PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

COMPLAINT COUNSEL'S APPEAL OF THE INITIAL DECISION

John Newman
Deputy Director

Peggy Bayer Femenella
Acting Assistant Director

James Abell
Acting Deputy Assistant Director

Stephen Rodger
Deputy Assistant Director

Jeanine Balbach
Michael Blevins
Erik Herron
Frances Anne Johnson
Joonsuk Lee
Meredith Levert
Nicole Lindquist
Michael Lovinger
David Morris
Kristian Rogers
Eric Sprague

Attorneys

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496
Email: jabell@ftc.gov

Dated: April 5, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

RECORD REFERENCES

References to the record are made using the following citation forms and abbreviations:

PX – Complaint Counsel Exhibit

ID – Initial Decision Page

IDF – Initial Decision Finding

CCB – Complaint Counsel's Post-Trial Brief

CCRB – Complaint Counsel's Post-Trial Reply Brief

CCFF – Complaint Counsel's Post-Trial Findings of Fact and Conclusions of Law

CCRRFF – Complaint Counsel's Post-Trial Reply Findings of Fact and Conclusions of Law

RB – Respondents' Post-Trial Brief

Tr. – Citations to Trial Testimony: Witness (Party) Tr. 0000

STATEMENT OF THE CASE

A. Summary of the Argument

This appeal presents a straightforward anticompetitive agreement between two horizontal competitors. Respondent Altria Group, Inc. ("Altria"), the largest tobacco company in the United States, withdrew all of its products from the closed-system e-cigarette market and signed a non-compete to obtain a substantial ownership stake in Juul Labs, Inc. ("JLI"), the undisputed market leader. Altria had invested hundreds of millions of dollars developing its popular e-cigarettes; acquired several other e-cigarette products from third parties; possessed strong marketing and distribution capabilities, as well as significant regulatory experience; and publicly stated to investors that e-cigarettes were critical to the company's future. Following JLI's meteoric rise to market leadership, Altria adopted a two-track "make or buy" strategy: either it would continue to compete aggressively by investing in its own e-cigarette business, or, more preferably, it would exit and partner with JLI. Altria ultimately chose the latter, reaching an agreement to buy 35 percent of JLI (the "Transaction"). As a result, Altria withdrew its own e-cigarettes and entered a written non-compete guaranteeing that it would not market or develop any e-cigarettes for at least six years.

In its Initial Decision ("the Decision"), the Court (1) dismissed Complaint Counsel's Sherman Act Section 1 claim,[1] finding that Altria's sudden exit from the closed-system e-cigarette market was unrelated to any agreement with JLI, and (2) dismissed Complaint Counsel's Clayton Act Section 7 claim, 15 U.S.C. § 18, concluding that the Transaction did not substantially lessen competition. In reaching these conclusions, the Decision ignored well-settled

[1] Section 5 of the FTC Act, 15 U.S.C. § 45, prohibits unfair methods of competition, including conduct that violates Section 1 of the Sherman Act, 15 U.S.C. § 1.

precedent governing the review of evidence in conspiracy cases and credited the self-serving testimony from Respondents' executives over more reliable contemporaneous evidence. As a result of its flawed analysis, the Court set an insurmountable standard for proving the existence of an agreement and ignored the Transaction's significant anticompetitive effects. It also missed the fundamental truth of this case: but for the Transaction, the leading tobacco company in the United States would have continued to compete aggressively in the closed-system e-cigarette market on price, innovation, and other key dimensions of competition.

The Court's analysis is flawed in two main respects. First, in dismissing the Section 1 claim, it erred in finding that Altria's exit was not the result of an agreement with JLI. In reaching this conclusion, the Court failed to consider the evidentiary record as a whole; ignored material evidence; and relied on self-serving, post-hoc testimony from Respondents' executives whose credibility had been called into serious question.

Second, the Court erred in its analysis of anticompetitive effects. Despite finding that Complaint Counsel had properly defined a relevant market and had shown that market was highly concentrated, the Court nevertheless concluded that Complaint Counsel was not entitled to a presumption of harm under Section 7. The Court then compounded this error by ignoring the critical question of any Section 7 analysis: does the Transaction create a reasonable probability of anticompetitive effects when compared to the "but-for" world in which the Transaction did not occur? The Court's analysis of the effects of the Transaction and non-compete agreement under Section 7 and Section 1, respectively, was further marred by its failure to examine the likely harm to consumers stemming from reduced innovation, higher prices, and loss of choice.

The Commission now has the opportunity to correct these errors and protect competition in the closed-system e-cigarette market. *See* Commission Rule 3.54(a), 16 C.F.R. § 3.54(a) ("Upon appeal from or review of an initial decision, the Commission will consider such parts of

the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision.").

B. Statement of Facts

1. Altria affirms its long-term commitment to e-cigarettes

Given the long-term decline in combustible cigarettes, Altria viewed e-cigarettes as critical to its future, and consistently identified achieving "long-term leadership" in the growing e-cigarette category as a strategic goal. CCFF ¶¶93-108. The other major tobacco manufacturers {[redacted]} CCFF ¶¶74, 109-17, 1031-32. Altria's then-CEO, Howard Willard, recognized that "long-term leadership won't be achieved overnight," but remarked that Nu Mark—Altria's innovation subsidiary focused primarily on e-cigarettes—had "a diverse product portfolio and a pipeline of promising products in development" and was "well positioned to achieve long-term leadership in the category, bolstered by [Altria's] world-class marketing, sales and distribution[,] and regulatory capabilities." CCFF ¶103.

In addition to expressly committing to the category in its public investor statements, Altria invested hundreds of millions of dollars in acquiring, developing, marketing, and selling e-cigarettes. CCFF ¶¶409-35, 532-44. Altria's annual spending on e-cigarette product development grew from a mere $7 million in 2012 to a projected $90 million in 2017. CCFF ¶413. These investments yielded results: Altria's MarkTen e-cigarette brand {[redacted]}[2] CCFF ¶¶136-37, 489, 1091. Even after JUUL's

[2] The Court correctly found that the relevant product market is closed-system e-cigarettes, ID16-22, which includes cigalikes and pod-based products, that consist of a battery and sealed pods or cartridges containing nicotine liquid.

explosive growth, MarkTen was still the third best-selling U.S. e-cigarette brand in April 2018. CCFF ¶1740. Both Altria's MarkTen cigalikes and its recently introduced MarkTen Elite pod-based products were growing in sales and generating positive margins when Altria discontinued them in late 2018. CCFF ¶¶1097, 1104-08, 1112-28; CCRRFF ¶431. Indeed, in August 2018, MarkTen cigalikes were the second fastest growing e-cigarette brand in the U.S. behind JUUL. CCFF ¶1368.

2. Altria invests for the future while improving its current performance

Beyond its existing products, Altria also worked to develop and launch its next generation of e-cigarettes. CCFF ¶¶1538-74, 1690-91. Its $350 million Center for Research and Technology employed over 400 scientists, physicians, product developers, and engineers who worked on innovative products, including e-cigarettes. CCFF ¶452; CCRRFF ¶907. Pre-Transaction, Altria was actively pursuing several advanced R&D projects, evaluating several other e-cigarette acquisitions (including of pod-based products with nicotine salts), and collaborating with several third parties on e-cigarette development. CCFF ¶¶1566-68, 1574, 1719-30.

[redacted]. CCFF ¶¶1068-75, 1088-111; CCRRFF ¶181. Indeed, Altria rewarded Nu Mark's President with significant bonuses in 2016 and 2017. CCFF ¶¶490, 1095. Nu Mark's R&D group, NMI, could quickly resolve technical problems, fixing the leaking[3] gasket in Elite's pods in only a few months. CCFF ¶¶14-19, 443, 1209-10. And by October 2018, Nu Mark had

CCFF ¶¶218, 286. Cigalikes have a similar shape as cigarettes, whereas pod-based products have varied shapes. CCFF ¶¶278-79. JLI's product looks like a USB flash drive. CCFF ¶279. Both cigalikes and pod-based products may, or may not, contain nicotine salts. CCFF ¶288.

[3] Most pod-based products, including JUUL, suffered from leaking. CCFF ¶¶1203-05, 1222, 1483-90.

developed a prototype for an optimized version of Elite ("Elite 2.0") that contained nicotine salts, which was generating positive consumer feedback. CCFF ¶¶1281-94.

3. FDA regulation of e-cigarettes

In 2016, the FDA issued regulations requiring manufacturers of new e-cigarette products to submit a Premarket Tobacco Application ("PMTA") and obtain a marketing authorization before selling their products. CCFF ¶197. E-cigarettes on the market before the effective date of the "Deeming Rule" (August 8, 2016) could remain on the market, but the manufacturers of those e-cigarettes had to file a PMTA by a certain deadline. CCFF ¶¶198-99. At the time of the Transaction, that deadline was August 2022, although it later changed several times and was ultimately set at September 9, 2020. CCFF ¶¶199, 201. Manufacturers can submit PMTAs for new e-cigarette products after the deadline, but they cannot sell those products until receiving FDA approval. CCFF ¶200.

In reviewing a PMTA, the FDA evaluates whether the product is "appropriate for the protection of public health." 21 U.S.C. § 387j(c). A key factor that the FDA considers is initiation risk—the risk that youth or non-smokers will begin using the product. CCFF ¶¶1323-27. To date, the only e-cigarettes to receive marketing authorizations by the FDA are a Reynolds cigalike (Vuse Solo), the Logic Power cigalike, and the Logic Pro hybrid device. IDF261; CCRRFF ¶262; FDA News Release, "FDA Issues Decisions on Additional E-cigarette," Mar. 24, 2022 ("FDA News Release").[4]

4. JLI makes clear that a "precept" for any Transaction is Altria exiting e-cigarettes

JUUL took off dramatically in 2017, quickly eclipsing MarkTen and {[redacted]} to become the e-cigarette leader. CCFF ¶¶156, 158, 546. JLI's rise stood in the way of Altria's

[4] *See* Exhibit B to Complaint Counsel's Motion Requesting Official Notice of FDA Decision.

highly publicized goal of leading the e-cigarette category, the largest and fastest growing alternative to traditional cigarettes, threatening both Altria's e-cigarette goals and its lucrative but declining traditional cigarette business. CCFF ¶¶59-74, 96-105. After realizing the gravity of the situation, Altria pursued two parallel strategic pathways: acquiring JLI and improving its own e-cigarette business. CCFF ¶1718.

