

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



In the Matter of

Altria Group, Inc.
a corporation;

And

JUUL Labs, Inc.
a corporation.

Docket No. 9393

ORIGINAL

ANSWER AND DEFENSES
OF RESPONDENT ALTRIA GROUP, INC.

Pursuant to Rule 3.12 of the Federal Trade Commission’s (“FTC” or the “Commission”) Rules of Practice for Adjudicative Proceedings (the “Rules”), Respondent Altria Group, Inc. (“Altria”), by and through its undersigned counsel, hereby files the following answer to the Commission’s Administrative Complaint (the “Complaint”) against Altria and JUUL Labs, Inc. (“JLI”).

INTRODUCTION

Through this action, the FTC is seeking to unwind Altria’s \$12.8 billion minority investment in JLI based on a fundamental misunderstanding of why Altria made that investment, a fundamental misunderstanding of why Altria shut down Nu Mark (its e-vapor subsidiary), and a fundamental misunderstanding of the regulatory framework in which Altria and JLI operate. As will be shown in this proceeding, contrary to the FTC’s allegations, Altria did not withdraw its own products to facilitate a JLI deal, and Altria’s e-vapor products did not serve as a competitive constraint on JLI — which, after Nu Mark’s exit, would go on to lower prices in

response to competition. Altria withdrew its e-vapor products because it concluded that they could not meet FDA's regulatory requirements, because they lacked consumer appeal, and because they had lost money and had no short- or long-term path to profitability. The minority investment that the FTC challenges, which was designed to make JLI a more successful competitor by, among other things, helping it to successfully navigate complex regulatory hurdles and thereby continue selling its products, does not violate the antitrust laws. Altria submits that, on the full record, and in considering the applicable law, the relief sought by the Complaint should be denied.

Altria's subsidiary, Philip Morris USA, has for more than a century been one of the nation's leading manufacturers of conventional, combustible cigarettes. In 2012, Altria established a new subsidiary, Nu Mark, to develop reduced-harm tobacco products, recognizing that adult consumers were becoming interested in e-vapor products because they could potentially provide some or all of the satisfaction of combustible cigarettes without the associated tar and without the stigma associated with smoking. Although Altria set up Nu Mark to compete, it did not have scientists or technical experts who were experienced in developing e-vapor products. After failing in its initial efforts to develop a successful product on its own, Altria undertook an acquisition strategy beginning in 2014. All of this was done at a time when the FDA did not regulate e-vapor products.

Far from being a "threat to JLI's market dominance" as the FTC alleges, Altria's effort was a failure. By late 2017, the original product using a platform that Altria had acquired in 2014, the "cig-a-like" MarkTen, had failed to gather traction with consumers and was ineffective in getting smokers to convert to e-vapor products. Consumer demand was shifting to pod-based products, like JUUL, a product introduced by JLI, a Silicon Valley startup. Still without proven

research and development capability required to internally develop a competitive e-vapor product, Altria again sought to acquire products in the hope of expanding sales.

By this point, FDA regulations imposed a significant constraint on Altria's options. Congress has designated the FDA as the only federal agency that "possesses the scientific expertise needed to implement effectively all provisions of the Family Smoking Prevention and Tobacco Control Act." Pub. L. No. 111-31, § 2(45), 123 Stat. 1776, 1781 (2009). Under that statute, as made applicable to e-vapor products via an FDA regulation known as the "Deeming Rule," all e-vapor products had to obtain FDA authorization before they could be sold to consumers (through a submission known as a Premarket Tobacco Product Application ("PMTA")).

The FDA made clear that e-vapor products would only be authorized to be sold if they were appropriate for the protection of public health because they generated positive health benefits for American consumers of tobacco products. But the FDA exercised its enforcement discretion to allow products that had been for sale in the United States on or before August 8, 2016 to remain for sale, pending PMTA approval, so long as an application was filed by a deadline set by the agency. That enforcement discretion could be revisited, and, regardless, the FDA was clear that any new or changed product without "8/8/16 status" could not be sold to consumers until after receiving PMTA approval, a multi-year process.

