kind of</p> <p>18 misnomer. We were not authorized at 7-Eleven</p> <p>19 Corporate, and they run a franchise system</p> <p>20 where the franchises are allowed to take on</p> <p>21 other products. I think they were allowed to</p> <p>22 sell a certain percentage of the products. I</p> <p>23 don't know what that percentage is anymore.</p> <p>24 It used to be 5 percent.</p> <p>25 And so, you can think of a 7-Eleven</p>	<p style="text-align: right;">Page 137</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. You're aware that NJOY is not owned</p> <p>3 by a major tobacco company, right?</p> <p>4 A. Yes.</p> <p>5 Q. And yet it has seen significant</p> <p>6 success in growth in the last couple of years,</p> <p>7 right?</p> <p>8 MR. FORD: Objection.</p> <p>9 MR. LEE: Objection.</p> <p>10 A. I have seen that they've sold</p> <p>11 product over the last couple of years, yes.</p> <p>12 Q. At major convenience stores?</p> <p>13 MR. FORD: Objection.</p> <p>14 A. They show up in the data of selling</p> <p>15 product in major convenience stores, yes.</p> <p>16 Q. Mr. Wexler, you're familiar with the</p> <p>17 Premarket Tobacco Authorization, or PMTA</p> <p>18 process, right?</p> <p>19 A. Yes.</p> <p>20 Q. What is the PMTA process?</p> <p>21 A. In 2009, the FDA was given</p> <p>22 jurisdiction by legislation over cigarettes</p> <p>23 and oral tobacco. And in that legislation,</p> <p>24 they had the opportunity to deem other tobacco</p> <p>25 products under this jurisdiction. They did so</p>

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<p style="text-align: right;">Page 138</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 in 2016.</p> <p>3 As part of that deeming process,</p> <p>4 they basically said that any product that</p> <p>5 wasn't on the market in 2007 in yet what is</p> <p>6 called a grandfather status, had to go through</p> <p>7 a process through the FDA in order to get</p> <p>8 authorization to stay on the market.</p> <p>9 (Discussion held off the record.)</p> <p>10 A. Where was I? So, in 2016, they</p> <p>11 basically said that they deemed the other OTB</p> <p>12 products, including vape, and that any product</p> <p>13 that wasn't on the market before February</p> <p>14 something, 2007 had to go through a process</p> <p>15 called a PMTA, Premarket Tobacco</p> <p>16 Authorization, in order to stay in the market.</p> <p>17 And they had a provision that said</p> <p>18 that products that are on the market as of</p> <p>19 this date in August, I think it was</p> <p>20 August 16th, I may be off a couple of days,</p> <p>21 could stay on the market. And they set a time</p> <p>22 period where they had until 2022 to submit</p> <p>23 this application. Through various changes in</p> <p>24 political jockeying, that date moved a couple</p> <p>25 of times. Then there was a lawsuit in</p>	<p style="text-align: right;">Page 140</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 dollars on the PMTA process, including</p> <p>3 RipTide's PMTA, right?</p> <p>4 A. That is not correct. We spent a lot</p> <p>5 of money -- I believe what we've told to</p> <p>6 everybody and it's fairly close to what we</p> <p>7 actually spent, I don't know the exact number</p> <p>8 that we actually spent, it's roughly</p> <p>9 \$17 million. RipTide products were not</p> <p>10 included in that process.</p> <p>11 Q. Sorry. Can you explain a little bit</p> <p>12 more about RipTide not being included in that</p> <p>13 process?</p> <p>14 A. We did not submit applications for</p> <p>15 RipTide in September of 2020.</p> <p>16 Q. Mr. Wexler, what work have you done</p> <p>17 on that process for RipTide's PMTA?</p> <p>18 A. We have done a lot of exploratory</p> <p>19 work; scoping out what we'd have to do to</p> <p>20 submit an application for RipTide.</p> <p>21 Q. Okay. Can I show you a document?</p> <p>22 A. Can I just explain something?</p> <p>23 There is some confusion as to</p> <p>24 whether or not we need to put an application</p> <p>25 in for RipTide, and that's part of the dilemma</p>
<p style="text-align: right;">Page 139</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Maryland where they established the date as</p> <p>3 September 2020 as the date when these</p> <p>4 applications were due.</p> <p>5 These applications are very</p> <p>6 extensive. They require an analysis of a lot</p> <p>7 of data, both physical data, which includes</p> <p>8 the PK tests that I think you mentioned</p> <p>9 earlier, as well as evaluating the vape for</p> <p>10 potential harmful constituents, as well as</p> <p>11 social data in terms of who uses the product.</p> <p>12 You have to do survey work on labels. It's a</p> <p>13 very extensive thing and a very expensive</p> <p>14 process.</p> <p>15 Q. Thank you for that. Just for</p> <p>16 clarity of the record, I think you said</p> <p>17 August 16th was the date that products needed</p> <p>18 to be on the market. It's actually</p> <p>19 August 8th.</p> <p>20 A. Okay. I apologize.</p> <p>21 Q. No, no need to I apologize.</p> <p>22 A. A lot of dates to keep straight</p> <p>23 here.</p> <p>24 Q. No, I mean, you did pretty good.</p> <p>25 In 2020, you spent millions of</p>	<p style="text-align: right;">Page 141</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 that we had, because the enabling law gave the</p> <p>3 FDA jurisdiction over tobacco-based nicotine,</p> <p>4 and RipTide does not use tobacco-based</p> <p>5 nicotine. It uses synthetic nicotine; that's</p> <p>6 part of the NicTech system.</p> <p>7 So, we did do exploratory work. We</p> <p>8 decided not to pursue the PMTA, but certainly</p> <p>9 scoped out what would be required to do it.</p> <p>10 Q. So just to confirm, RipTide is still</p> <p>11 in the market, then, because it is your view</p> <p>12 that you do not need to submit a PMTA?</p> <p>13 A. Yeah, it is our view that the FDA</p> <p>14 would not even look at the RipTide because it</p> <p>15 doesn't have jurisdiction over it.</p> <p>16 Q. I just submitted a document, Wexler</p> <p>17 Exhibit 12.</p> <p>18 A. Okay. Let me take a look at it.</p> <p>19 MR. SOWLATI: Just for the record,</p> <p>20 this is Wexler EX 12. This document is a</p> <p>21 Turning Point press release dated</p> <p>22 October 27, 2020.</p> <p>23 Q. Can you please let me know when</p> <p>24 you've had a chance to take a look at it.</p> <p>25 A. Okay.</p>