By the spring of 2018, Respondents discussed Altria acquiring a partial interest in JLI. CCFF ¶881. JLI made clear that a transaction was only possible if Altria exited its existing e-cigarette business and agreed not to compete in the future. CCFF ¶¶868-69, 872, 881-88. Riaz Valani, a JLI board member, testified that a "general precept for [] what it would take for Altria to ever have an involvement with JUUL would be that they [] couldn't have a directly competitive offering of their own." CCFF ¶869.

There was uncertainty about how Altria's market exit would be effectuated. Before the exchange of the initial term sheet, Altria conveyed to JLI that its ongoing relationship with Philip Morris International ("PMI") might be an obstacle.[5] CCFF ¶¶899, 927-31. Altria was concerned that under its Joint Research, Development, and Technology Sharing Agreement ("JRDTA") with PMI, it did not have the right to divest or contribute its e-cigarette products to a third party until July 2020, when the JRDTA expired. CCFF ¶927. Given this complication, one option that Respondents discussed was Altria simply ceasing to operate its e-cigarette business. CCFF ¶¶968-82.

On July 30, 2018, JLI sent an initial term sheet requiring Altria to divest, "or if divestiture is not reasonably practicable, contribute at no cost to [JLI] and if such a contribution

[5] PMI is an international company manufacturing and selling various nicotine products, including cigarettes, heated tobacco products, and e-cigarettes. CCFF ¶2071. In 2008, PMI split from its former parent, Altria, with PMI focusing on international markets and Altria focusing on the U.S. CCFF ¶2071.

is not reasonably practicable, then cease to operate" its existing e-cigarette business no later than nine months following the Transaction, and commit to a forward-looking non-compete. CCFF ¶¶683-86. JLI's Valani testified that the divest/contribute/cease to operate term "reflect[ed] the intent" of Altria "not being directly competitive in the electronic cigarette space." CCFF ¶897. Referring to the same provision, JLI board member Nick Pritzker testified that the "goal was for [Altria] not to be competing against Juul if they had a significant interest in Juul...." CCFF ¶898.

On August 1, 2018, Altria's Willard and then-CFO Billy Gifford met with Valani, Pritzker, and JLI's then-CEO Kevin Burns to discuss the term sheet. CCFF ¶¶690-91. Days later, Willard, Gifford, and other Altria executives met with Nu Mark President Brian Quigley. CCFF ¶1361. At this meeting, Gifford suggested possibly pulling Elite off the market, surprising Quigley, given that Altria "had just launched [Elite]." CCFF ¶¶1361-62. Indeed, Willard himself had recently touted to investors that "Nu Mark grew volume by approximately 16% in the quarter and 23% for the first half" and that Elite and MarkTen Bold[6] were "getting traction with consumers." CCFF ¶1113. Quigley testified that it was unusual to launch a product, have it grow, and then pull it several months later. CCFF ¶1511. Quigley "could not understand why" Altria's executives might want to shut down the business. CCRRFF ¶842.

Nonetheless, the negotiations around Altria's exit continued. On August 4, 2018, JLI sent a revised term sheet adding the word "shutdown" to the non-compete agreement. CCFF ¶694. The next day, Willard's talking points for a call with JLI stated that (1) "Altria has come a long way to accommodate [JLI] in this process," including by "[d]emonstrating flexibility with our existing vapor business, if necessary, in order to form the partnership[;]" and (2) "If we establish this partnership, then we expect that Altria will: ... potentially exit our own vapor business."

[6] Introduced in 2017, MarkTen Bold was a cigalike containing nicotine salts. CCFF ¶¶21, 1196.

CCFF ¶¶698-99. In a revised version of these talking points, Altria's General Counsel, Murray Garnick, added a statement that if a deal does not work out, Altria and JLI should "shake hands, and agree to be competitors." CCFF ¶701.

As negotiations proceeded, the non-compete agreement remained a central feature of any deal. On August 9, 2018, Altria tried to strike the divest/contribute/cease to operate language from the term sheet, allowing Altria to compete through its existing and future e-cigarettes until HSR clearance (or beyond if clearance was not granted).[7] CCFF ¶¶704-07. The next day, Altria executives decided to move forward with the MarkTen cigalike PMTA and with implementing a new gasket to fix Elite's leaking pods. CCFF ¶¶1364-65. But JLI reacted strongly to Altria's deletion of the divest/contribute/cease to operate provision, insisting that it was "not acceptable" for Altria to retain any right to compete through its existing or future e-cigarette products, and required Altria's confirmation it was aligned on this issue before proceeding with a planned meeting in San Francisco on August 18, 2018. CCFF ¶¶720-24. The August 18 meeting occurred, with Altria clarifying that its removal of the divest/contribute/cease to operate language was driven by antitrust concerns, and that Altria had no substantive disagreement with the term. CCFF ¶730.

As negotiations continued, Altria sent JLI a letter on October 5, 2018, confirming that it would "not compete, in a manner consistent with our previous discussions, in the U.S. e-vapor market for any period…." CCFF ¶782. Altria also sent JLI a term sheet on October 15, 2018, including a reference to Altria "otherwise exiting" the e-cigarette business. CCFF ¶800.

[7] Respondents filed for HSR clearance solely to convert Altria's non-voting interest to a voting interest and appoint JLI board members. CCFF ¶¶33-35, 47.

5. After receiving JLI's non-compete demand, Altria surprises industry participants by suddenly exiting the e-cigarette market

Beginning in the fall of 2018, in accordance with its agreement with JLI, Altria took a series of steps that culminated in the complete removal of its existing e-cigarette products from the market. On October 25, 2018, Altria withdrew its pod-based e-cigarettes Elite and Apex from the market, due to a purported youth use concern. CCFF ¶987. Four days later, on October 29, Respondents agreed on a final term sheet. CCFF ¶¶820-25. On December 7, 2018, Altria announced the discontinuation of its remaining e-cigarette products, including MarkTen cigalikes. CCFF ¶848. {[redacted]} CCFF ¶¶859-60.

In light of Altria's public statements, investments, and strong incentive to compete in e-cigarettes, the company's decision to eliminate its entire e-cigarette business was a dramatic reversal. Altria's products were already gaining traction with consumers, and its size and resources positioned it to be a formidable competitor unlike any other in the market. CCFF ¶¶409-35, 493-522. Indeed, Altria's customers, competitors, and market analysts all expressed surprise when Altria announced the complete abandonment of its e-cigarette business. CCFF ¶¶1017-27. Reynolds, for example, was "very surprised" by Altria's "substantial strategic shift." CCFF ¶1018. Rivals {[redacted]}, and Logic have refused to abandon the critical e-cigarette market, despite facing challenges similar to Altria. CCFF ¶¶1028-32.

6. Altria and JLI agree to a six-year non-compete as part of the Transaction

On December 20, 2018, Respondents executed and closed the Transaction whereby Altria purchased 35 percent of JLI for $12.8 billion. CCFF ¶¶33-34. The Transaction included a non-compete term barring Altria from participating in all aspects of the e-cigarette business,

including R&D, for an initial term of six years. CCFF ¶38. The non-compete included a clause that Altria "may engage in the business relating to (I) its GreenSmoke, MarkTen [], and MarkTen Elite brands, in each case, *as such business is presently conducted*…." CCFF ¶1002 (emphasis added). Altria, however, had already stopped selling these products, so the only business "presently conducted" was to sell through remaining inventory. CCFF ¶¶1001-05. This term guaranteed that Altria could not compete with any of its e-cigarette products going forward.

7. The non-compete precludes Altria from commercializing PMI's VEEV

Altria's strategic partnership with PMI included a commitment to "collaborate to develop the next generation of e-vapor products for commercialization in the United States." CCFF ¶145. Under the JRDTA, Altria and PMI pooled resources, technology, and IP for Altria to use within the U.S. and for PMI to use internationally. CCFF ¶¶516-17.

In particular, the JRDTA gave Altria the right to commercialize PMI's promising, next-generation pod-based e-cigarette, VEEV, in the U.S.[8] CCFF ¶¶1644-46. Launched in select international markets by PMI in 2020, VEEV has nicotine salts, numerous appealing product features, and is a "high quality" product that performs well with consumers. CCFF ¶¶1647-48, 1651-86. PMI fully intended and expected Altria to commercialize VEEV in the U.S. CCFF ¶1690. {[redacted]}

[8] As part of its strategic partnership with PMI, Altria worked with PMI to secure PMTA approval for—and has already commercialized—PMI's IQOS heat-not-burn product in the U.S. CCFF ¶¶385-86, 1078-82, 1605; Garnick (Altria) Tr. 1687-88.

[redacted] } As a result, Altria could not commercialize VEEV.[9]

QUESTIONS PRESENTED

A. Whether the evidence, considered as a whole, shows that it is more likely than not that Altria's sudden exit from the closed-system e-cigarette market was due to an agreement with JLI rather than a unilateral decision by Altria?

B. Whether the Transaction—and Altria's related exit from the e-cigarette business—creates a reasonable probability of competitive harm in the U.S. market for closed-system e-cigarettes?

ARGUMENT

I. Respondents agreed that Altria would exit the closed-system e-cigarette market

The evidence demonstrates that Respondents entered into an agreement that Altria would exit the closed-system e-cigarette market. Proof of an agreement need not be in the form of a formal contract. *Esco Corp. v. United States*, 340 F.2d 1000, 1007 (9th Cir. 1965) ("[I]t is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged…."). To determine whether an agreement exists, the Supreme Court requires that:

> [T]here must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 768 (1984).

The evidence establishes that Altria and JLI had a "conscious commitment" to the scheme for Altria to exit the market:

[9] The non-compete contained an exception allowing Altria to compete if it merged with PMI. CCFF ¶¶1698-703. { [redacted] } CCFF ¶¶1704-10. { [redacted] } CCFF ¶1711. { [redacted] } CCFF ¶¶1712-16.

- After repeated demands by JLI that Altria exit the market as part of any transaction (CCFF ¶¶684-86, 720-24, 880-924);
- And Altria telling JLI that it would do so (CCFF ¶¶730, 782, 800-01);
- Altria exited the market (CCFF ¶¶812, 848, 987);
- And Respondents concluded the Transaction almost simultaneously (CCFF ¶¶812, 820-25, 848, 861, 987).