Recognizing that its existing cig-a-like products were not competitive, Altria, in late 2017, scrambled to acquire a pod-based product that had 8/8/16 status. Altria held unsuccessful exploratory discussions with JLI and, at the same time, scoured the globe for pod-based products with 8/8/16 status that it could acquire. As talks with JLI were going nowhere, in the fall of 2017, Nu Mark licensed the rights to an e-vapor product owned by a Chinese manufacturer that

had 8/8/16 status. Due to the product's 8/8/16 status, Nu Mark could not make material modifications to the newly acquired e-vapor product without waiting for PMTA approval.

Nu Mark rushed to rebrand the Chinese-made product as MarkTen Elite and to expand its availability to consumers in March 2018. But after initial optimism about its prospects, Altria realized by the summer of 2018 that Elite had many problems and was not converting adult smokers. Elite also was not effectively competing with other e-vapor products, including JUUL, which was successful in large part because of its proprietary nicotine salts formula that provided users with a satisfying, cigarette-like experience. Elite, by contrast, did not provide consumers with an experience similar to that of traditional cigarettes or other e-vapor products, like JUUL.

Despite Altria spending millions and using its distribution expertise to introduce Elite to consumers, at the time it was pulled, Elite had a trivial nationwide share of sales and little consumer appeal. In the four years before the business was wound down, Nu Mark had lost hundreds of millions of dollars — and it was projected to lose hundreds of millions more in the coming years. Altria also concluded that Elite, as well as Nu Mark's preexisting MarkTen products, could not obtain PMTA approval in their current form. Both MarkTen and Elite lacked a key element for obtaining PMTA approval — the ability to convert existing smokers and thereby significantly reduce the overall harm to the health of American tobacco consumers.

As a result of these considerations, in September 2018, at a time when negotiations with JLI had broken off, Altria began the process of shutting down the vast majority of its ongoing e-vapor development work (including work on a PMTA for Elite), having concluded that the existing Elite product could not obtain FDA approval. Instead, Altria would restructure its resources to transition to “growth teams,” charged with hitting the reset button on Altria's e-vapor strategy and trying to come up with a competitive e-vapor product from scratch. But

even in a best-case scenario, where Altria would be able to rapidly develop such a product (its poor track record notwithstanding), it would not be able to sell the product for many years and only if authorized by the FDA.

Meanwhile, on September 12, 2018, FDA Commissioner Gottlieb wrote letters to Altria, JLI, and three other e-vapor manufacturers, expressing concern that e-vapor products were contributing to the “epidemic rate of increase in youth use,” threatening to revisit its enforcement discretion as set out in the Deeming Rule, and expressly calling for manufacturers to consider stopping the sale of flavored products. Altria recognized the letter as creating new regulatory exposure for e-vapor products. In response, on October 25, 2018, Altria determined to discontinue its Elite product and the flavored MarkTen products (other than the traditional tobacco, menthol, and mint varieties).

Altria also continued its effort to reach a deal with JLI. And, on December 20, 2018, after twenty months of on-again, off-again discussions, Altria made a \$12.8 billion investment for a 35% stake in JLI. Recognizing that JLI and Altria had different strengths developed in different markets — JLI with the ability to design satisfying e-vapor products and Altria with mature distribution systems and regulatory know-how — as part of the agreement, the parties designed a pro-competitive structure under which Altria would devote significant resources to help shore up JLI’s crucial PMTA efforts. In order to facilitate the provision of those services, Altria also agreed as part of the final transaction that it would not develop or acquire new e-vapor products while holding a significant investment in JLI. Altria’s commitment was reasonably ancillary to the pro-competitive benefits provided by the transaction; without it, JLI could not have agreed to allow Altria access to JLI’s development plans and gained the full benefits of Altria’s regulatory expertise. The transaction thus both made JLI more efficient and

had no anticompetitive effect. On January 28, 2020, Altria and JLI amended their support service agreement to eliminate some other aspects of the agreement, but Altria agreed to continue to support JLI in navigating the complex regulatory pathway to obtaining the PMTA approval on which JLI's future success hinges.