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<p style="text-align: right;">Page 142</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. I'm just going to focus you on the</p> <p>3 page stamped 12-002, the third paragraph from</p> <p>4 the top. You see "On September 8th"?</p> <p>5 Turning Point says, in its press</p> <p>6 release, "On September 8, 2020, TPB announced</p> <p>7 that it submitted to the U.S. Food and Drug</p> <p>8 Administration premarket tobacco applications</p> <p>9 covering 250 products." Then going down, you</p> <p>10 say, "the PMTA covered a broad assortment of</p> <p>11 products in the vapor category, including,"</p> <p>12 and at the end of that sentence, it says, "a</p> <p>13 closed system e-cigarette."</p> <p>14 What is that referring to?</p> <p>15 A. Wait, I'm trying to find where it</p> <p>16 says that.</p> <p>17 Q. Sure. It's the-second-to-last</p> <p>18 sentence of that paragraph.</p> <p>19 A. That's a long sentence, and it's</p> <p>20 terribly constructed. Hold on.</p> <p>21 Okay. What was your question?</p> <p>22 Q. It says that the PMTAs that you</p> <p>23 submitted covered a broad assortment of</p> <p>24 products in the vapor category, including, at</p> <p>25 the end of the sentence, it says a closed</p>	<p style="text-align: right;">Page 144</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Is it Mr. Cushman or Ms. Cushman? I</p> <p>3 just want to be precise.</p> <p>4 A. I did not say Mr. Cushman.</p> <p>5 Q. Okay.</p> <p>6 A. She is not a Mr.</p> <p>7 Q. Okay. Great. I just wanted to</p> <p>8 clarify.</p> <p>9 A. I thought you were saying if she</p> <p>10 wanted to be called Ms. or Mrs., you know, and</p> <p>11 you never know these days the correct</p> <p>12 terminology.</p> <p>13 Q. She notes that, "Turning Point is</p> <p>14 just testing the highest nicotine strengths</p> <p>15 for HPHCs to cut costs."</p> <p>16 A. Wait, what paragraph are you on?</p> <p>17 Q. This is Paragraph 17.</p> <p>18 A. Okay. What's the question?</p> <p>19 Q. So, she says there, "Turning Point</p> <p>20 is just testing the highest nicotine strengths</p> <p>21 for HPHCs to cut costs."</p> <p>22 A. Yes, that's what she says.</p> <p>23 Q. HPHCs refers to harmful and</p> <p>24 potentially harmful compounds, right?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 143</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 system e-cigarette.</p> <p>3 I'm just wondering what closed</p> <p>4 system e-cigarette you're referring to there.</p> <p>5 A. South Beach Smoke.</p> <p>6 Q. I am going to load one more</p> <p>7 document, and I'm hoping it can be quick, and</p> <p>8 then hopefully we can go on a lunch break.</p> <p>9 Does that work?</p> <p>10 A. It will work for me.</p> <p>11 Q. Mr. Wexler, as we discussed earlier,</p> <p>12 one of your colleagues, Brittani Cushman,</p> <p>13 submitted a Declaration, which I've just sent</p> <p>14 you by Zoom chat. It's stamped Wexler</p> <p>15 Exhibit 11. I'm not going to spend a lot of</p> <p>16 time with this. I just have a few questions.</p> <p>17 Can you please let me know when that's loaded?</p> <p>18 A. It's loaded.</p> <p>19 Q. Mr. Wexler, have you seen this</p> <p>20 document before?</p> <p>21 A. I don't remember seeing it.</p> <p>22 Q. Just to begin, who is Ms. Cushman?</p> <p>23 A. She is currently my general counsel.</p> <p>24 Q. Now, if you can, turn to Paragraph</p> <p>25 17 of Ms. Cushman's Declaration -- sorry.</p>	<p style="text-align: right;">Page 145</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. Why did you choose to focus on the</p> <p>3 highest nicotine strengths?</p> <p>4 A. Okay. So, the purpose of this</p> <p>5 testing is to see what exposure a consumer</p> <p>6 gets in consuming the products. And there</p> <p>7 are -- as I've talked about particularly with</p> <p>8 open systems, there are enormous variety of</p> <p>9 flavors and nicotine strengths. We felt that</p> <p>10 by testing the highest levels of nicotine</p> <p>11 strengths, those are the products that have</p> <p>12 most -- more of the ingredients than any other</p> <p>13 product. So, it would be sort of a worst-case</p> <p>14 scenario.</p> <p>15 So, if there was going to be the</p> <p>16 presence of things in the products that were</p> <p>17 problematic, they were most likely to show up</p> <p>18 with the highest nicotine products. And so,</p> <p>19 we felt as though that was the most effective</p> <p>20 way to get to the answers that the FDA was</p> <p>21 seeking.</p> <p>22 MR. SOWLATI: Thank you, Mr. Wexler,</p> <p>23 for your patience and time. For now, I</p> <p>24 don't have any further questions, so maybe</p> <p>25 we can go to a lunch break.</p>

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<p style="text-align: right;">Page 146</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 MR. LEE: Hold on, hold on. I don't</p> <p>3 think I have that many questions. So, if</p> <p>4 Mr. Wexler is okay, not too hungry and can</p> <p>5 go make another hour, I think maybe we can</p> <p>6 continue after short break.</p> <p>7 THE WITNESS: If it's all right with</p> <p>8 you --</p> <p>9 MR. FORD: We should go off the</p> <p>10 record.</p> <p>11 (Discussion held off the record.)</p> <p>12 (Luncheon recess taken at</p> <p>13 12:30 p.m.)</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 148</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. Yes.</p> <p>3 Q. Can you explain what was the V2</p> <p>4 product a little bit?</p> <p>5 A. The V2 product was an early form of</p> <p>6 Cigalike product. It was principally sold</p> <p>7 online by a company called VMR, and they came</p> <p>8 to us and asked us if we would be willing to</p> <p>9 pick up retail distribution for the product</p> <p>10 and take it to retail C-stores, tobacco</p> <p>11 outlets. It was a fairly standard Cigalike</p> <p>12 product.</p> <p>13 Q. And do you recall when was the time</p> <p>14 frame, approximately, about that discussion?</p> <p>15 A. Well, the discussion went on for a</p> <p>16 while, and I think we started implementing in</p> <p>17 2013, I think.</p> <p>18 Q. Thank you.</p> <p>19 Mr. Wexler, you mentioned that after</p> <p>20 Turning Point had been selling the V2 product</p> <p>21 you just described, the company that</p> <p>22 manufactured V2 product was acquired by</p> <p>23 another company, correct?</p> <p>24 A. Yes.</p> <p>25 Q. Who acquired that company from the</p>
<p style="text-align: right;">Page 147</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A F T E R N O O N S E S S I O N</p> <p>3 (Time noted: 1:18 p.m.)</p> <p>4 L A R R Y W E X L E R,</p> <p>5 resumed and testified as follows:</p> <p>6 EXAMINATION BY</p> <p>7 MR. LEE:</p> <p>8 Q. Good afternoon, Mr. Wexler. I hope</p> <p>9 you had a nice lunch.</p> <p>10 A. I enjoyed my sandwich. Thank you.</p> <p>11 Q. Great. My name is Joonsuk Lee, I'm</p> <p>12 an attorney with the Federal Trade Commission,</p> <p>13 and I'm going to ask you some questions. I</p> <p>14 may jump around a little bit because Counsel</p> <p>15 has covered a number of areas that I would</p> <p>16 otherwise cover. So, if you need a frame of</p> <p>17 reference for any of my questions, just say,</p> <p>18 back up a second, and tell me what we are</p> <p>19 talking about here before I jump in.</p> <p>20 Is that okay?</p> <p>21 A. Thank you. I appreciate that.</p> <p>22 Q. Great. Do you recall that earlier</p> <p>23 in the morning today, you discussed a product</p> <p>24 named V2 which Turning Point had distributed?</p> <p>25 Do you recall that?</p>	<p style="text-align: right;">Page 149</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 manufacturer V2?</p> <p>3 A. JUUL, I don't know if they're called</p> <p>4 JUUL Inc. or JUUL Company, but JUUL purchased</p> <p>5 VMR. They bought the whole -- they didn't</p> <p>6 just buy the product. I think they bought the</p> <p>7 whole company.</p> <p>8 Q. Okay. Thank you for that</p> <p>9 clarification.</p> <p>10 And you also mentioned earlier today</p> <p>11 that after that acquisition by JUUL of the</p> <p>12 company that manufactures V2, Turning Point</p> <p>13 Brand was shut off, that was your language, to</p> <p>14 sell the V2 product, correct?</p> <p>15 MR. SOWLATI: Objection to form.</p> <p>16 A. What does that mean?</p> <p>17 MR. FORD: You can go ahead and</p> <p>18 answer.</p> <p>19 Counsel for Altria is stating an</p> <p>20 objection for the record. That's all.</p> <p>21 A. So, like, in most contracts, the</p> <p>22 contract with VMR had divorce provisions.</p> <p>23 Sometimes, you spend more time on divorce</p> <p>24 provisions than you do on the operating</p> <p>25 provisions.</p>