The Court's analysis of whether Respondents entered into an agreement suffers from a plethora of errors falling into two broad categories: a failure to consider the totality of the evidence and an overreliance on self-serving, post-hoc testimony from executives whose credibility was severely compromised. These errors are fatal.

A. The totality of the evidence proves a Section 1 agreement

Assessing the existence of an agreement under Section 1 requires considering the "totality of the evidence." *See United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013). Here, the Court failed to look at the entire evidentiary mosaic, instead addressing each tile of evidence in isolation, and in many instances, failed to address key evidence at all, ignoring ordinary course documents, party correspondence, and contrary testimony from Respondents' witnesses. Remarkably, the Court made a blanket statement that facts and evidence not cited were not reliable or material. ID4. Yet the Decision considered it material that one Altria hire had falsified his resume. ID51.

The Court set an evidentiary burden for Section 1 plaintiffs that contradicts settled precedent, all but requiring Complaint Counsel to produce explicit confirmation of the entire agreement in either emails or wiretaps. The Court's refusal to draw appropriate inferences from the parties' contemporaneous documents (e.g., term sheets and talking points) and from the powerful circumstantial evidence of agreement should be corrected by the Commission. *See In re Elec. Books*, 859 F. Supp. 2d 671, 681 (S.D.N.Y. 2012) ("conspiracies nearly always must be

proven through inferences that may fairly be drawn from the behavior of the alleged conspirators"); *see also City of Tuscaloosa v. Harcros Chems., Inc*., 158 F.3d 548, 569 (11th Cir. 1998).

1. The fundamental purpose of the non-compete was to ensure Altria's exit

On July 30, 2018, JLI sent a term sheet requiring that Altria "divest (or if divestiture is not reasonably practicable, contribute at no cost to [JLI] and if such a contribution is not reasonably practicable, then cease to operate)" its existing e-cigarette business no later than nine months following the Transaction.[10] IDF761, 766. When this key provision is properly considered within the context of the full record, it shows that the purpose of the term was to ensure Altria's exit. CCB31-33; CCRB27-28, 52-56. The Court, however, erroneously concluded that it simply "proposed steps for obtaining HSR clearance." ID38, 64.

First, the Court ignored testimony from JLI's primary negotiators that the purpose of the divest/contribute/cease to operate term was to ensure Altria's exit from e-cigarettes, and that JLI was "agnostic" as to how that "end state" was achieved. CCFF ¶¶900, 904. JLI's Valani testified that the term "reflect[ed] the intent" to have Altria "not [be] directly competitive in the electronic cigarette space."[11] CCFF ¶897. Referring to the same provision, JLI's Pritzker testified that the "goal was for [Altria] not to be competing against Juul if they had a significant interest in Juul, and I didn't care how that would come about." CCFF ¶898. The Court ignored this testimony in

[10] The "not reasonably practicable" language only makes sense in light of Altria's concern that its JRDTA with PMI prevented it from divesting or contributing its e-cigarette products. CCFF ¶¶926-32; CCRB54-55. The evidence supports an inference that Altria made JLI aware of this concern before the July 30 term sheet. CCFF ¶¶926-32. Notably, on July 27, JLI's deal adviser understood that Altria would "shut down" its e-cigarette business should the Transaction proceed. CCFF ¶¶673, 675, 969-71.

[11] The Court found that JLI's demand was driven solely by concerns that Altria would have access to its confidential information, ID40, 64, but ignored substantial evidence that JLI was concerned that Altria would have conflicting incentives if it continued to sell its own e-cigarettes while owning an interest in JLI. CCFF ¶¶870-72; CCRRFF ¶788.

favor of self-serving testimony that the term's purpose was to ensure that Altria would agree to any concessions required by the FTC.[12] ID38, 65.

Second, the notion that the divest/contribute/cease to operate term was only concerned with securing antitrust clearance fails to place it in its proper context. Behind the legalese, the term conveyed a simple, yet powerful message: Altria would not be allowed to enter a deal with JLI and remain a competitor in e-cigarettes. Valani testified that "cease to operate" was included as a "fail-safe" and reflected "JLI's desire to not have any outs in [Altria's] commitment to not be [] competing." CCFF ¶¶907-09.

The Decision also relied on testimony that the divest/contribute/cease to operate term did not require Altria to act before the Transaction, and that JLI expected the FTC to require a divestiture of Altria's competing products.[13] ID39, 64-65. But the Court missed the most important point: JLI made its demand clear both verbally and in writing that the only way for a deal to happen was for Altria to agree to exit the market. CCRB54; CCFF ¶¶868-69, 881-88. Such a request to engage in anticompetitive conduct is evidence of an illegal agreement. *Interstate Circuit vs. United States*, 306 U.S. 208, 227 (1939).

2. JLI's non-compete demand influenced senior Altria executives' approach to Nu Mark in the summer of 2018

The record clearly shows that Altria leadership's approach to Nu Mark in the summer of 2018 was influenced by JLI's non-compete demand. Only four days before receiving the July 30 term sheet, Altria's Willard told investors that Nu Mark was growing and that Elite and MarkTen Bold were "getting traction" with consumers. CCFF ¶1113. On August 1, 2018, Altria's Willard

[12] In crediting this illogical explanation, the Court ignored that contribution and "cease to operate" are not antitrust remedies.

[13] Pritzker's testimony that he expected the FTC to require a divestiture shows his recognition that the deal presented potential antitrust problems. IDF770; CCFF ¶898.

and Gifford met in a hotel suite with JLI's Pritzker, Valani, and Burns to discuss the term sheet. Two days later, in an August 3 meeting with Nu Mark President Quigley, Gifford suggested pulling Elite, which was the first time Quigley heard Altria leadership raise this possibility. CCFF ¶1361. The Court dismissed the significance of the timing of Gifford's suggestion. ID36, 71; IDF588.

The Court's characterization of Quigley's August 3 presentation to Altria leadership (ID35, 71) omits key statements supportive of MarkTen cigalikes and Elite, and ignores that Quigley recommended that Altria keep both products on the market. CCRB21-24; CCRRFF ¶842. The Court also disregarded that the entire purpose of Quigley's "bridge plan" was to ensure Altria always had a pod product on the market, because he "did not feel it made sense to walk away from the business." CCFF ¶1155; CCRRFF ¶850. The outcome of the August 3 meeting was that Quigley was to "go forward with the Elite business" and that Quigley had convinced Altria leadership there was "more to the MarkTen cig-a-like business than [they] thought." IDF589; CCRRFF ¶842.

The Court dismissed the notion that Altria leadership's decisions regarding e-cigarettes were related to ongoing negotiations with JLI. ID71. But the sequence of events makes the relationship clear: Altria executives understood that JLI was requiring Altria's exit and the July 30 term sheet made that explicit. Then they met with Quigley, who advocated the merits of Altria's current e-cigarette products, and soon thereafter struck the divest/contribute/cease to operate term from the August 9 term sheet. CCFF ¶915; CCRRFF ¶842. Consistent with that revision, on August 10, Altria leadership decided to move forward with the new Elite gasket and the MarkTen cigalike PMTA. CCFF ¶¶1364-65. But they then withdrew the products after JLI rejected the revised term sheet as unacceptable.

Complaint Counsel does not contend that an inference of conspiracy is warranted solely because the same executives were involved in JLI negotiations and Nu Mark business decisions. ID72 n.21. Rather, Complaint Counsel argues that the *timing and sequence of events*—as well as the stunned reactions of investors, competitors, and, most importantly, Altria executives who were not privy to the JLI negotiations—logically support an inference that Altria's decision to exit e-cigarettes was driven by an agreement with JLI. CCFF ¶¶1016-27, 1111, 1361-62, 1511; CCRRFF ¶842. Such a radical departure from Altria's previous ironclad commitment to competing in the e-cigarette market supports an inference that Altria's actions were the product of an agreement with JLI. *See Interstate Circuit*, 306 U.S. at 221-22.

3. The evidence strongly supports an inference of an agreement

The record evidence shows that Respondents agreed that Altria would exit e-cigarettes. In its analysis, however, the Court improperly discounted several key pieces of evidence, including dismissing as "vague and ambiguous" statements from Willard's draft talking points for an August 6, 2018 call with JLI. ID68. These draft talking points state that to "accommodate" JLI, Altria would "potentially exit our own e-vapor business." CCFF ¶¶978-81. In a revised version, Garnick adds that if a deal does not proceed, the parties should "shake hands, and agree to be competitors." CCFF ¶701. These statements clearly support an inference that (1) Altria agreed to exit its e-cigarette business in response to JLI's demand,[14] and (2) that without a deal, Altria would continue to compete against JLI.

The *only* time Altria wavered on its commitment to exit e-cigarettes was in its August 9, 2018 term sheet, in which Altria removed the divest/contribute/cease to operate term and edited

[14] {[redacted]}" CCFF ¶982 (emphasis in original).

the non-compete to permit itself to compete in e-cigarettes if HSR clearance was not granted. CCFF ¶¶704-07. JLI responded by providing Altria with a list of "foundational concepts," including an unequivocal statement that it was "not acceptable" for Altria to retain *any* right to compete in e-cigarettes. CCFF ¶¶704-07, 722, 914-22, 951. JLI communicated that its participation in a planned August 18 meeting was conditional on Altria's "alignment" on this issue (among others). CCFF ¶¶951, 978. Valani provided Altria board member Dinyar Devitre the list of "foundational concepts" on August 15 during a private meeting. CCFF ¶¶710-11, 719-20, 914-24, 951. The list consisted of nine bullet points, the second of which read:

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

The Court misread this critical piece of evidence, concluding that JLI only objected to Altria's removal of "divest" and was indifferent to Altria's removal of "cease to operate." ID42, 65. But this narrow reading is inconsistent with the context of the negotiations, with Altria's own understanding of this bullet, and with the relevant provision at issue from the July 30 term sheet. The "commitment to divest MarkTen" that was "stricken" was the provision in the July 30 term sheet that Altria must "divest (or if divestiture is not reasonably practicable, contribute at no cost to [JLI] and if such a contribution is not reasonably practicable, then cease to operate)" its e-cigarette business. CCFF ¶915. Considering this context, the clear inference is that JLI was objecting to Altria's removal of this entire "divest" term—which JLI itself defined to include contribution and cease to operate should divestiture not be "reasonably practicable." Indeed, Altria's negotiators understood this bullet to be JLI's response to Altria striking the divest/contribute/cease to operate commitment and understood the statement "[t]his is not

acceptable to us" to refer to Altria's retention of any rights to compete with its *existing* or future e-cigarette products. CCFF ¶¶921-22.