The Complaint ignores these business realities in alleging that this pro-competitive transaction violates Section 1 of the Sherman Act, Section 5 of the FTC Act, and Section 7 of the Clayton Act. And its allegations fail to “recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies,” IA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 243g (4th ed. 2020) (quoting *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411-12 (2004)), *i.e.*, the heavily regulated market for nicotine-based products. In short, the FTC's Complaint — which ultimately rests on the premise that consumer welfare would have been enhanced if Altria had continued selling products that it concluded would ultimately not pass PMTA review — is totally ill-conceived.

Equally ill-conceived is the notion that the remedy the FTC seeks — an order of divestiture that would relieve Altria of its obligation to assist JLI in its effort to obtain regulatory approval for JUUL and allow Altria to attempt to develop its own e-vapor products — would benefit consumers. Given the FDA's regulatory scheme, even if Altria's investment were unwound and it began to seek to compete with JLI — and even if Altria could figure out (despite its poor track record) how to develop a competitive product — it could not bring that product to consumers for years. In the meantime, Altria would be penalized by being forced to divest its stock before being able to realize the value of its investment in JLI. And, for its part, JLI would

lose the support from Altria that it needs to obtain PMTA approval and to pursue its mission to convert smokers.

In sum, and as will be demonstrated at trial, consumer welfare will be served by denying the FTC the relief that it seeks and permitting Altria and JLI to proceed to provide consumers the benefits of their agreement.

RESPONSE TO THE SPECIFIC ALLEGATIONS OF THE COMPLAINT

All allegations not expressly admitted herein are denied. Altria does not interpret the headings and subheadings throughout the Complaint as well-pleaded allegations to which any response is required. To the extent such a response is required, Altria denies all allegations in the headings and subheadings of the Complaint. Use of certain terms or phrases defined in the Complaint is not an acknowledgment or admission of any characterization the Commission may ascribe to the defined terms. Unless otherwise defined, capitalized terms shall refer to the capitalized terms defined in the Complaint, but any such use is not an acknowledgment or admission of any characterization the Commission may ascribe to the capitalized terms.

Altria does not concede the truthfulness of third-party articles and news sources quoted or referenced in the Complaint. To the extent that a response is required, Altria denies all allegations of the third-party articles and news sources quoted in or referenced in the Complaint. Altria additionally denies that the Commission is entitled to any of the relief sought in the Notice of Contemplated Relief on page 16 of the Complaint. Altria reserves the right to amend and/or supplement this answer at a later stage of the proceedings as permitted by the Rules. Each paragraph below corresponds to the same-numbered paragraph in the Complaint.

I. NATURE OF THE CASE

1. The first sentence of Paragraph 1 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

Altria admits the allegations of the second sentence of Paragraph 1. Altria denies the allegations of the third sentence of Paragraph 1, except to admit that it began selling e-vapor products in 2013, that there has been a shift in consumer demand toward alternative nicotine products, and that it sought to meet this consumer demand. Altria denies the remaining allegations of Paragraph 1.

2. Altria denies the allegations of Paragraph 2, except to admit that JLI introduced JUUL, its pod-based e-vapor product, in 2015, and, by 2017, had obtained significant sales.

3. Altria denies the allegations of the first four sentences of Paragraph 3, except to admit that its Nu Mark subsidiary offered products in the e-vapor category, including the MarkTen and MarkTen Elite, and that Nu Mark expanded the availability to consumers of MarkTen Elite, a pod-based e-vapor product, in March 2018. Altria denies the allegations in the last sentence of Paragraph 3 and respectfully refers to its statements to the investment community for a more complete and accurate statement of their contents.

4. Altria denies the allegations of Paragraph 4.

5. Altria denies the allegations of Paragraph 5, except to admit that it did not reach an agreement with JLI until December 20, 2018.