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2 We were very concerned that we would

3 build a retail presence for the product and

4 then VMR would pull the product from us. So,

5 there were a number of provisions in there to

6 give us time to sell through our inventory and

7 also some provisions that if VMR was sold,

8 that we would get a portion of the proceeds of

9 the sale.

10 Shortly after JUUL bought VMR, we

11 were given notice by JUUL that we could sell

12 out the inventory that we had on hand for a

13 certain period and that they would be no

14 longer supplying us with any replenishment.

15 So, after going out and getting 20, 30,000

16 stores, more, putting displays out, creating a

17 consumer base, the product was taken from us.

18 Q. Okay. Thank you. When you say 20

19 to 30 stores, what type of stores are you

20 referring to?

21 MR. FORD: Twenty to 30,000.

22 MR. LEE: Sorry about that. Let me

23 restart.

24 Q. When you say, "20 to 30,000 stores,"

25 what type of stores are you referring to?

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2 A. It would be the stores that are

3 normal in our distribution platform. They

4 were principally C-stores and tobacco outlets.

5 Q. When you say, "C-stores and tobacco

6 outlets," they are different from vape shops,

7 correct?

8 A. Yes. We did not distribute V2 in --

9 it may have gotten into some vape shops, but

10 we had no program to put them into vape shops.

11 Q. Why not?

12 A. They were a closed system product.

13 We believe the markets are somewhat different

14 and that it was more likely someone, on a

15 product like V2, would either buy them online

16 or buy them in C-stores. The products

17 themselves cannot have -- we talked about this

18 earlier. The products themselves didn't

19 really have the kind of experience that people

20 in open systems were looking for.

21 Q. Thank you.

22 Changing the topic a little here,

23 Turning Point Brands have been distributing

24 vape products to vape shops, correct?

25 A. Beginning in 2016 when we bought

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2 Vapor Beast, the principal business of Vapor

3 Beast was distributing products to vape shops.

4 Before that, we had no business. We didn't

5 spend any time in vape shops before 2016.

6 Q. Okay. Thank you.

7 Since 2016, Turning Point Brands

8 have been involved in distributing vape

9 products to vape shops, correct?

10 A. Yes. In 2016 we bought Vapor Beast,

11 and then shortly thereafter, we bought Vapor

12 Shark, which had a small distribution

13 business. They were a little more B2C, and

14 they had retail operations.

15 Then we bought Vapor Supply in 2017,

16 and they also had a wholesale business that

17 shifted to vape shops. And then we bought

18 IVG, which was mostly a B2C, but they also had

19 a wholesale business that sold to vape shops.

20 Q. Thank you.

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

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2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 Q. Thank you.

13 Based on your experience, how do you

14 describe the demographics of the customers who

15 come to Turning Point Brands' vape shops?

16 MR. SOWLATI: Objection to form.

17 MR. FORD: Objection.

18 A. In my -- I did not spend a lot of

19 time inside the retail stores. It was my

20 impression that the demographics of the people

21 who came to the stores were older. I know

22 from our B2C operation, which also deals with

23 open systems, that the demographics, the

24 average age of our consumers in one of our

25 product lines is 55; another one is 48. So,

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<p style="text-align: right;">Page 154</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 they're somewhere in that age bracket.</p> <p>3 What I saw in the stores -- they</p> <p>4 didn't do any studies, so this is not speaking</p> <p>5 with any explicit data. My impression was</p> <p>6 that the consumers were in the age, probably</p> <p>7 average somewhere around 48 to 50. But</p> <p>8 there's not -- I never saw any data on the</p> <p>9 people who came to the stores.</p> <p>10 Q. Okay. Thank you.</p> <p>11 Again, changing the topic slightly,</p> <p>12 when you say, "C-stores," that means</p> <p>13 convenience stores, right?</p> <p>14 A. Yes. Sorry. It's a bit of industry</p> <p>15 jargon.</p> <p>16 Q. That's fine. I try to use the same</p> <p>17 language, C-stores, here.</p> <p>18 Do you recall earlier in the morning</p> <p>19 when you were discussing with Counsel for</p> <p>20 Altria, you were speaking about contracts at</p> <p>21 C-stores? Do you recall that?</p> <p>22 A. Yes, I do.</p> <p>23 Q. So, when you say contracts in the</p> <p>24 context of C-stores, do you mean retail</p> <p>25 contracts between tobacco companies and</p>	<p style="text-align: right;">Page 156</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Again, the specifics of these</p> <p>3 contracts change over time, but this is the</p> <p>4 kind of general principals.</p> <p>5 In return, the C-store operator or</p> <p>6 the store operator -- because these contracts</p> <p>7 are also in other channels, the C-store</p> <p>8 channel basically gives up the facings to the</p> <p>9 manufacturers. And the mechanics of that are</p> <p>10 sort of interesting. I'll get back to that.</p> <p>11 And in return, they get payments based on</p> <p>12 their sales, and they also get access to</p> <p>13 promotional payments -- promotions that, at</p> <p>14 times, are not available to stores that are</p> <p>15 not under contract.</p> <p>16 I'll speak a little bit about the</p> <p>17 impact it has in the moist snuff category</p> <p>18 because I'm a little bit more familiar with</p> <p>19 that. So, if you look at -- and at one time,</p> <p>20 I did some analysis on just using national</p> <p>21 shares rather than any specific chain. So</p> <p>22 Altria has roughly 53 percent of the national</p> <p>23 share of moist snuff. Reynolds has about 32</p> <p>24 shares. So, between the two of them, they</p> <p>25 have about 85 percent share. And moist snuff</p>
<p style="text-align: right;">Page 155</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 C-store chains?</p> <p>3 MR. SOWLATI: Objection to form.</p> <p>4 A. The major tobacco companies in</p> <p>5 cigarettes and in moist snuff, that I'm fairly</p> <p>6 familiar with, contract with the stores.</p> <p>7 These contracts generally cover a number of</p> <p>8 different parameters. The major companies</p> <p>9 generally ask for shelf space, the share of</p> <p>10 the available space, visible space equal to</p> <p>11 their market share. That market share could</p> <p>12 be the trading area; it could be the specific</p> <p>13 chain; the chain they share with the specific</p> <p>14 chain. They generally ask for the highest</p> <p>15 amount whether it's the -- if the trading area</p> <p>16 was lower than the chain, they'd ask for the</p> <p>17 percent of sales they have in the chain, or if</p> <p>18 the trading area was higher, they would do</p> <p>19 that.</p> <p>20 They ask for signage. Generally,</p> <p>21 they get the top signs and any signs embedded</p> <p>22 into the selling area. And they have</p> <p>23 provisions that if there are other signs put</p> <p>24 up around the store, they get additional signs</p> <p>25 as well.</p>	<p style="text-align: right;">Page 157</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 is usually sold in fairly contained -- is</p> <p>3 often sold in fairly contained geographies</p> <p>4 inside the store. It's sort of a display.</p> <p>5 These displays can have 32, 48, or</p> <p>6 64 -- generally, they have either 32, 48, or</p> <p>7 64 facings. And so, when you do the math of</p> <p>8 the 85 percent, I'll focus just on the 64</p> <p>9 facing one, Altria and Reynolds would get all</p> <p>10 but ten of the facings. So, you're talking</p> <p>11 now that there's ten facings available.</p> <p>12 There's 64 facings in this display, and Altria</p> <p>13 and Reynolds would get all but ten. So, they</p> <p>14 would get about 54. And so, three companies,</p> <p>15 Swisher, Swedish Match, and Turning Point,</p> <p>16 would then have only ten facings in which they</p> <p>17 could display the product.</p> <p>18 So, I looked at it. If you were to</p> <p>19 take -- and I'm using -- this is not a</p> <p>20 scientific -- I'm using this just to try to</p> <p>21 describe in principals. You can poke all</p> <p>22 kinds of holes into this analysis. But if you</p> <p>23 were to use national shares and apply it, if</p> <p>24 you were to rank the top 64 SKUs nationally,</p> <p>25 if you were to do that, then there would be 20</p>