Valani discussed JLI's list of "foundational concepts" with Devitre to get "some verification from the Altria team that [] they were aligned with this prior to us sitting down" for the planned August 18 meeting. CCFF ¶¶724, 952. Given that the August 18 meeting took place (CCFF ¶¶728, 953), the logical inference is that Altria indicated its "alignment" with the demand to exit e-cigarettes. *See In re Elec. Books*, 859 F. Supp. 2d at 681. But the Court failed to draw this logical inference.

Further supporting this inference, Willard's written opening remarks for the August 18 meeting include a planned statement that Altria's removal of the divest/contribute/cease to operate language was driven by concerns about antitrust scrutiny "not by substantive disagreement" with JLI's demand that Altria exit and enter a non-compete. CCFF ¶730. The Court refused to draw any inference from this strong piece of evidence, however, instead relying on Willard's trial testimony that he could not recall if this topic was discussed.[15] ID42. This is error. *See City of Tuscaloosa*, 158 F.3d at 569 (plaintiffs commonly prove the existence of an anticompetitive agreement through inferences drawn from circumstantial evidence); *Gainesville Utils. Dep't v. Fla. Power & Light Co.*, 573 F.2d 292, 301 n.14 (5th Cir. 1978) (self-serving testimony from party witnesses should be given little weight when contemporaneous business documents show agreement). Moreover, the Court ignored Valani's testimony that it was "likely" that the non-compete term was discussed at the August 18 meeting. CCFF ¶954.

[15] The Court's justification for willfully disregarding this key evidence is particularly egregious since few Section 1 defendants would be foolish enough to admit at trial that they had reached an illegal agreement. *See In re Wholesale Grocery Products Antitrust Litig.*, 752 F.3d 728, 734 (8th Cir. 2014) ("[M]ost would-be monopolists probably can be expected to display a bit more guile, jotting down only a few seemingly common terms while sealing their true anticompetitive agreement with a knowing nod and wink.").

The Court attributed significance to the fact that "cease to operate" does not appear in the August 19 term sheet. But given that Altria told JLI that the language raised antitrust concerns, one would expect that language to have been removed. *See In re Wholesale Grocery Products*, 752 F.3d at 734. That "cease to operate" was removed does not change the fact that JLI had already clearly communicated its demand that Altria exit—including specifying, *in writing*, that if divestiture or contribution were not practicable, Altria must nonetheless "find the ability to cease to operate." CCFF ¶¶867-986.

And "cease to operate" is exactly what Altria did. Doing so benefited Respondents by allowing Altria to provide enhanced services immediately,[16] enabling the non-compete to take effect immediately, and by significantly accelerating Altria's ability to file for antitrust clearance. CCRB63-66; *see United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015) ("Circumstances that may raise an inference of conspiracy include 'a common motive to conspire….'").

Moreover, the August 19 term sheet is consistent with an agreement for Altria to exit, as it required Altria to contribute its e-cigarette assets to JLI upon antitrust clearance, and if antitrust clearance was not obtained by nine months after purchase, to divest its e-cigarette business within six months thereafter. CCFF ¶733. In other words, far from allowing Altria to compete with its existing products indefinitely, the August 19 term sheet required Altria to exit even if antitrust clearance is not obtained. The August 22 joint issues list shows the parties in agreement on this point. ID44; CCFF ¶¶958-60. That is the very essence of the agreement at issue—JLI securing a commitment from Altria that it would exit e-cigarettes.

The Court dismissed the significance of Willard's October 5 letter to JLI reaffirming Altria's commitment not to compete "in a manner consistent with our previous discussions […],"

[16] The Court ignored evidence that JLI's business-people were {[redacted]}, instead relying solely on Pritzker's testimony. CCFF ¶¶984-85.

illogically concluding that "discussions" refers only to the August 19 term sheet (which, again, is consistent with an agreement to exit). ID69. The Court ignored Valani's testimony that Willard's statement reflected that Altria's "obligation to us was to not be competitive and that we assumed that they would find the legal means to do so and that we're prepared to give them [] any flexibility as long as the result was okay." CCFF ¶963.

4. Altria's purported justifications for removing Elite were pretextual

In accepting Altria's claims that its removal of Elite was unrelated to an agreement with JLI, the Decision made three key errors: (1) it failed to recognize the pretextual nature of Altria's assertion that it removed Elite in response to the FDA's concerns about youth vaping; (2) it disregarded that Altria's commitment to remove Elite occurred *after* it was clear that the JLI deal was on track; and (3) it ignored evidence that Altria overstated the challenges with its existing products.

First, the Decision credited Respondents' argument that Altria removed its pod products—Elite and Apex—to "satisfy the FDA" over youth vaping concerns, ID82, but failed to acknowledge that *at the very same time* Altria was negotiating an investment in JLI, whose pod-based JUUL was viewed (including by Altria) as the driver of the youth vaping epidemic. CCRB38-39, 77-78. As the FDA Commissioner recognized, this is illogical: "[Altria's] newly announced plans with JUUL contradict[ed] the commitments [Altria] made to the FDA." CCFF ¶¶1240-42. Indeed, Altria's own documents indicate that the youth vaping issue was pretextual and {[redacted]}. CCFF ¶¶1244-47. "[P]retextual excuses are circumstantial evidence that can disprove the likelihood of independent action." *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 478 (3d Cir. 1998); *see also Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir. 1985) ("evidence of pretext, if believed by the [fact finder], would disprove the likelihood of independent action on the part of [Respondent]").

Importantly, while the Court relied on Altria's assertion that Elite was removed due to youth vaping concerns, it repeatedly precluded Complaint Counsel from asking questions about this issue at trial. Willard (Altria) Tr. 1246-49; Gardner (Altria) Tr. 2652-57, 2677-82; Murillo (JLI) Tr. 3032-37.

Second, the Court credited Altria's contention that the decision to remove Elite was made in late September 2018 during a "break" in negotiations, concluding that Elite's discontinuation was therefore unrelated to an agreement with JLI. ID73. But the Court disregarded evidence showing that Altria purposefully did not make any commitment to remove Elite until *after* it had confirmation from JLI that the deal was on track[17] and that at the September 25-27 leadership meeting, Altria executives discussed continuing to pursue the JLI Transaction *before* they discussed potentially removing Elite. CCRRFF ¶943. Moreover, an internal Altria analysis prepared for the leadership meeting {[redacted]} CCFF ¶¶1244-45.

The Court suggested that Garnick's October 4 notes for a board call meant Altria was going to remove Elite regardless of the JLI Transaction. ID50-51. To the contrary, {[redacted]} CCFF ¶777. In other words, Altria would not commit to pulling its pod products unless JLI was willing to do the Transaction. Indeed, Willard's October 5 letter to JLI requested a response by no later than October 12, six days before Altria's scheduled meeting with Gottlieb. CCFF ¶¶779, 1238. Willard received confirmation by that date that JLI wanted to move forward. CCFF ¶¶779, 791-

[17] The Court also ignored that Altria continued pursuing the Transaction throughout the short-lived "break" in negotiations. CCRB33-34.

93. Altria sent the October 25 letter to the FDA announcing the removal of Elite *after* it confirmed the JLI deal was on track. CCFF ¶¶812, 987. Only four days later, Respondents agreed on a final term sheet. CCFF ¶¶820-25.

Third, the Court accepted Altria's argument that Elite was a commercial failure and that it was unlikely to get FDA approval, ID80, but ignored a substantial body of contrary evidence. For instance, the Court ignored that Elite's sales grew continuously from its introduction to its discontinuation, that Nu Mark believed Elite had a role to play in the market, and that Willard told investors that Elite was "getting traction" on the July 26 investor call (i.e., the quarterly call immediately before the October 25 call in which Willard announced Elite's removal). CCFF ¶¶1112-31, 1311-17; CCRRFF ¶842. The Court likewise adopted Altria's argument that Elite could not convert smokers or obtain FDA approval due to lack of nicotine salts but ignored that (1) the only studies Altria conducted showed that Elite *could* convert smokers, (2) conversion is but one factor in the FDA's analysis; initiation risk is another; and (3) Nu Mark planned to offer Elite 2.0 with and without nicotine salts, confirming that Altria saw value in such products. CCFF ¶¶1311-15, 1320, 1323-27; CCRRFF ¶616. The FDA has suggested that nicotine salts increase the risk of initiation, meaning that a product without nicotine salts may be *more likely* to win PMTA approval. CCFF ¶1336. In fact, two of the three e-cigarettes the FDA has approved to date do **not** have nicotine salts, and the recent FDA decisions focus on *both* initiation and conversion, reinforcing that Altria was well-positioned for PMTA approval and but for the Transaction, Altria would be a competitively significant player in the closed-system e-cigarette market. IDF261; CCRRFF ¶262; FDA News Release; FDA Letter to Logic, Mar. 24, 2022 ("FDA Letter").[18]

[18] *See* Exhibit A to Complaint Counsel's Motion Requesting Official Notice of FDA Decision.

5. Altria's exit only made sense with the Transaction

The evidence is crystal clear: But for the Transaction, Altria would be competing in the critical e-cigarette market. As discussed above, up until the JLI deal, Altria's public statements, actions and investments demonstrated its unequivocal commitment to competing in e-cigarettes. *See supra* at 3. Among other facts, the Court treated as immaterial that Nu Mark's financial performance was improving and that Nu Mark was in the process of spending $100 million to acquire shelf space;[19] that Elite and MarkTen cigalike sales volumes were growing; that Elite's leaking issue had been fixed; that Altria could commercialize VEEV with PMI; and that Nu Mark executives who were not involved in the JLI negotiations thought it was important to keep e-cigarette products on the market. *See supra* 3-4, 9-10, 14-16, 22.