6. Altria admits the allegations of the first sentence of Paragraph 6. Altria denies the remaining allegations of Paragraph 6 and respectfully refers to the Class C-1 Common Stock Purchase Agreement, by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC, dated as of December 20, 2018 (the “Purchase Agreement”), the Relationship Agreement, by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises LLC, dated as of December 20, 2018 (the “Relationship Agreement”), the Services Agreement, by and between Altria Group, Inc. and JUUL Labs, Inc., dated as of December 20, 2018 (the “Services

Agreement”), the Intellectual Property License Agreement, by and between Altria Group, Inc., its Subsidiaries, and JUUL Labs, Inc., entered into as of December 20, 2018 (the “Intellectual Property License Agreement”), and the Eighth Amended and Restated Voting Agreement, by and among JUUL Labs, Inc., Altria Group, Inc., Altria Enterprises LLC, certain Investors, the Key Common Holders, and each Additional Party, made as of December 20, 2018 (the “Voting Agreement”), for a more complete and accurate statement of their contents.

7. Altria denies the allegations of the first two sentences of Paragraph 7. Altria lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 7 and denies them on that basis.

8. Altria denies the allegations of Paragraph 8.

9. Altria admits the allegations of Paragraph 9, but avers that the departure of its Chief Growth Officer to JLI was unrelated to the Transaction.

10. The first sentence of Paragraph 10 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations. Altria denies the allegations of the second sentence of Paragraph 10, except to admit that product development or acquisition requires time and/or capital and that new tobacco products require premarket authorization by the FDA pursuant to statutory and regulatory requirements before such new tobacco products can be marketed and sold in the United States. Altria respectfully refers to the FDA statutory and regulatory requirements for a more complete and accurate statement of their contents.

11. The first two sentences of Paragraph 11 set forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations. Altria denies the allegations in the last sentence of Paragraph 11, except to admit that it entered

into certain amendments with JLI in January 2020 that removed some support that Altria had been providing to JLI, but maintained other support, including with respect to regulatory matters, which is ongoing. Altria respectfully refers to those amendments for a more complete and accurate statement of their contents.

12. Paragraph 12 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

13. Paragraph 13 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

II. JURISDICTION

14. Paragraph 14 sets forth legal conclusions to which no response is required.

15. Paragraph 15 sets forth legal conclusions to which no response is required.

16. Paragraph 16 sets forth legal conclusions to which no response is required.

III. RESPONDENTS

17. Altria admits the allegations of the first two sentences of Paragraph 17. Altria denies the allegations of the third sentence of Paragraph 17. Altria admits the allegations of the last sentence of Paragraph 17.

18. Altria admits the allegations of the first sentence of Paragraph 18, except notes that JLI has announced that its headquarters are moving to Washington, D.C. Altria denies the allegations of the second sentence of Paragraph 18.

IV. THE TRANSACTION

19. Altria denies the allegations of the first and third sentences of Paragraph 19 and respectfully refers to the Purchase Agreement, Services Agreement, Relationship Agreement, Voting Agreement, and Intellectual Property License Agreement for a more complete and

accurate statement of their contents. Altria denies the allegations of the second sentence of Paragraph 19, except to admit that Altria's initial investment did not require a notification under the Hart-Scott-Rodino Act.

20. Altria denies the allegations of Paragraph 20 and respectfully refers to the Purchase Agreement, Services Agreement, Relationship Agreement, Voting Agreement, and Intellectual Property License Agreement for a more complete and accurate statement of their contents.

21. Altria admits that, on February 4, 2019, it filed under the HSR Act with respect to its conversion of its interest into voting securities. The remaining allegations of Paragraph 21 set forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the remaining allegations of Paragraph 21.

22. Altria denies the allegations of Paragraph 22 and respectfully refers to the Relationship Agreement for a more complete and accurate statement of its contents.

23. Altria respectfully refers to the Services Agreement and Relationship Agreement for a more complete and accurate statement of their contents. To the extent that the allegations of Paragraph 23 are inconsistent with the Services Agreement and Relationship Agreement, Altria denies such allegations.