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<p style="text-align: right;">Page 158</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 SKUs from the other three companies that would</p> <p>3 rank in the top 64 SKUs. When you look at</p> <p>4 that, what happens is that the retailer, on</p> <p>5 average, cannot service as broad a market as</p> <p>6 they could under the contract. So, let's call</p> <p>7 this kind of activity "natural selection."</p> <p>8 This whole process of natural selection, where</p> <p>9 you actually go and you rank all the SKUs, the</p> <p>10 64 SKUs. I think it stops at 64. The other</p> <p>11 three companies would then get 20 SKUs.</p> <p>12 Now, what's interesting about that</p> <p>13 is because of these contracts, the</p> <p>14 distribution of these other three companies'</p> <p>15 SKUs are somewhat limited. So, for instance,</p> <p>16 I just looked at some data for another purpose</p> <p>17 the other day, and in the data that we get</p> <p>18 from MSA, which is an information service that</p> <p>19 tracks shipments into retail across</p> <p>20 hundreds -- 200-some odd thousand stores.</p> <p>21 We have one particular SKU. Our</p> <p>22 can, our Stoker's Wintergreen, would rank in</p> <p>23 the stop 64. Now, it's ranked in the top 64</p> <p>24 nationally, but in the last 13 weeks it only</p> <p>25 had shipments into something, like, 32 percent</p>	<p style="text-align: right;">Page 160</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 these products have lower distribution. And</p> <p>3 so, their velocities must be higher in the</p> <p>4 points of distribution that they have. So, if</p> <p>5 you were to take the velocity of the brands</p> <p>6 where they do sell and apply that velocity to</p> <p>7 this kind of mythical store that I've just</p> <p>8 created with the 64-SKU thing, essentially,</p> <p>9 the store sales would be -- just by taking out</p> <p>10 those ten products and putting in these other</p> <p>11 ten product, the store sales would be</p> <p>12 22 percent higher. Again, you could poke lots</p> <p>13 of holes in it. But in any case, the</p> <p>14 implication is that the store gives up some</p> <p>15 economics by reducing their sales by not</p> <p>16 having the breadth in the marketplace.</p> <p>17 And what's interesting about it is</p> <p>18 that there is a shift value in the smokeless</p> <p>19 category. And the brands, a lot of the SKUs</p> <p>20 that are being excluded from this rack are</p> <p>21 SKUs that are priced at a lower level. So,</p> <p>22 it's basically hurting the consumer because</p> <p>23 the consumer's having less access to products</p> <p>24 that are at a lower cost. And at least in the</p> <p>25 case of our product, which we've done some</p>
<p style="text-align: right;">Page 159</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 of all the stores and 36 percent of the chain</p> <p>3 stores. So that if it had universal</p> <p>4 distribution, you could make the presumption</p> <p>5 that its share would be higher and all of our</p> <p>6 product share would be higher and that we</p> <p>7 would have more products that were in the 64.</p> <p>8 But if you just look at what the</p> <p>9 retailer loses in this, they kind of restrict</p> <p>10 the percent of the market that they can cover</p> <p>11 because of this constraint that's imposed on</p> <p>12 them by Altria and Reynolds. And if you do</p> <p>13 it, this analysis I did, I looked at the</p> <p>14 brands, the SKUs that Altria and Reynolds</p> <p>15 would lose because they'd drop out of the top</p> <p>16 64, these ten SKUs, and ten SKUs would come</p> <p>17 in. And that would increase the coverage of</p> <p>18 the market by one-and-a-half to two percent.</p> <p>19 And that gap is growing because these are</p> <p>20 growing brands in the marketplace. So, the</p> <p>21 retailer loses by not having the breadth of</p> <p>22 products that they need to service all the</p> <p>23 potential consumers that go into their store.</p> <p>24 What becomes interesting, when you</p> <p>25 look at the -- now, remember, these brands,</p>	<p style="text-align: right;">Page 161</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 testing against some of the major brands, are</p> <p>3 at least equivalent, we actually get slight</p> <p>4 preference. We really don't get statistical</p> <p>5 preference, but you can say that there are at</p> <p>6 least -- they are no less than equal in taste</p> <p>7 preference. But because of the difficulty and</p> <p>8 lack of room to put these products into these</p> <p>9 sets, the consumer's getting prevented,</p> <p>10 preventing access to these products. So</p> <p>11 there's a number of really important</p> <p>12 implications of these contracts. And we've</p> <p>13 seen it in cigarettes, you can see it in</p> <p>14 smokeless.</p> <p>15 What's interesting is that when we</p> <p>16 were first introducing RipTide, I think it</p> <p>17 was -- you didn't see a lot of contracted</p> <p>18 space in vape. I did notice, this is in July,</p> <p>19 call it June, July, August of 2019, I did</p> <p>20 notice the last time I was out, and</p> <p>21 unfortunately because of COVID I think we've</p> <p>22 all been inside too much, I haven't been out</p> <p>23 in stores very often.</p> <p>24 But when I've gone out, I have seen</p> <p>25 that the vape section is much more organized</p>

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 2 than it was when we were first introducing  
 3 RipTide and certainly light years difference  
 4 than when we introduced V2. When we  
 5 introduced V2, you can get vape into a lot of  
 6 different places. You can even get counter  
 7 displays in there.  
 8 They've since been regulated out by  
 9 the FDA. But now when you walk into a store,  
 10 the stores that I've been in, and quite  
 11 frankly, it is not a statistical sample  
 12 because I haven't been in a lot of stores  
 13 because of COVID, but I have seen some  
 14 pictures that the sales guys sent in, that you  
 15 tend to see the section that looks just like  
 16 cigarettes and just like, you know, the moist  
 17 snuff sort of display section, where JUUL has  
 18 this big sign on the top. And the only  
 19 embedded signs you see in the display is  
 20 Reynolds product and you see that most of the  
 21 other products are sort of at the bottom.  
 22 And this has some implications  
 23 because, for instance, our RipTide product, we  
 24 had the worst possible -- if you were to pick  
 25 a time to introduce RipTide, we picked