Against this backdrop, it is illogical that Altria would have decided to exit and sit on the sidelines of this critical market absent the JLI Transaction. {[redacted]}, but Altria is the only one who exited. CCFF ¶¶109-14, 1132-39. Yet the Court failed to acknowledge or mention that fact. Indeed, Altria's customers and competitors were surprised by Altria's exit, and the investment community quickly concluded that the only explanation was an impending JLI transaction. CCFF ¶¶1016-27. The Court simply disregarded this powerful circumstantial evidence that Altria's actions were against its economic interest. *See In re Pool Prods. Distrib. Mkt. Antitrust Litig.,* 988 F. Supp. 2d 696, 712-13 (E.D. La. 2013) (acts that "risk a loss of market share to the other manufacturers" are acts against economic self-interest supporting claim of conspiracy).

The notion that Altria made an *independent* business decision to exit e-cigarettes *less than two weeks before closing the JLI Transaction* defies logic. This is especially true given the

[19] The Court stated that Nu Mark lost $101 million in the first nine months of 2018, ID58, ignoring that this includes the $100 million spent to acquire shelf space for innovative products for a three-year period. CCB61.

overwhelming evidence that, as a term of the deal, JLI was requiring Altria to get rid of its existing products and enter a non-compete. In an October 2018 email about preparing PMTAs for Altria's cigalike products, Altria's Garnick succinctly summarized the effect of the pending JLI deal on Altria's existing e-cigarette products: "no evapor product fits with Tree."[20] CCRRFF ¶935; *see* CCFF ¶¶1396-400. And, indeed, no e-vapor product did.

B. The Court erroneously relied on self-serving testimony from executives whose credibility was highly suspect

In support of its finding that there was no agreement between Respondents, the Court relied heavily on the testimony of the Altria and JLI witnesses. ID64-75. However, that testimony was often contradicted by ordinary course documents and therefore deserved little weight. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 396 (1948); *see, e.g.*, *Gainesville Utils. Dep't.*, 573 F.2d at 301 n.14; *In re Toys "R" Us, Inc.*, 126 F.T.C. 415, 567 n.39 (1998) (rejecting "self-serving" testimony that was contradicted by contemporaneous documentary evidence).

The Court also ignored warning signs that the testimony of certain executives was simply not credible. For example, the Court ignored that former Nu Mark President Brian Quigley's trial testimony contradicted his earlier investigational hearing ("IH") testimony, thereby undermining the credibility of his trial testimony. This was a critical error because the Court relied heavily on Quigley's trial testimony that Gifford's suggestion that Altria discontinue Elite at their August 3 meeting made sense. ID36, 71; IDF588. But Quigley testified the *very opposite* at his IH:

> Q: We've already looked at some documents that show that both MarkTen cigalikes and MarkTen Elite, which had just been launched, were growing; is that right?
>
> A: Correct.
>
> Q: Did you understand why Howard [Willard], Billy [Gifford], Murray [Garnick], and K.C. [Crosthwaite] might want to just shut down the business?

[20] "Tree" or "Project Tree" referred to the potential Transaction or to JLI itself. CCFF ¶626.

> A: I could not understand why.
>
> Q: Did you get some sense that's what they wanted to do?
>
> A: Frankly, I did not understand what was going on at the place at that point in time. [] I didn't know what was happening. All I knew was for some reason whatever I said seemed like the wrong answer." CCRRFF ¶842.

Indeed, there were several instances in which Quigley's trial testimony directly contradicted his IH testimony. For example, at trial Quigley testified that he "wasn't surprised" by Gifford's suggestion regarding pulling Elite, but at his IH, he testified that he *was* surprised, given that Altria "had just launched [Elite]." Quigley Tr. 1958-59; CCFF ¶1362. Similarly, at trial Quigley testified that MarkTen cigalikes were "not meaningful," ID35, IDF578, but at his IH he testified that his goal going into the August 3 meeting was to "prove to [Altria leadership] that our cig-a-like business *was meaningful*." CCRRFF ¶842 (emphasis added). Compounding these credibility concerns, Quigley had several potential business entanglements with Altria at the time of his trial testimony that raised significant concerns about potential bias.[21] It was error for the Court to completely ignore Quigley's IH testimony in favor of his revisionist, contradictory, and biased trial testimony.[22]

The Court also relied heavily on testimony from Altria executives who undermined their own credibility by providing materially misleading testimony during the FTC's investigation. While attempting to justify Elite's removal from the market, multiple Altria executives

[21] In July 2020, Quigley became COO of medical device company Respira. CCFF ¶2037. In his role at Respira, Quigley inquired about Altria's interest in doing business with Respira. CCRRFF ¶875. Quigley also serves as a member of the Board of Directors of Lexaria Nicotine, one of the companies associated with Lexaria Biosciences, which Altria partially owns. CCRRFF ¶875; CCFF ¶¶2037-39

[22] Quigley's IH testimony is also more reliable than his subsequent testimony because his IH took place in December 2019, closer in time to the events in question than his deposition (February 2021) or trial (June 2021) testimony. *See Alaska Pulp Corp. v. United States*, 59 Fed. Cl. 400, 405-06 (2004) ("recorded remarks and early correspondence [of an officer of plaintiff corporation were] much more credible in the Court's view than later evidence attributed to him"); *Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256, 273 (2008); *Taylor v. Hannigan*, No. 93–3147, 1998 WL 239640, *27 (D. Kan. 1998).

emphasized during their IHs that [redacted], and that Altria did not implement the new gasket to fix the problem due to FDA concerns. CCFF ¶¶1224-25; CCRRFF ¶¶670, 674. Almost seven months after Altria's executives testified under oath to this fact, Altria's counsel sent a letter to Complaint Counsel acknowledging that the executives' testimony was incorrect, and the new Elite gasket actually was implemented. CCFF ¶¶1221, 1226. Given that Respondents continued to highlight Elite's leaking issue, CCRRFF ¶¶461-77, the Commission is "entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 147 (2000).

II. Altria's exit from the market has and will continue to harm competition

As discussed above, the evidence shows that Respondents agreed that Altria would exit e-cigarettes. That agreement is illegal under Section 1. *See infra* 40-44. Complaint Counsel's Section 7 case does not require a finding of agreement, but instead only a finding that Altria's exit was related to the Transaction. CCRB87-88. And the evidence is overwhelming that but for the Transaction, Altria would have continued to compete in e-cigarettes. CCFF ¶¶442, 701, 1390-400, 1718-21. Under either analytical framework, the harm stems from Altria's complete exit from the closed-system e-cigarette market. As set forth below, the Court's analysis of competitive harm under Section 7 and Section 1 suffers from myriad legal and factual errors.

A. The Transaction creates a reasonable probability of harm to competition in violation of Section 7

Despite finding that Complaint Counsel had properly defined the relevant market as the sale of closed-system e-cigarettes in the United States and established that the market was highly concentrated before Altria began pulling its e-cigarettes, the Court concluded the Transaction has not substantially lessened competition. This conclusion is both contrary to law and inconsistent with the facts.

The Court made three critical errors. *First*, it failed to credit Complaint Counsel's post-Transaction market concentration analysis. *Second*, it analyzed anticompetitive effects using an inappropriate "before-and-after" framework, rather than a "but-for world" comparison. *Third*, it misapplied the case law by treating Altria as an actual potential competitor, rather than the actual competitor that it was.

1. The Transaction is presumptively anticompetitive

The Decision erred in finding that Complaint Counsel was not entitled to a presumption of anticompetitive harm. While the Court correctly accepted the pre-Transaction market shares calculated by Complaint Counsel's expert, Dr. Rothman, it failed to credit Complaint Counsel's well-supported calculation of post-Transaction concentration levels. ID90-91.

Complaint Counsel "can establish its prima facie case by showing that the proposed merger would 'lead to undue concentration in the market.'" *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 90 (D.D.C. 2017); *United States v. Philadelphia Nat'l. Bank,* 374 U.S. 321, 364-65 (1963); *In re Polypore Int'l, Inc.*, No. 9327, 2010 WL 9933413, at *8 (F.T.C. Dec. 13, 2010), *aff'd*, 686 F.3d 1208 (11th Cir. 2012). "Market power or the lack of it is often measured by the [Herfindahl-Hirschman Index ("HHI")]." *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986). A transaction is "presumptively unlawful" if it increases the HHI by more than 200 points and results in a "highly concentrated" market with a post-transaction HHI exceeding 2,500. *Aetna*, 240 F. Supp. 3d at 42; *Merger Guidelines* §5.3. The Commission may rely on "the closest available approximation" of market shares when calculating concentration levels. *PPG Indus.*, 798 F.2d at 1505; *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 72 (D.D.C. 2011); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 54 (D.D.C. 2015) ("The FTC need not present market shares and HHI estimates with the precision of a NASA scientist. The 'closest available approximation' often will do.").

As the Decision correctly found, "Dr. Rothman's reliance on market shares from the most recent 12-month period before Altria stopped selling products … to calculate pre-Transaction market shares is appropriate and consistent with the Merger Guidelines." ID90. Using these market shares, Dr. Rothman calculated that the closed-system e-cigarette market had a pre-Transaction HHI of 3,276, which is considered highly concentrated under the *Merger Guidelines*. CCFF ¶¶1754-55; PX5000-043 (¶89).

To calculate the Transaction's change in market concentration, Dr. Rothman estimated "the difference between concentration with Altria in the market and concentration with Altria not in the market, holding all else equal." CCRRFF ¶1682. Because of Altria's exit from the market post-Transaction, Dr. Rothman had to reallocate Altria's pre-Transaction market share—10.1 percent—to the remaining competitors. Dr. Rothman's baseline was to allocate Altria's share to the remaining competitors in proportion to their shares. CCFF ¶1752. Using this approach, Dr. Rothman calculated that the closed-system e-cigarette market had a post-Transaction HHI of 3,929, with an HHI increase of 652. CCFF ¶1754.

Dr. Rothman's method of calculating the post-Transaction concentration level was "the best way to estimate … the effect of Altria's exit on concentration." CCRRFF ¶1682. It was also one of "the closest available approximation[s]" of market shares. *PPG Indus.*, 798 F.2d at 1505. The Court, however, adopted the spurious critique made by Respondents' expert that Dr. Rothman incorrectly assumed where Altria's market share would divert in its absence. ID91. Having adopted Respondents' flawed "before-and-after" analysis, the Court erred in concluding that Dr. Rothman's post-Transaction HHI calculations were "not economically sound." ID91.