24. Altria respectfully refers to the Intellectual Property License Agreement for a more complete and accurate statement of its contents. To the extent that the allegations of Paragraph 24 are inconsistent with the Intellectual Property License Agreement, Altria denies such allegations.

25. Altria admits the allegations of Paragraph 25 and respectfully refers to Amendment No. 1 to Class C-1 Common Stock Purchase Agreement, by and among JUUL Labs,

Inc., Altria Group, Inc., and Altria Enterprises, LLC, entered into as of January 28, 2020, and the Purchase Agreement (together, the “Amended Purchase Agreement”), Amendment No. 1 to Relationship Agreement, by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises LLC, entered into as of January 28, 2020, and the Relationship Agreement (together, the “Amended Relationship Agreement”), Amendment No. 1 to Services Agreement, by and between Altria Group, Inc. and JUUL Labs, Inc., made and effective as of January 28, 2020, and the Services Agreement (together, the “Amended Services Agreement”), and the Ninth Amended and Restated Voting Agreement, by and among JUUL Labs, Inc., Altria Group, Inc., Altria Enterprises LLC, certain Investors, the Key Common Holders, and each Additional Party, made as of January 28, 2020 (the “Revised Voting Agreement”), for a more complete and accurate statement of their contents.

26. Altria respectfully refers to the Revised Voting Agreement for a more complete and accurate statement of its contents. To the extent that the allegations of Paragraph 26 are inconsistent with the Revised Voting Agreement, Altria denies such allegations.

27. Altria respectfully refers to the Amended Relationship Agreement for a more complete and accurate statement of its contents. To the extent that the allegations of Paragraph 27 are inconsistent with the Amended Relationship Agreement, Altria denies such allegations.

28. Altria respectfully refers to the Amended Services Agreement for a more complete and accurate statement of its contents. To the extent that the allegations of Paragraph 28 are inconsistent with the Amended Services Agreement, Altria denies such allegations.

V. INDUSTRY BACKGROUND

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

29. Altria denies the allegations of Paragraph 29 as to Altria, except to admit that it acknowledged the opportunity to pursue various alternative nicotine growth categories, including

e-vapor products. Altria otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 29 and denies them on that basis.

30. Altria denies the allegations of Paragraph 30, except to admit that Nu Mark introduced the MarkTen e-vapor product in 2013, that it made certain acquisitions of e-vapor platforms, and that it expanded the availability to consumers of MarkTen Elite, a pod-based e-vapor product, in March 2018.

31. Altria denies the allegations in the first sentence of Paragraph 31, except to admit that it discussed the e-vapor category in certain investor presentations and internal incentive compensation plans, to which Altria respectfully refers for a more complete and accurate statement of their contents. The second sentence of Paragraph 31 purports to characterize and quote a statement by Howard Willard, Altria's former CEO, to which Altria respectfully refers for a more complete and accurate statement of its contents.

32. Altria denies the allegations of Paragraph 32, except to admit that JLI was spun off from Pax Labs, Inc. and in 2015 introduced a pod-based e-vapor product, JUUL.

B. The PMTA Process for E-cigarettes

33. Altria respectfully refers to the statutes, regulations, guidances, and other materials governing the FDA's premarket authorization regime for a more complete and accurate statement of the regulatory framework. To the extent that the allegations of Paragraph 33 are inconsistent with that regulatory framework, Altria denies such allegations and avers that the PMTA filing date has been adjourned to September 9, 2020.

34. Altria admits that preparing a PMTA requires a significant amount of resources — time, personnel, and money — and that the FDA has processes in place to assist small companies in preparing PMTAs and has committed to a streamlined PMTA approval process for small companies. Altria otherwise denies the allegations of Paragraph 34.

35. Altria respectfully refers to the FDA’s January 2, 2020 announcement and the referenced statute passed by Congress for a more complete and accurate statement of those materials’ contents. To the extent that the allegations of Paragraph 35 are inconsistent with that announcement and that statute, Altria denies such allegations.