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 2 absolutely the wrong time to do it. Just as  
 3 we were getting distribution, just as we were  
 4 starting to get into stores, Vape Gate  
 5 happened, which I think is what I talked about  
 6 earlier, which is that marijuana product that  
 7 caused some issues in the lungs. The FDA and  
 8 the CDC came out, and their first reaction,  
 9 since this was a vaping product, even though  
 10 it was a marijuana product -- well, they found  
 11 out it was a marijuana product. They didn't  
 12 know what product was causing it. They came  
 13 out and they said, "Don't vape, and certainly  
 14 don't vape anything that you haven't vaped  
 15 before and hadn't had problems with." So just  
 16 as RipTide started to get a little bit of  
 17 traction, as Graham talked about in the Vesser  
 18 presentations, all of a sudden all the  
 19 momentum just stopped everything just stopped  
 20 and it was like we hit a brick wall.  
 21 One of the consequences of the Vape  
 22 Gate and the controversy -- now, the CDC and  
 23 the FDA ultimately came out and said, "This  
 24 isn't vaping products. It's just a marijuana  
 25 product." But one of the consequences was,

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 2 there was a lot of political pressure, and the  
 3 FDA came out and banned flavors in pod  
 4 systems. Now, what's interesting in sort of  
 5 demonstrating this totally different consumer  
 6 base is that when they banned flavors in pod  
 7 systems, they actually left flavors in open  
 8 systems. And I think that the reason for that  
 9 is because the open systems are really  
 10 ex-cigarette smokers, very little initiation  
 11 there, and they're just older. And with pod  
 12 systems, pod systems were popular among  
 13 populations -- a different type of population,  
 14 and the FDA was very concerned about -- and,  
 15 you know, looking at the national surveys that  
 16 are done on youth usage, you know, you don't  
 17 see any open systems there. They're just not  
 18 there. They're pretty high from these pod  
 19 systems.  
 20 So, without the ability to have  
 21 flavors and with the hangover of all this  
 22 distribution that we got where we didn't  
 23 get -- and quite frankly, we didn't get a lot  
 24 of sales because of all the controversy there  
 25 on vape, we sort of just said, Okay, we're

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 2 going to de-emphasize RipTide, and we're going  
 3 to stop going national. We're going to pull  
 4 back. If you look at our financial  
 5 statements, we had a very large write-off at  
 6 the end of 2019 with the inventory that we  
 7 bought because we were seeing momentum. We  
 8 started building up our inventory to sell the  
 9 product, and then we had to write it all off  
 10 because the market for us just sort of closed.  
 11 Now, we did keep RipTide open in  
 12 some geographies in 2020. We had some  
 13 geographies where we said, "Okay. Let's see  
 14 what we could do with RipTide." Just a couple  
 15 of observations. The hit rates on RipTide  
 16 were much lower than they were when we first  
 17 introduced it. I hadn't seen any contracts,  
 18 but it certainly -- the vape section certainly  
 19 looked like there were contracts there. I've  
 20 talked to one of our ex-Philip Morris  
 21 employees, and they say that there are  
 22 contracts in vape now. As I said, I've never  
 23 seen one.  
 24 I do know that our hit rates, our  
 25 success rates of sales guys walking into



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<p style="text-align: right;">Page 166</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 stores were lower. And it was much more</p> <p>3 difficult, the acquisition of shelf space</p> <p>4 where it was a lot slower in 2020 than it was</p> <p>5 in 2019 before these sections were as well</p> <p>6 organized as they are today.</p> <p>7 Q. Thank you very much.</p> <p>8 You mentioned "hit rates."</p> <p>9 What are hit rates?</p> <p>10 A. Oh, sorry. I'm a creature of our</p> <p>11 internal jargon. Hit rates are the number of</p> <p>12 times a salesperson is successful at getting</p> <p>13 new distribution divided by the number of</p> <p>14 times they present the product. So, we</p> <p>15 basically look at, if this is a priority for</p> <p>16 them, you assume that they made the ask in</p> <p>17 every store they go into, and then we</p> <p>18 calculate how many stores we got this new</p> <p>19 distribution in, and then we just divide it.</p> <p>20 And that's what we call a hit rate.</p> <p>21 Q. Thank you.</p> <p>22 So, you covered a lot of ground</p> <p>23 here, but you also mentioned the RipTide</p> <p>24 product sold by Turning Point Brands.</p> <p>25 Earlier, you mentioned market shares in the</p>	<p style="text-align: right;">Page 168</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 different than V2 and VMR, which was the</p> <p>3 existing product that we entered into a</p> <p>4 partnership with VMR. This was a</p> <p>5 self-developed product.</p> <p>6 Q. Got it. Thank you.</p> <p>7 Do you recall how much of research</p> <p>8 and development spend was invested in</p> <p>9 developing the RipTide product?</p> <p>10 MR. SOWLATI: Objection to form.</p> <p>11 A. I don't remember seeing a number on</p> <p>12 that. I know we did work with our supplier to</p> <p>13 help develop the -- they had developed a</p> <p>14 number of devices, and we chose one of the</p> <p>15 devices and worked with them to try to improve</p> <p>16 entire spends, and we created the liquid.</p> <p>17 Q. What about RipTide device, the</p> <p>18 RipStick?</p> <p>19 A. That's what we did. We went to some</p> <p>20 of our suppliers and we picked a product from</p> <p>21 the supplier that they had on their shelf, and</p> <p>22 then we asked them to customize it for us.</p> <p>23 There was very little development effort on</p> <p>24 our part. It was really on the supplier's</p> <p>25 part.</p>
<p style="text-align: right;">Page 167</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 C-store channel.</p> <p>3 Do you have any sense of national</p> <p>4 market shares for RipTide in the C-store</p> <p>5 channel today?</p> <p>6 A. It's minimal. I don't have an exact</p> <p>7 number, but it's not material.</p> <p>8 Q. Do you think it's over 5 percent?</p> <p>9 A. For RipTide in C-stores?</p> <p>10 Q. Yes.</p> <p>11 A. No.</p> <p>12 Q. Over 1 percent?</p> <p>13 A. I haven't looked at it, but if it</p> <p>14 was 1 percent, I would have looked at it. So,</p> <p>15 I will assume it's significantly less than</p> <p>16 1 percent nationally.</p> <p>17 Q. Thank you.</p> <p>18 Could you explain a little about how</p> <p>19 Turning Point Brands first acquired the right</p> <p>20 to sell RipTide product?</p> <p>21 A. We didn't acquire the right to sell</p> <p>22 RipTide product. We filed for a trademark and</p> <p>23 developed the product. So, we designed the</p> <p>24 product; we created the product. It wasn't a</p> <p>25 preexisting product that we acquired. Very</p>	<p style="text-align: right;">Page 169</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. Since Turning Point developed the</p> <p>3 RipTide product, has anyone approached you or</p> <p>4 the company to acquire the product?</p> <p>5 A. Not that I know of.</p> <p>6 Q. Would you have sold it, if the price</p> <p>7 was right?</p> <p>8 MR. SOWLATI: Objection to form.</p> <p>9 MR. FORD: Objection.</p> <p>10 A. I guess you'd have to decide what</p> <p>11 the price is right. I think, in general, in</p> <p>12 markets, if someone comes with an offer that</p> <p>13 has a higher value than the long-term value</p> <p>14 you think you have in a product, you have to</p> <p>15 at least consider it.</p> <p>16 Q. Thank you.</p> <p>17 Let's talk about the liquid for the</p> <p>18 RipTide product. So, if I understand what you</p> <p>19 discussed in the morning correctly, RipTide</p> <p>20 liquid does not use nicotine derived out of</p> <p>21 tobacco, correct?</p> <p>22 A. That is correct.</p> <p>23 Q. So, RipTide's liquid uses synthetic</p> <p>24 nicotine, correct?</p> <p>25 A. Yes.</p>