The Decision incorrectly claimed that Dr. Rothman's concentration analysis depends on the proportional allocation of Altria's pre-Transaction market share. ID91; IDF186. It does not: the Transaction increases market concentration under numerous assumptions on where Altria's

sales divert as a consequence of its exit—a fact the Court simply ignored. CCFF ¶1760; CCRRFF ¶1682. For example, Dr. Rothman showed that if all of Altria's sales were to be captured by Reynolds instead of being reallocated proportionally, then the post-Transaction HHI would still increase by 460, which is well above the 200-point threshold for the presumption. CCFF ¶1760. Thus, even assuming all of Altria's sales would divert to "products other than JLI's JUUL product," as Respondents claim, ID91; IDF185, the resulting post-Transaction HHI would still trigger the presumption of competitive harm. *See PPG Indus.*, 798 F.2d at 1505.

Moreover, the Court incorrectly found that Dr. Rothman's market concentration analysis overstates Altria's competitive significance and the harm that arises from the Transaction.[23] ID90-91. If anything, Dr. Rothman's analysis understates Altria's competitive significance and the amount of harm because it does not fully reflect the dynamic harm caused by Altria's exit—especially the loss of innovation competition. PX7048 (Trial Dep. at 34-35); CCFF ¶¶1463-92, 1538-87, 1638-96, 1704-16; CCRRFF ¶¶1492, 1601, 1649. Altria's market share decline from 2017 to 2018 does not provide reliable data points to evaluate its competitive significance as every e-cigarette producer except JLI lost market shares during that time.[24] PX5000-030-31 (Tbl.1); PX7048 (Trial Dep. at 76-77). The Court's assessment of Altria's competitiveness is undercut by Altria's own admissions. For example, in late July 2018, Altria's Willard publicly told investors that MarkTen Bold and Elite were driving growth for Nu Mark and "getting traction with consumers." CCFF ¶1113. Pure share calculations also *understate* Altria's competitive positioning as they cannot fully capture Altria's significant capabilities, such as the

[23] The Court's adoption of Respondents' expert's market concentration analysis is also misguided because his analysis of post-Transaction data "ignore[s] confounding factors" that influence market shares and "confuse[s] correlation with causation." ID91; PX7048 (Trial Dep. at 29); CCFF ¶¶1758-60; CCRRFF ¶1368.

[24] The total volume in the U.S. closed-system e-cigarette market, meanwhile, more than doubled between 2017 and 2018. PX5000-030-31 (Tbl.1). Thus, a producer could lose market share, and still significantly grow volume, which happened to Altria. CCFF ¶1097.

JRDTA with PMI and its distribution and marketing infrastructure as the leading tobacco company. CCFF ¶¶493-544, 1697-710; CCRRFF ¶¶1551, 1620-22, 1627, 1630.

The Court's reliance on the market's general shift towards pod-based products to discount Altria's competitive significance is also misplaced. ID90. Contrary to the Decision's conclusion, this trend does not undermine Dr. Rothman's market share calculations. Altria's collaboration with PMI would have put it in a strong position {[redacted]}[25] and Altria was also actively working on Elite 2.0 with nicotine salts. CCFF ¶¶1555, 1564-68, 1638-716. Moreover, because of less initiation risk, the FDA has only granted PMTAs to cigalikes and non-pod-based e-cigarettes to date. IDF261; CCRRFF ¶262; FDA News Release; FDA Letter.

Simply put, none of the reasons cited in the Decision provide any basis to discredit Dr. Rothman's market concentration analysis. Complaint Counsel has therefore met its burden to establish a prima facie case that the Transaction is presumptively unlawful under Section 7. *See, e.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001) ("Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive."); *FTC v. Hackensack Meridian Health*, *Inc.,* No. 20-18140, 2021 WL 4145062, at *20 (D.N.J. Aug. 4, 2021).

2. The Court's "before-and-after" analysis is misguided and does not inform whether the Transaction has harmed or is likely to harm competition

The Decision ignored the fundamental question raised by Section 7. Instead of examining whether the Transaction was likely to result in anticompetitive effects when compared to the "but-for" world in which the Transaction did not occur—as instructed by Section 7 case law and

[25] For example, {[redacted]} CCFF ¶¶1697-710; CCRRFF ¶¶1625, 1627, 1630.

the *Merger Guidelines*—the Court instead employed an irrelevant "before-and-after" analysis. This is fatal error.

a) The Court's focus on post-transaction evidence was both misplaced and contrary to law

The fundamental task in any Section 7 analysis is to determine the probable effects of a given transaction on competition by comparing two "worlds"—one with the transaction and the other without. As a federal district court summarized in *FTC v. Peabody Energy Corp.*, "[t]he Court's objective is to determine the [transaction's] likely effect on competition compared to the but-for world in which the [transaction] is not allowed." 492 F. Supp. 3d 865, 917 (E.D. Mo. 2020) (citing *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 700 (8th Cir. 1979) ("[W]hen examining a merger, a court must necessarily compare what may happen if the merger occurs with what may happen if the merger does not occur."). The *Merger Guidelines* adopt the same approach. §1 ("Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.").[26] The Court, however, skipped this fundamental inquiry.

As Dr. Rothman testified, the proper way to evaluate the competitive effects of the Transaction is to analyze "the difference between competition in the actual world"—where "Altria and JLI enter into the transaction"—and "competition in the but-for-world" in which "the transaction doesn't happen." CCFF ¶1759. The Court's misguided analysis of post-Transaction prices, output, and concentration, however, does not replicate the proper comparison of the

[26] Notably, the Decision's citation to this sentence of the *Merger Guidelines* omits the last part of the sentence—"as compared to what will likely happen if it does not"—replacing it with an ellipsis. ID95.

actual and "but-for" worlds and is fatally flawed because it does not control for confounding factors.[27] CCFF ¶¶1758, 2094-124; PX5001-031-37 (¶¶49-62), 040-041 (¶72).

For example, the Court relied on the post-Transaction behavior of third parties, including Reynolds and NJOY, to conclude that competition in the closed-system e-cigarette market has increased since the Transaction. ID101-02. But such reliance is misplaced because the behavior of competitors post-Transaction, standing alone, does not answer the relevant question about the competitive effects of the Transaction. Indeed, the evidence shows that Reynolds' and NJOY's competitive activities—such as the launches of Vuse Alto and NJOY Ace, and their discounts and promotions—were *not driven or influenced by* Altria's exit and would have occurred in the "but-for" world. IDF986; CCRRFF ¶¶1710-11. As such, these activities are confounding factors and do not inform the question of whether the actual world is more or less competitive than the "but-for" world. CCFF ¶¶1830-31; 2123-24.

The Decision's discussion of the relevant case law on the probative value of post-acquisition evidence is similarly flawed. ID100-01. First, it is well-established that a showing of actual post-transaction harm is not required under Section 7. *United States v. General Dynamics Corp.*, 415 U.S. 486, 505 (1974) (stating that the absence of "concrete anticompetitive symptoms … does not itself imply that competition has not already been affected"); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) ("Section 7 [of the Clayton Act] does not require proof that a merger … caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future."); *Polypore*, 2010 WL 9933413, at *7. Second, post-Transaction evidence can still be distorted by external factors that render it less reliable even if

[27] Confounding factors are "factors that affected Dr. Murphy's measures that were unrelated to the transaction and therefore would have occurred even without the transaction." PX5001-031 (¶50); PX7048 (Trial Dep. at 42-43).

not subject to outright manipulation. For example, in the private antitrust actions against Respondents stemming from the Transaction, the federal district court held that the potential impact of JLI's withdrawal of its fruit-flavored pods in response to public pressure meant that Respondents could not prevail on their motion to dismiss simply by citing evidence that absolute prices declined after the deal. *In re JUUL Labs, Inc., Antitrust Litig.*, 20-cv-02345-WHO, 2021 WL 3675208, at *16 (N.D. Cal. Aug. 19, 2021).[28] Here, in contrast, the Court ignored substantial record evidence that the youth-vaping and vaping-related health crises negatively affected JLI's market performance more than any other e-cigarette company. CCFF ¶¶1248-53, 1462, 1912-17; CCRRFF ¶1715.

Thus, while the market environment in the post-Transaction timeframe is not wholly irrelevant, the Court's simple "before-and-after" comparison does not answer the fundamental question of what the probable effects of the Transaction—and Altria's resulting exit— are on competition.

b) A correct "but-for world" analysis shows that the Transaction creates a reasonable probability of harm to competition

The Decision failed to consider ample evidence showing that, but for the Transaction, Altria would have competed aggressively in the relevant market on price, innovation, and other key dimensions of competition. This failure is contrary to the well-established Section 7 jurisprudence, which asks the factfinder "to determine the [transaction]'s likely effect on competition compared to the but-for world in which the [transaction] is not allowed." *Peabody Energy*, 492 F. Supp. 3d at 917. In finding that the Transaction did not lead to substantial lessening of competition, the Decision incorrectly dismissed a large body of evidence that,

[28] Even though this decision was considering a motion-to-dismiss, the underlying logic applies all the same; the mere decline in prices after the Transaction is not probative of the ultimate competitive effects question. *See, e.g.*, *Hosp. Corp. of Am.*, 807 F.2d at 1389.

viewed together, demonstrates Altria's competitive significance in e-cigarettes, and the consumer harm resulting from Altria's exit. CCFF ¶¶1408-730.

As an initial matter, the Decision's effects analysis misses the forest for the trees. ID93-112. By slicing up the discontinuation of Elite, the discontinuation of MarkTen cigalikes, the shuttering of R&D operations, and the termination of Altria's relationship with PMI, the Court failed to analyze whether the loss of Altria as *a competitive whole* gives rise to the harm in this case. The Transaction's effect was the *complete* elimination of Altria—whose impact was greater than the mere sum of its parts—as a significant competitive force in the market. CCFF ¶¶944-1015. For example, Altria's efforts in the pre-Transaction marketplace informed future product development efforts and bolstered its ability to launch new products effectively after development.[29] CCFF ¶¶1553-87.