VI. THE RELEVANT MARKET

36. Paragraph 36 sets forth legal conclusions to which no response is required.

37. Altria admits the allegations of the first, third, and fourth sentences of Paragraph 37. With respect to the second sentence, Altria admits that there are two broadly defined, although not exclusive, types of e-vapor products, closed-system devices and open-system devices, but denies that they are their own “categories.” Altria denies the remaining allegations of the second sentence. As to the remaining allegations of Paragraph 37, Altria respectfully refers to the referenced FDA statement of enforcement policy for a more complete and accurate statement of its contents. To the extent that the remaining allegations of Paragraph 37 are inconsistent with that statement of enforcement policy, Altria denies such allegations.

38. Altria denies the allegations of Paragraph 38, except to admit that open-tank e-vapor products incorporate refillable tanks that users manually fill with e-liquid and that users can customize various components.

39. Altria denies the allegations of Paragraph 39, except to admit that closed-system e-vapor products are sold through multi-outlet channels, as well as other outlets, and open-tank systems are sold through retail outlets known as vape shops, as well as other outlets.

40. Altria denies the allegations of Paragraph 40.

41. The first sentence and third sentence of Paragraph 41 set forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations. Altria denies the remaining allegations of Paragraph 41.

42. Paragraph 42 sets forth legal conclusions to which no response is required.

VII. MARKET STRUCTURE

43. Paragraph 43 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

44. Paragraph 44 sets forth legal conclusions and characterizations of the Merger Guidelines and court decisions to which no response is required. To the extent that a response is required, Altria denies the allegations.

45. Paragraph 45 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations of Paragraph 45.

VIII. ANTICOMPETITIVE EFFECTS

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

46. Altria denies the allegations of Paragraph 46 and respectfully refers to the testimony of the referenced witnesses for a more complete and accurate statement of its contents.

47. Altria admits the allegations of the first sentence of Paragraph 47, except to deny the characterization of individuals as "lead negotiators" for Altria. Altria denies the remaining allegations of Paragraph 47 and respectfully refers to the quoted term sheet for a more complete and accurate statement of its contents.

48. Altria denies the allegations of Paragraph 48 and respectfully refers to the testimony of JLI's former CFO for a more complete and accurate statement of its contents.

49. Altria admits the allegations of Paragraph 49, except to deny the characterization of individuals as “lead negotiators” for Altria.

50. Altria denies the allegations of Paragraph 50 and respectfully refers to the referenced draft talking points for a more complete and accurate statement of their contents.

51. Altria denies the allegations of Paragraph 51 and respectfully refers to the referenced draft talking points for a more complete and accurate statement of their contents.

52. Altria denies the allegations of Paragraph 52 and respectfully refers to the email sent by Billy Gifford and the term sheet markup for a more complete and accurate statement of their contents.

53. Altria lacks knowledge or information sufficient to form a belief as to the truth of this allegation and denies it on that basis.

54. Altria admits the allegations in the first two sentences of Paragraph 54, except to deny that the purpose of this discussion was to go over a “few key points of disagreement.” Altria denies the remaining allegations of Paragraph 54 and respectfully refers to JLI’s message for a more complete and accurate statement of its contents.

55. Altria denies the allegations of the first two sentences of Paragraph 55 and respectfully refers to the quoted letter for a more complete and accurate statement of its contents. Altria lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of Paragraph 55, and on that basis denies those allegations. Altria denies the remaining allegations of Paragraph 55.

56. Altria denies the allegations of Paragraph 56, except to admit that, on October 25, 2018, it announced that Nu Mark would be discontinuing certain of its e-vapor products, including MarkTen Elite and flavored MarkTen products (other than tobacco, mint, and

menthol), because of the concerns expressed by the FDA that pod-based systems and nontraditional flavors could be contributing to youth usage.

57. Altria denies the allegations of Paragraph 57 and respectfully refers to the quoted email for a more complete and accurate statement of its contents.