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<p style="text-align: right;">Page 170</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Q. I think you tried to explain this a</p> <p>3 little in the morning, but how is synthetic</p> <p>4 nicotine different from nicotine salts?</p> <p>5 MR. SOWLATI: Objection to form.</p> <p>6 A. In tobacco-derived nicotine, the</p> <p>7 nicotine is extracted from the tobacco plant</p> <p>8 and then put into a solution for its use. In</p> <p>9 synthetic nicotine, there is a chemical</p> <p>10 reaction -- I'm going to get a little bit out</p> <p>11 of my skin here because I'm not a chemist. I</p> <p>12 can give you some of my impressions.</p> <p>13 Essentially, it is -- okay. I know</p> <p>14 there's always a risk of being colorful, but</p> <p>15 it's a bit Frankensteinian where you have</p> <p>16 these big tubes and reactors and all this</p> <p>17 stuff, where you put together a series of</p> <p>18 chemicals, and there's a forced chemical</p> <p>19 reaction to combine them, and it creates a</p> <p>20 nicotine. But the nicotine is not exactly the</p> <p>21 same as a nicotine derived from tobacco,</p> <p>22 that's extracted from a tobacco plant. It</p> <p>23 actually has -- it actually is just a little</p> <p>24 bit different. It has different properties</p> <p>25 when it's consumed.</p>	<p style="text-align: right;">Page 172</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 A. At peak, we had six or seven people</p> <p>3 involved in the R&amp;D in the vape product. It's</p> <p>4 embarrassingly small compared to large</p> <p>5 companies like Altria and Reynolds.</p> <p>6 Q. Do you have a sense of your annual</p> <p>7 budget for R&amp;D for vape products?</p> <p>8 A. I think I need to put this in a</p> <p>9 little bit of context. With Vape Gate, what</p> <p>10 we saw with the CDC and the FDA announcements,</p> <p>11 we saw a fairly significant contraction in the</p> <p>12 marketplace. Our run rate of sales in our</p> <p>13 vaping area was probably 150, \$160 million</p> <p>14 annual run rate going into Vape Gate. After</p> <p>15 Vape Gate, it came down fairly quickly to</p> <p>16 somewhere around plus or minus 100 million;</p> <p>17 more minus than plus, I think.</p> <p>18 In response, what we did is, we had</p> <p>19 to -- we severely cut back on our investment</p> <p>20 in vape. We consolidated two operating</p> <p>21 companies that we had, we consolidated four</p> <p>22 distribution points to one, and we severely</p> <p>23 cut back on our R&amp;D staff. That was in late</p> <p>24 November, early December of 2019. We</p> <p>25 essentially had to get -- unfortunately, we</p>
<p style="text-align: right;">Page 171</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 Tobacco-derived nicotine tends to</p> <p>3 get a little more immediacy in terms of --</p> <p>4 this is from what consumers tell us. Again, I</p> <p>5 don't know the physiological -- what happens</p> <p>6 physiologically or what happens chemically.</p> <p>7 This is what consumers tells us.</p> <p>8 Tobacco-derived nicotine tends to get a faster</p> <p>9 impact on the body, but synthetic nicotine is</p> <p>10 much more longer lasting. It stays active in</p> <p>11 the body for a longer period of time. That's</p> <p>12 what consumers have told us.</p> <p>13 So, part of the NicTech technology</p> <p>14 is using the synthetic nicotine kind of</p> <p>15 creates a different experience that, as I said</p> <p>16 before earlier this morning, that a subsection</p> <p>17 of consumers seek to enjoy. Again, you'd have</p> <p>18 to talk to one of my scientists to explain why</p> <p>19 and how that works.</p> <p>20 Q. Fair enough. Thank you.</p> <p>21 Does Turning Point Brands have</p> <p>22 in-house research and development personnel?</p> <p>23 A. We do.</p> <p>24 Q. How many do you have on the R&amp;D of</p> <p>25 vape product?</p>	<p style="text-align: right;">Page 173</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 had to layoff about 10 percent of our staff.</p> <p>3 Q. Thank you.</p> <p>4 Let's change gears a little here</p> <p>5 again. Sorry about that. Let's talk about</p> <p>6 your product distribution specifically to the</p> <p>7 C-store channel. I understand Turning Point</p> <p>8 Brands have other products, for example,</p> <p>9 Stoker's and moist snuff product that's sold</p> <p>10 into the C-store channel.</p> <p>11 But how do you compare the Turning</p> <p>12 Point Brands' capability of distribution to</p> <p>13 the C-store channel to major tobacco</p> <p>14 companies' distribution capabilities?</p> <p>15 MR. SOWLATI: Objection to form.</p> <p>16 MR. FORD: Objection.</p> <p>17 A. Okay. So, can you describe what you</p> <p>18 mean by, "distribution capabilities"?</p> <p>19 Q. Sure. Let me clarify. Your access</p> <p>20 to stores and the spaces inside the stores.</p> <p>21 A. Okay. So, let me take a step back</p> <p>22 because I'm still trying to understand what</p> <p>23 the question is.</p> <p>24 First thing is that, we can walk</p> <p>25 into any store that the major guys can walk</p>