Even the Court's fragmented analysis of Altria's then-existing e-cigarette products ignored material facts that should have been considered in analyzing Altria's competitive significance. First, when discussing MarkTen cigalikes, ID96-97, the Court repeatedly cited the declining share of cigalikes, but ignores the fact that MarkTen cigalike volumes were growing at the time of the Transaction, and that MarkTen was the second-fastest growing e-cigarette brand behind JUUL.[30] CCFF ¶¶1036, 1368. Second, when discussing Elite, the Court ignored that before its discontinuation Elite's sales were growing, that Nu Mark data showed that Elite appealed to certain customers, and that unlike JUUL, Elite did not have a youth vaping problem. CCFF ¶¶1112-28. In fact, in May 2018, JLI's competitive intelligence expert, Joseph O'Hara,

[29] Some of Altria's internal development projects that were ended because of the Transaction included actual consumer usage studies in October 2018 with Elite 2.0 prototypes containing nicotine salts, which were generating positive reviews. CCFF ¶¶1292, 1546; CCRRFF ¶966.

[30] The Court also completely ignored in its analysis that the only e-cigarette to receive PMTA approval by the time of the Decision was a cigalike product from Reynolds. IDF261. Since the Decision, two additional e-cigarettes have received approval—a Logic cigalike and a Logic hybrid product. CCRRFF ¶262; FDA News Release.

concluded that Elite—even without nicotine salts and with leaking issues at the time—was one of the few products with "long-term viability." CCFF ¶¶1129, 1516-22. Third, the Court ignored the fact that in the "but-for" world, Altria could still have its MarkTen cigalikes and Elite on the market today, three years after the Transaction, so long as they submitted PMTAs for review.[31] CCFF ¶¶199-203. The Court's failure to consider the three-plus years of lost price, innovation, and shelf-space competition from these products was error.

The Court also incorrectly discounted Altria's ability to bring new products to market in the relevant timeframe, ID108-12, ignoring evidence that pre-Transaction, in October 2018, Altria was developing Elite 2.0 and conducting live consumer tests with its prototypes. CCFF ¶¶1281-94. It also ignored Altria documents from August 2018 that Altria was on-track to submit a PMTA for Elite 2.0 in January 2022, *seven months ahead* of the then-PMTA deadline in August 2022. CCFF ¶¶1299-300.

The Court also ignored Altria's collaboration with and access to PMI's e-cigarette technology, giving Altria another viable path to commercialize a pod-based product with nicotine salts in the near future—and this is hardly "pure conjecture." ID110-11; CCFF ¶¶1588-619. The evidence unambiguously shows that Altria had access to an almost market-ready product in PMI's VEEV, that {[redacted]} CCFF ¶¶1638-93, 1708-10; CCRRFF ¶¶1627, 1630.

The Court found it material that {[redacted]}, ID111, but ignored evidence that {[redacted]} and believed it could {[redacted]}. CCFF ¶¶1692-93, 1708-10; CCRRFF

[31] By late 2018, Altria's MarkTen cigalike PMTA was already "75% complete." CCFF ¶¶1264-66.

¶¶1551, 1620-22. Far from "pure conjecture," the evidence reflects {[redacted]} CCFF ¶¶1677-81, 1697, 1704-10; CCRRFF ¶¶1551, 1620-22, 1625, 1627, 1630. {[redacted]}[32] CCFF ¶¶1698-710. The Court's failure to consider these facts was fatal error.

The loss of innovation competition resulting from an anticompetitive merger is a significant form of competitive harm. *See FTC v. Hackensack Meridian Health, Inc.*, No. CV 20-18140, 2021 WL 4145062, at *24 (D.N.J. Aug. 4, 2021) (stating that a merger would "remove an incentive for both entities to continue to improve quality metrics and offer innovative medical technology"); *United States v. Bazaarvoice, Inc.*, No. 13–cv–00133–WHO, 2014 WL 203966, at *21 (N.D. Cal. January 8, 2014) (noting that potential effects of the merger include "avoid[ing] competition in pricing and innovation"); *see also Merger Guidelines* §6.4 ("Competition often spurs firms to innovate. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. That curtailment of innovation could take the form of reduced incentive to continue with an existing product-development effort or reduced incentive to initiate development of new products.").

The Decision failed to properly evaluate innovation competition and the key evidence on this issue. ID99-100, 108-12. In addition to ignoring Altria's work on Elite 2.0 and its access to

[32] {[redacted]} CCFF ¶¶1704-10.

PMI's VEEV, the Court did not discuss NMI's innovation capabilities or Altria's advanced R&D projects—described by one Altria executive as "placing multiple bets." CCFF ¶¶1281-300, 1555-86, 1644-46, 1687-93. The evidence unambiguously shows that instead of competing with an innovative new product, {[redacted]} CCFF ¶¶39-40, 1007-08, 1694-96, 1712-16. By failing to consider Altria's multi-front efforts to compete on innovation and to improve its future competitive position, the Court took a myopic view of the competitive dynamics of the closed-system e-cigarette market. The Commission should correct this error.

3. Altria was an actual competitor at the time it exited the e-cigarette market

When discussing market shares and concentration, the Decision correctly ruled that "Complaint Counsel's economic expert witness properly treated Altria as an existing competitor by analyzing the market that existed prior to October 2018," when Altria began to withdraw its e-cigarette products from the market. ID89. The Court noted that the district court took a similar approach in *Aetna*. ID89 (citing 240 F. Supp. 3d at 79, 90).

When evaluating the likelihood of anticompetitive effects, however, the Court erroneously treated Altria as an actual potential competitor instead of an actual competitor, and therefore applied the incorrect legal standard.[33] ID105-12. The Commission should correct this

[33] Because Altria and JLI are correctly considered current competitors for purposes of Section 7, the Commission does not need to reach the actual potential competition doctrine. But should it do so, then the Commission should correct the ambiguity in the Decision, ID108 at n.34, and clarify that when determining whether Altria is an actual potential entrant, the appropriate question is whether Altria "probably" would have entered the closed-system e-cigarette market but for the Transaction. *See Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 977-78 (8th Cir. 1981); *see also In re McWane, Inc.*, No. 9351, 2014 WL 556261, at *32 (F.T.C. January 30, 2014). Altria has unrivaled "ability (unlike other potential entrants) to reenter the market given its extensive background, regulatory experience, and ample funds." *Juul Labs, Inc. Antitrust Litig.*, 2021 WL 3675208, at *21. Moreover, Altria had access to PMI's VEEV and internal pipeline projects in place in case the JLI Transaction did not happen. CCFF ¶¶1281-300, 1538-87, 1638-93, 1708-10; *see also* CCB95-97; CCRB124-27.

error and consider Respondents as actual competitors for purposes of the Section 7 analysis. *See* CCB94-95; CCRB112-13; *see also Juul Labs, Inc. Antitrust Litig.*, 2021 WL 3675208, at *21 (holding that "Altria and JLI were actual competitors at the time the alleged antitrust Agreement was made" and stating that it "does not alter Altria's actual competitor status that, as part of the alleged antitrust Agreement, Altria left the market by the time the Agreement was fully effectuated and publicly disclosed."). Properly treating Respondents as actual competitors allows for an evaluation of the Transaction's anticompetitive effects "using the standard tools of antitrust analysis." *Aetna*, 240 F. Supp. 3d at 76.

The Court's failure to apply the correct standard resulted in an unreasonably high bar for establishing a reasonably likely reduction of future competition between current competitors. By erroneously relying on actual potential competition cases, ID106-07, the Court required Complaint Counsel to show that Altria would have competed in the closed-system e-cigarette market in the "near future." ID106 (noting that *Mercantile Texas Corp. v. Board of Governors of Fed. Res. Sys.*, 638 F.2d 1255 (5th Cir. 1981) held that "independent entry should be expected within two or three years"). Although the Court also cited *Aetna* for its "near future" requirement, ID106-07, it omitted how the *Aetna* court defined the term "near future" in a current competition case. 240 F. Supp. 3d at 88 ("Indeed, there is some evidence that Aetna intends to once again offer plans in at least some of the 17 counties *in the near future*. Aetna withdrew in a manner specifically designed to allow it to compete in those markets *within the next five years*." (emphasis added)). Complaint Counsel has shown that, but for the Transaction, it is reasonably probable that Altria would have introduced new e-cigarette products to compete

with JLI, such as VEEV and Elite 2.0, within five years.[34] In fact, {[redacted]}. CCFF ¶¶1704-10. Moreover, in August 2018, Altria concluded it was on-track to submit a PMTA for Elite 2.0 in January 2022. CCFF ¶1299.

* * * * *

Because Respondents failed to rebut Complaint Counsel's strong prima facie case,[35] the Commission should find that the Transaction is likely to result in a substantial lessening to competition under Section 7.

B. The challenged agreement violated Section 1

The record shows that the challenged agreement[36] is anticompetitive under the rule of reason, which follows a three-step burden-shifting framework: (1) "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect," (2) "the burden then shifts to the defendant to show a procompetitive rationale for the restraint," and (3) "[i]f the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2160 (2021) ("*NCAA*"). If the analysis proceeds to the third step and the plaintiff "fails to demonstrate a less restrictive way to

[34] Notably, Altria could compete without introducing new products. But for the non-compete, Altria could have reintroduced Elite and its MarkTen cigalikes before the PMTA deadline and had those products on the market today if it submitted PMTAs. CCFF ¶¶199-203.

[35] Respondents claim that the deal will result in efficiencies based on certain services that Altria agreed to provide pursuant to a services agreement. CCFF ¶1871. A January 2020 amendment to that agreement, however, eliminated everything but regulatory services related to JLI's PMTA submissions. CCFF ¶1871. Moreover, Respondents failed to substantiate these remaining efficiency claims, rendering them not cognizable. CCFF ¶¶1881, 1889-955.

[36] The challenged agreement includes both Respondents' unwritten agreement that Altria would exit e-cigarettes and their written, six-year non-compete agreement. Although the evidence shows that these two agreements were part of a single anticompetitive deal, each agreement on its own was sufficient to cause anticompetitive effects.

achieve the procompetitive benefits, the court must balance the anticompetitive and procompetitive effects of the restraint." *Impax Labs., Inc. v. FTC*, 994 F.3d 484, 492 (5th Cir. 2021).