58. Altria denies the allegations of Paragraph 58, except to admit that, on December 7, 2018, it announced Nu Mark was discontinuing its few remaining products.

59. Altria admits the allegations in the first sentence of Paragraph 59. Altria denies the remaining allegations of Paragraph 59 and respectfully refers to the quoted emails for a more complete and accurate statement of their contents.

60. Altria denies the allegations of Paragraph 60, except to admit that it executed and announced the Purchase Agreement and other related agreements on December 20, 2018 and respectfully refers to those agreements for a more complete and accurate statement of their contents.

61. Altria denies the allegations in the first two sentences of Paragraph 61, and respectfully refers to the Purchase Agreement and other ancillary agreements for a more complete and accurate statement of their contents, including Article 3(a) of the Relationship Agreement, which prevents Altria from “tak[ing] actions with the purpose of preparing to engage in the e-Vapor Business, including through engaging in or sponsoring research and development activities.” Altria lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence of Paragraph 61, and on that basis denies them.

B. Respondents’ Conduct Caused Harm to Competition

62. Paragraph 62 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations of Paragraph 62.

63. Altria denies the allegations of Paragraph 63, except to admit that it used its distribution network to expand the distribution of MarkTen Elite.

64. Altria denies the allegations of Paragraph 64 as to Altria, except to admit that, at times, Nu Mark used promotions in its failed attempt to successfully market MarkTen and MarkTen Elite. Altria lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations as to JLI, and on that basis denies them.

65. Altria denies the allegations of Paragraph 65, except to admit that Nu Mark expended significant resources to acquire and attempt to develop various e-vapor products, none of which was a commercial success.

66. Altria denies the allegations of Paragraph 66.

67. Altria denies the allegations of Paragraph 67, except to admit that some retailers voluntarily participated in Nu Mark incentive programs that, among other things, provided incentives to retailers for the placement of certain products in certain locations within the retailers' stores.

68. Altria denies the characterizations of the documents and executive statements referenced in Paragraph 68 and respectfully refers to those documents and statements for a more complete and accurate statement of their contents.

69. Altria denies the allegations of Paragraph 69.

IX. LACK OF COUNTERVAILING FACTORS

70. Paragraph 70 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

71. Altria denies the allegations of Paragraph 71, except to admit that Philip Morris International, a multinational tobacco manufacturer, submitted a PMTA application for its IQOS

heat-not-burn device in May 2017 and received approval two years later in April 2019.

Moreover, Altria admits that preparing a PMTA requires a significant amount of resources — time, personnel, and money — and that the FDA has processes in place to assist small companies in preparing PMTAs and has committed to a streamlined PMTA approval process for small companies. Additionally, to the extent that portions of the allegations of Paragraph 71 rely on internal Altria documents and submissions made by Altria to the FTC during its investigation of the Transaction, Altria respectfully refers to those documents and submissions for a more complete and accurate statement of their contents. Altria lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations as to JLI, and on that basis denies them.

72. Altria denies the allegations of Paragraph 72 and respectfully refers to submissions made by Altria to the FTC during its investigation of the Transaction for a more complete and accurate statement of the requirements for selling an e-vapor product.

73. Altria denies the allegations of Paragraph 73.

74. Altria lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 74 and denies them on that basis.

75. Paragraph 75 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

76. Paragraph 76 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

X. VIOLATIONS

Count I — Illegal Agreement

77. Altria incorporates each response set forth above as though fully set forth herein.

78. Paragraph 78 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

79. Paragraph 79 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

Count II — Illegal Acquisition

80. Altria incorporates each response set forth above as though fully set forth herein.

81. Paragraph 81 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

82. Paragraph 82 sets forth legal conclusions to which no response is required. To the extent that a response is required, Altria denies the allegations.

AFFIRMATIVE AND OTHER DEFENSES

Altria asserts the following defenses with respect to the causes of action alleged in the Complaint, without assuming the burden of proof or persuasion where such burden rests on the Commission. Altria reserves the right to supplement its defenses as discovery progresses.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Complaint fails to allege any harm to competition.