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<p style="text-align: right;">Page 174</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 into. We don't have nearly as many people,</p> <p>3 and so, you know, we have roughly 150 people</p> <p>4 in our sales department. At the time when I</p> <p>5 left Philip Morris, Altria, I think their</p> <p>6 number was something like 3,000, so it was</p> <p>7 very different. So, we cannot cover as many</p> <p>8 stores.</p> <p>9 Now, you know, you need to separate</p> <p>10 distribution from selling, okay? Because we</p> <p>11 actually don't deliver to C-stores, and for</p> <p>12 the most part, I did not believe that the</p> <p>13 majors do. They do in some cases, and there</p> <p>14 are some retailers that have their own</p> <p>15 distribution centers, so they may deliver to</p> <p>16 those distribution centers.</p> <p>17 We deliver to a trade class that's</p> <p>18 called tobacco and candy wholesalers, for the</p> <p>19 most part. They're the bulk of our direct</p> <p>20 customers. That's who we ship most of our</p> <p>21 product to. There are some other trade</p> <p>22 classes that are some of the other products</p> <p>23 that we won't talk about. They perform the</p> <p>24 function of receiving the product, and they</p> <p>25 actually ship it into the retail. So the</p>	<p style="text-align: right;">Page 176</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 know, quite frankly, from time to time, we get</p> <p>3 encroached upon by other companies. There's</p> <p>4 been a couple of times when one of the</p> <p>5 majors -- you know, we had in situation in one</p> <p>6 area where one of the majors was actually</p> <p>7 taking our product and hiding it behind</p> <p>8 signage in the rack. That's not incredibly</p> <p>9 widespread. So our sales guy goes in, he</p> <p>10 talks to the store owner, talks about what we</p> <p>11 have to offer, talks about new products,</p> <p>12 checks inventory to see if they have any</p> <p>13 inventory gaps they can fill. When I say</p> <p>14 "he," I'm saying generically, this covers both</p> <p>15 men and women. We do have women in our sales</p> <p>16 force. In these politically-sensitive times,</p> <p>17 I'm always careful about saying things like</p> <p>18 that. And they'll straighten out the racks,</p> <p>19 they'll put up signage where possible.</p> <p>20 We also have another group of</p> <p>21 people -- so we let 100 people go do that. We</p> <p>22 have another group of people that call on</p> <p>23 chains, and there are large chains and small</p> <p>24 chains. That's a very different type of sell.</p> <p>25 There you go in and you sell to the head of</p>
<p style="text-align: right;">Page 175</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 retail actually orders from the tobacco and</p> <p>3 candy wholesalers. They don't order directly</p> <p>4 from us. They perform the function of</p> <p>5 collecting taxes, paying the taxes to the</p> <p>6 state, and collecting the money from the</p> <p>7 retailer.</p> <p>8 Now, at the same time, sort of a</p> <p>9 parallel system, our salespeople go into</p> <p>10 stores to try to create demand for the</p> <p>11 product. So, our sales guys will walk into,</p> <p>12 let's say, an independent retailer, and</p> <p>13 they'll talk to the store manager, talk to the</p> <p>14 store owner, explain the features and benefits</p> <p>15 of our products, pricing. They'll also go</p> <p>16 through and check the dating. Some of our</p> <p>17 products are dated and we don't want our</p> <p>18 consumers to have products that are dated</p> <p>19 because they don't taste as good. They don't</p> <p>20 perform as well.</p> <p>21 They will also put up signage and</p> <p>22 they'll try to straighten out our areas in the</p> <p>23 stores. So, like, for instance, in the</p> <p>24 smokeless rack, we have the veins that are --</p> <p>25 the facings that are assigned to us. You</p>	<p style="text-align: right;">Page 177</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 merchandising, you make your sale, and they</p> <p>3 then planogram you into their store set. And</p> <p>4 in most cases, the store managers are then</p> <p>5 responsible for putting the product up on the</p> <p>6 rack. Now, people go in periodically and</p> <p>7 check and make sure that we're getting our</p> <p>8 space we're allowed. But in most chain</p> <p>9 stores, you can't put up signage. You</p> <p>10 actually have to buy the signage; you have to</p> <p>11 contract for the signage.</p> <p>12 I think that -- so when you talk</p> <p>13 about our capabilities versus the other</p> <p>14 companies' capabilities, there's a couple of</p> <p>15 different things. One is that we have far</p> <p>16 fewer people, so we have far less breadth. I</p> <p>17 think my sales force does an excellent job.</p> <p>18 If one of products is Zig-Zag rolling</p> <p>19 papers -- I once had a competitor come up to</p> <p>20 me and say, "How many salespeople do you have?"</p> <p>21 You must have like 300, 400 salespeople</p> <p>22 because everywhere I go, I see Zig-Zag," and</p> <p>23 it was one of my proudest moments, this guy</p> <p>24 acknowledging that my guys do a great job.</p> <p>25 But we don't, we only have, like, a hundred</p>

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<p style="text-align: right;">Page 178</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 people on the street.</p> <p>3 I sort of lost my have track there a</p> <p>4 little bit.</p> <p>5 So, in any case, sp one difference</p> <p>6 is the breadth that we can get and the number</p> <p>7 of people. And while we do get a lot of</p> <p>8 breadth, it's very thin on depth, because if</p> <p>9 we're calling on one store, we can't call</p> <p>10 another store. We only have X number of</p> <p>11 thousands of sales calls to allocate in a</p> <p>12 year. And if we go to 200,000 stores, which I</p> <p>13 don't even know if we can get to in a year,</p> <p>14 you know, we can't revisit any other stores.</p> <p>15 So, we're in a constant process of allocating</p> <p>16 our sales calls among the various stores.</p> <p>17 The other thing we have is, we don't</p> <p>18 have that much market leverage and market</p> <p>19 power. So, while in some segments, like in</p> <p>20 papers in the measured universe, in</p> <p>21 principally a C-store area, we have about 35</p> <p>22 shares. Zig-Zag is a leading product. Most</p> <p>23 of the time, it's the leading product. It's</p> <p>24 certainly the leading premium brand in papers.</p> <p>25 And in make your own cigar wraps, which is the</p>	<p style="text-align: right;">Page 180</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 about a concept called weighted distribution,</p> <p>3 which is basically the percent of where the</p> <p>4 product is sold. We have been able to, very</p> <p>5 successfully over the last couple of years,</p> <p>6 increase our weight of distribution. So,</p> <p>7 we're now in about 60 percent of the market.</p> <p>8 But it's a struggle because, you know,</p> <p>9 remember, when you go back to that rack,</p> <p>10 there's only a very limited space. And if</p> <p>11 they create more space, then they've got to</p> <p>12 give more space to Altria and Reynolds. So,</p> <p>13 it's very self defeating. If we can't get one</p> <p>14 of those ten slots, where if we're in an open</p> <p>15 rack where the space has been allocated, if</p> <p>16 they accept four or five of our SKUs and if</p> <p>17 the contracts require them to keep this</p> <p>18 proportion of space for Reynolds and Philip</p> <p>19 Morris, it means they've got to give even more</p> <p>20 space to the other companies which has a</p> <p>21 consequence that they can't have as many</p> <p>22 products on the stores. It's a very</p> <p>23 constraining thing for both the retailer and</p> <p>24 for competitors.</p> <p>25 And as I said, you know, we sell our</p>
<p style="text-align: right;">Page 179</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 outer shell of a machine-made cigar, you know,</p> <p>3 we have 60-some-odd share.</p> <p>4 So, in markets where there's free</p> <p>5 and fair trade, we do very well. So, in</p> <p>6 markets, like -- for instance, competitors in</p> <p>7 papers have been companies that are sort of</p> <p>8 our size and significantly bigger, but not as</p> <p>9 big as Altria and Reynolds. As you can see,</p> <p>10 we've done pretty well with our products in</p> <p>11 those particular segments.</p> <p>12 In products like moist snuff, as I</p> <p>13 said, you know, Philip Morris and Reynolds</p> <p>14 between them have 85 share. Now, I think</p> <p>15 we've done very well. We introduced our</p> <p>16 product in 2008. It has grown almost on a</p> <p>17 straight line since 2008. It actually</p> <p>18 accelerated in the last two years. But it's</p> <p>19 been a struggle. I mean, we're still -- you</p> <p>20 know, in the last 13 weeks, our products have</p> <p>21 gotten about 30-some-odd percent -- shipments</p> <p>22 into 30-some-odd percents of stores.</p> <p>23 Now, we do focus on the</p> <p>24 larger-volume stores. So, you can see in our</p> <p>25 earnings calls and things like that, we talk</p>	<p style="text-align: right;">Page 181</p> <p>1 L. WEXLER - CONFIDENTIAL</p> <p>2 product for about 40 percent less than the</p> <p>3 majors. And so, the consumers are not getting</p> <p>4 access to a product that is tested as equally</p> <p>5 as good and sells at a significant discount to</p> <p>6 the majors because of this arrangement where</p> <p>7 competition is limited because of the</p> <p>8 requirement that Philip Morris and Reynolds</p> <p>9 has.</p> <p>10 Now, it's kind of interesting. I've</p> <p>11 done -- I was an operations research major in</p> <p>12 college, so I'm sort of a little faster with</p> <p>13 math. And one of my first jobs, which wasn't</p> <p>14 on my resume that Adam went through earlier</p> <p>15 this morning, was doing an inventory program</p> <p>16 for a small manufacturer of hand tools. And I</p> <p>17 quickly learned that because of cycle stock</p> <p>18 and safety stock and all that, you don't need</p> <p>19 proportional inventory based on proportion of</p> <p>20 sales. No rational person has their inventory</p> <p>21 evenly divided by percent -- you know, percent</p> <p>22 of inventory is not percent of what your sales</p> <p>23 are.</p> <p>24 So, for instance, you know, one vein</p> <p>25 can -- one facing can service, you know, a</p>

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2 product that has one share or three share or

3 five shares. You don't need five times as

4 much space just because something has five

5 share versus one share because these racks are

6 refilled multiple times during the week and

7 because the turnover is, you know -- you

8 either have some depth to them so there's

9 turnover there.

10 So, again, going back to my

11 nomenclature before, if you had natural

12 selection and the retailer had free choice and

13 he really wanted to get breadth and service

14 the consumers walking in through the door,

15 they want to have a wider selection of

16 product, but they can't because the

17 opportunity costs of bringing in these other

18 products and then giving, basically, not

19 useful space to Reynolds and Altria, the

20 opportunity cost of other products you can't

21 put on the shelf, then, is too big an

22 opportunity cost. Not only are you selling

23 against the majors -- first of all, we're

24 selling against the other competitors that are

25 trying to get the same space.

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1 L. WEXLER - CONFIDENTIAL

2 And then we're going against the

3 majors in trying to get the space carved out

4 of their rack. We're also being constrained

5 by the way these contracts are designed from

6 every other product in the store so that we

7 have to prove that we're going to be

8 profitable enough for the retailer to take

9 against all of that.

10 So, it's a heavy load. And quite

11 frankly, the reason I'm so proud of my sales

12 guys, I'm so proud of the way the product has

13 performed, is that despite that, and I think

14 in large part because we came out with a tub

15 which doesn't fit into this confined space,

16 that we were able to get some distribution

17 because this is a tub format, that we've been

18 as successful as we are because the hurdle is

19 so incredibly difficult.

20 Q. Thank you.

21 MR. FORD: Can I interject? Can we

22 go off the record for five minutes? I

23 need to take a quick break.

24 (Recess was taken.)

25 BY MR. LEE:

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1 L. WEXLER - CONFIDENTIAL

2 Q. Mr. Wexler, I have one more question

3 to ask. Going back to the earlier discussion

4 of synthetic nicotine, are you aware of any

5 other companies that sell synthetic nicotine

6 products?

7 A. I have heard of some companies that

8 have started using synthetic nicotine

9 products. I can't name them at this time, but

10 I know that my guys have come and told me that

11 other companies are starting to sell them.

12 Q. Do you know whether they are in open

13 systems or closed systems?

14 A. The only ones I know of are in open

15 systems.

16 MR. LEE: Thank you. That's all for

17 now. I leave it to Mr. Sowlati to finish

18 his questions, and I will reserve my time

19 to potentially have follow-up questions.

20 Thank you.

21 MR. SOWLATI: I'm just going to

22 literally need five minutes, so if we can

23 get back at 2:25, and I can't imagine I'm

24 going to have more than a few questions.

25 (Recess was taken.)

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1 L. WEXLER - CONFIDENTIAL

2 FURTHER EXAMINATION

3 BY MR. SOWLATI:

4 Q. Okay, Mr. Wexler. Just a few more

5 questions, I promise.

6 You told Mr. Lee that the reason

7 RipTide lost momentum was because of

8 controversy around vaping and the FDA flavor

9 ban; is that right?

10 A. No. What I said was that those

11 things happened at the same time, and it's

12 sort of unknown what the potential of that

13 product could have been because of all the

14 controversy. And then, certainly, losing the

15 flavors made it much more difficult to compete

16 with that product.

17 Q. Okay. I'm just reading back your

18 testimony. You said, "suddenly all of the

19 momentum just stopped." That's what you

20 testified happened after the controversy

21 around vaping and the flavor ban, right?

22 A. I did say that, yes.

23 Q. Mr. Wexler, in addition to JUUL and

24 Reynolds, Imperial Tobacco through myblu and

25 Japan Tobacco through Logic compete in e-vapor

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1 L. WEXLER - CONFIDENTIAL

2 for shelf space, right?

3 A. Yes.

4 MR. SOWLATI: I have no further

5 questions.

6 MR. LEE: Thank you. I have no

7 further questions. I think this concludes

8 the deposition. Thank you very much.

9 MR. SOWLATI: Thank you very much,

10 Mr. Wexler, for your time.

11 (Time noted: 2:32 p.m.)

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23

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Page 188

1 C E R T I F I C A T E

2

3 STATE OF NEW YORK )

4 ) SS.:

5 COUNTY OF SUFFOLK )

6

7 I, KRISTI CRUZ, a Notary Public

8 within and for the State of New York, do

9 hereby certify:

10 That LARRY WEXLER, the witness

11 whose deposition is hereinbefore set

12 forth, was duly sworn by me and that

13 such deposition is a true record of the

14 testimony given by such witness.

15 I further certify that I am not

16 related to any of the parties to this

17 action by blood or marriage; and that I

18 am in no way interested in the outcome

19 of this matter.

20 IN WITNESS WHEREOF, I have

21 hereunto set my hand this 1st day of

22 February 2021.

23 *Kristi Cruz*

24 KRISTI CRUZ

25

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1 A C K N O W L E D G M E N T

2

3 STATE OF NEW YORK )

4 ) SS

5 COUNTY OF )

6

7 I, LARRY WEXLER, hereby certify that

8 I have read the transcript of my testimony

9 taken under oath in my deposition of

10 January 29, 2021; that the transcript is a

11 true, complete and correct record of my

12 testimony, and that the answers on the record

13 as given by me are true and correct.

14

15 \_\_\_\_\_

16 LARRY WEXLER

17

18

19

20 Signed and subscribed to before

21 me, this day

22 of , 20\_\_.

23 \_\_\_\_\_

24 Notary Public, State of New York

25

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1 \*\*\*ERRATA SHEET\*\*\*

2

3 U.S. LEGAL SUPPORT

4 90 Broad Street

5 New York, New York 10004

6 212.750.6434

7 REF: 338990

8 NAME OF CASE: MATTER OF ALTRIA GROUP AND JUUL LABS

9 DATE OF DEPOSITION: JANUARY 29, 2021

10 NAME OF WITNESS: LARRY WEXLER

PAGE	LINE	FROM	TO	REASON
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22 Subscribed and Sworn before me

23 this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

24 \_\_\_\_\_

25 Notary Public My Commission Expires:

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