THIRD DEFENSE

The Complaint fails to allege any harm to consumers or consumer welfare.

FOURTH DEFENSE

The Complaint fails to allege an appropriate relevant market.

FIFTH DEFENSE

Counts I and II fail to state a claim because they allege effects in “the U.S. market for e-cigarettes.” The Complaint itself defines “e-cigarettes” to include both closed-system and open-tank e-cigarettes. The Complaint alleges no predicate facts on which to base any finding that competition was lessened in this alleged market.

SIXTH DEFENSE

The alleged conduct had and continues to have substantial pro-competitive justifications and benefited and continues to benefit consumers and the public interest. Those pro-competitive justifications outweigh any alleged anticompetitive effects of the alleged conduct.

SEVENTH DEFENSE

To the extent that Counts I and II of the Complaint rely on Altria’s discontinuation of any e-vapor products, this is not a cognizable effect of any later agreement reached by Respondents, and Counts I and II therefore fail to state a claim.

EIGHTH DEFENSE

Neither the filing of this administrative action nor the contemplated relief is in the public interest, pursuant to 15 U.S.C. § 45.

NINTH DEFENSE

Nu Mark’s discontinuation of its e-vapor products did not unreasonably restrain trade or substantially lessen competition to the extent those products would not have received PMTA approval.

TENTH DEFENSE

Nu Mark’s discontinuation of the development of new e-vapor products did not unreasonably restrain trade or substantially lessen competition given the FDA regulatory framework.

ELEVENTH DEFENSE

Nu Mark's discontinuation of certain e-vapor products did not unreasonably restrain trade or substantially lessen competition to the extent any such finding by the FTC implicates the scientific or public health expertise held by the FDA.

TWELFTH DEFENSE

These proceedings are invalid because the structure of the Commission as an independent agency that wields significant executive power, and the associated constraints on removal of the Commissioners and other FTC officials, violates the separation of powers.

THIRTEENTH DEFENSE

The structure of these administrative proceedings, in which the Commission both initiates and finally adjudicates the Complaint against Altria, violates Altria's Fifth Amendment Due Process right to adjudication before a neutral arbiter.

FOURTEENTH DEFENSE

These administrative proceedings violate Altria's Fifth Amendment Due Process right to adjudication before a neutral arbiter as applied to Altria because the Commission has prejudged the merits of the instant action.

FIFTEENTH DEFENSE

The Commission's procedures violate Altria's right to procedural due process under the Due Process Clause of the Fifth Amendment.

SIXTEENTH DEFENSE

The Commission's procedures arbitrarily subject Altria to administrative proceedings rather than to proceedings before an Article III judge in violation of Altria's right to Equal Protection under the Fifth Amendment.

WHEREFORE, Altria respectfully requests that the Administrative Law Judge enter an order:

1. Denying the FTC's contemplated relief;
2. Dismissing the Complaint in its entirety with prejudice;
3. Awarding Altria its costs of suit; and
4. Awarding such other and further relief as the Administrative Law Judge may deem proper.

Respectfully submitted,

Dated: July 27, 2020

By: s/ Marc Wolinsky_____

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Counsel for Altria Group, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on July 27, 2020, I caused a true and correct copy of the foregoing Answer and Defenses to be filed through the Federal Trade Commission's E-Filing platform, which will send notifications of such filing to:

Office of the Secretary
Federal Trade Commission
Constitution Center
400 Seventh Street, S.W., Suite 5610
Washington, DC 20024

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

I HEREBY CERTIFY that, on July 27, 2020, I delivered via electronic mail a true and correct copy of the foregoing Answer and Defenses to the Complaint to:

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Notice of Electronic Service

I hereby certify that on July 27, 2020, I filed an electronic copy of the foregoing Answer and Defenses of Respondent Altria Group, Inc., with:

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600 Pennsylvania Ave., NW
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Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
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I hereby certify that on July 27, 2020, I served via E-Service an electronic copy of the foregoing Answer and Defenses of Respondent Altria Group, Inc., upon:

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