This traditional structure "do[es] not represent a rote checklist." *NCAA*, 141 S.Ct. at 2160. The Supreme Court has explained that "what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances" and "[t]he whole point of the rule of reason is to furnish an enquiry meet for the case." *Id.*; *see also FTC v. Actavis*, 570 U.S. 136, 159 (2013) ("[T]here is always something of a sliding scale in appraising reasonableness, and as such the quality of proof required should vary with the circumstances."). In this case, no elaborate analysis is necessary to understand the anticompetitive effects of an agreement not to compete between two horizontal competitors. Even the most rudimentary inquiry reveals that the agreement has a negative effect on competition in the-closed system e-cigarette market.[37]

The Court concluded, with minimal analysis, that Complaint Counsel did not meet its initial burden to show anticompetitive effects. ID112-14. This was a result of its earlier factual determination that Altria would not have competed regardless of the agreement. As described above, that factual finding was erroneous. The Decision did not address the subsequent steps in

[37] Respondents' conduct may well amount to a *per se* violation of Section 1 or be unlawful under the "inherently suspect" standard. *See Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 829-31 (3d Cir. 2010) (describing three standards courts use to analyze alleged restraints). Market allocation agreements among actual or potential competitors are typically *per se* antitrust violations. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam). And a federal district court has allowed a private action challenging this same Altria/JLI agreement to proceed with quick look and *per se* theories of liability. *In re JUUL Labs, Inc. Antitrust Litig.*, 2021 WL 3675208, at *18-19. Here, because Respondents' agreement clearly violates the more "thorough" rule of reason standard, Complaint Counsel's case proceeded under that standard. *California Dental Ass'n v. FTC*, 526 U.S. 756, 759 (1999). But, as the Supreme Court observed, "there is often no bright line separating *per se* from Rule of Reason analysis" and "the essential inquiry remains the same-whether or not the challenged restraint enhances competition." *Cal. Dental*, 526 U.S. at 779-80.

the analysis. The Commission should reverse the Court's conclusion and find that the challenged agreement is unlawful under the rule of reason.

The challenged agreement caused anticompetitive effects. The record shows direct evidence of the effect of Altria's absence from the market. Direct evidence is "proof of actual detrimental effects on competition, … such as reduced output, increased prices, or decreased quality in the relevant market." *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018).

First, the Transaction resulted in harm to innovation and quality in the market. Because of the six-year non-compete, [redacted] the "Rolls Royce" of e-vapor products, VEEV. CCFF ¶¶1651-86, 1694-96. {[redacted]} CCFF ¶¶1704-10. VEEV is currently sold by PMI in other countries, and PMI plans to launch it in more. CCFF ¶¶1647-50. After entering the non-compete, Altria has also taken actions that {[redacted]} CCFF ¶¶1847-63. Moreover, Altria's removal of its MarkTen products harmed those consumers who preferred those products. CCFF ¶¶1493-526.

Second, the Transaction resulted in higher prices than would have occurred if Altria had remained in the market. Dr. Rothman calculated that, under conservative assumptions, the Transaction resulted in an annual $33.6 million loss in consumer welfare from the loss of price competition and consumer choice as the result of Altria's exit.[38] CCFF ¶¶1416, 1525.

Respondents failed to show a procompetitive rationale. Respondents contend that the non-compete allowed Altria to provide JLI with beneficial regulatory and development

[38] Even where the impact on prices is not precisely quantified, "[t]he Supreme Court has emphasized … that overall consumer preferences in setting output and prices is more important than higher prices and lower output, *per se*, in determining whether there has been an injury to competition." *Sullivan v. NFL*, 34 F.3d 1091, 1101 (1st Cir. 1994) (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 106-07 (1984)).

assistance. This justification fails for three reasons. First, by Respondents' own admission, the value of Altria's assistance is "super speculative" and cannot be verified.[39] CCFF ¶¶1885-87, 1903. Respondents point to vague, self-serving testimony from their own executives, but do not offer ordinary course of business documents which show *how* the collaboration has achieved benefits. CCFF ¶¶1898-911; CCRRFF ¶¶1247-68. *See Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1576 (11th Cir. 1983) ("merely offering a rationale for a … restraint will not suffice; the record must support a finding that the restraint … does indeed have a pro-competitive effect"). There is currently no evidence JLI will even obtain regulatory approval or that, if it does, Altria's services will have made a difference in doing so.

Second, Respondents have failed to show that the non-compete was necessary to achieve its purported benefits. *See N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 369 (5th Cir. 2008) (rejecting claimed procompetitive benefits where defendant provided "no theory as to how its proffered procompetitive effects … result from or are in any way connected to" the challenged restrictions). JLI claims that regulatory approval services were the most important and JLI was uncomfortable sharing the necessary information with a competitor. RB38-39, 60-63. But Respondents' services agreement provided that Altria's services could begin *before* the non-compete went into effect, completely undermining JLI's stated rationale. CCRRFF ¶1234. A different set of services (the "enhanced services") coincided with the non-compete but are not advanced as a procompetitive benefit. CCFF ¶985; CCRRFF ¶1064.

Third, Respondents' claimed benefit is pretextual because it directly contradicts Respondents' other factual claims. Respondents contend, on the one hand, that JLI needed

[39] *See, e.g.*, *Wilk v. American Medical Ass'n*, 895 F.2d 352, 361 (7th Cir. 1990) (court cannot credit "speculative" procompetitive benefits); *see also Antitrust Guidelines for Collaborations Among Competitors* §3.36(a) (2000) ("Efficiency claims are not considered if they are vague or speculative or otherwise cannot be verified by reasonable means").

Altria's skill and experience to navigate the regulatory process, and on the other that Altria is so poor in that area that it would not be able to develop or improve its own products or secure FDA approval for them.[40] Respondents cannot have it both ways.

Any claimed benefits could have been achieved by less-restrictive alternatives. Even if the Commission were to find that the services provided a procompetitive benefit, JLI could nonetheless have obtained those services without the Altria non-compete. CCFF ¶¶1929-41. First, JLI could simply have hired employees or consultants with the requisite knowledge from Altria or other companies. CCRRFF ¶¶1275-77. In fact, JLI did just that, hiring its Chief Regulatory Officer and other regulatory and scientific personnel from Altria. CCFF ¶¶1934-41. JLI even hired an Altria executive to become CEO. CCFF ¶¶584-85. Second, even if Altria were the only source of these services, the parties could have used less restrictive measures than a non-compete, such as an information firewall. Respondents never even explored such measures. CCFF ¶¶1918-19.

The anticompetitive effects of the agreement outweigh any claimed benefits. Finally, even if the Commission decided to credit Respondents' claimed benefits, they would not outweigh the Transaction's anticompetitive effects. The Respondents have not credibly established that the Transaction resulted in any procompetitive benefits, so the price and quality effects following the removal of an actual competitor easily outweigh the Respondents' speculative and vague procompetitive claims.

[40] *Compare* RB130-31 *with* RB116-118.

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Commission reverse the Decision and enter the Order included in Appendix A.

Respectfully submitted,

Dated: April 5, 2022

s/ James Abell
James Abell
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2470
Facsimile: (202) 326-3496
Email: jabell@ftc.gov

Counsel Supporting the Complaint

Appendix A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

[PROPOSED] ORDER

I.

IT IS ORDERED that, as used in the Order, the following definitions apply:

A. "Altria" means Altria Group, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Altria Group, Inc., including, Altria Enterprises, LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "JLI" means JUUL Labs, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by JUUL Labs, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means Altria and JLI, individually and collectively.

D. "Commission" means the Federal Trade Commission.

E. "Cooperation Agreement" means the Cooperation Agreement by and among Juul Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on January 28, 2020.

F. "E-Cigarettes" means battery-powered devices that vaporize a liquid solution containing nicotine (an "e-liquid"), including a closed system, which consists of a device housing a battery and a heating mechanism, and sealed cartridges or pods that are pre-filled with e-

liquid, and an open system, which incorporates refillable tanks that customers manually fill with e-liquid.

G. "E-Cigarette Business Entity" means any Person that develops, manufactures, sells, or distributes E-Cigarettes.

H. "JLI Equity Stake" means the 35% interest Altria acquired from JLI pursuant to the Purchase Agreement.

I. "Monitor" means the Person appointed pursuant to Section VII of this Order.

J. "Non-Public Information" means all information not in the public domain, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents.

K. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.

L. "Purchase Agreement" means the Class C-1 Common Stock Purchase Agreement by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on December 20, 2018, and the subsequent Amendment No. 1 to Class C-1 Common Stock Purchase Agreement entered into on January 28, 2020.

M. "Transaction Agreements" means:

1. Intellectual Property License Agreement entered into by Respondents on December 20, 2018;
2. Ninth Amended and Restated Investors' Rights Agreement entered into by Respondents and various JLI stockholders on December 20, 2018;
3. Relationship Agreement by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on December 20, 2018, and the subsequent Amendment No. 1 to Relationship Agreement entered into on January 28, 2020;
4. Ninth Amended and Restated Right of First Refusal and Co-Sale Agreement entered into by Respondents and various JLI stockholders on December 20, 2018;
5. Services Agreement by and between Altria Group, Inc., and JUUL Labs, Inc. entered into on December 20, 2018, and the subsequent Amendment No. 1 to Services Agreement entered into on January 28, 2020;
6. True-Up Convertible Security Agreement by and among JUUL Labs, Inc., Altria Group, Inc., and Altria Enterprises, LLC entered into on December 20, 2018; and
7. JUUL Labs, Inc. Eighth Amended and Restated Voting Agreement entered into by Respondents and various JLI stockholders on December 20, 2018, and the subsequent Ninth Amended and Restated Voting Agreement entered into on January 28, 2020.

II.

IT IS FURTHER ORDERED that:

A. Respondents, directly or indirectly, or through any corporate or other device, in connection with the development, manufacturing, distribution, or sale of E-Cigarettes in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from, and are prohibited from, entering into or participating in any agreement or understanding, whether express or implied, with any Person to not compete in the development, manufacturing, distribution or sale of E-Cigarettes.

B. Respondents shall not, without prior approval of the Commission, enter into any agreement or business transaction with each other or any E-Cigarette Business Entity related to the development, manufacture, distribution, or sale of E-Cigarettes.

III.

IT IS FURTHER ORDERED that, within 10 days of this Order becoming final and effective (without regard to the finality of the divestiture requirements herein), Respondents rescind the Transaction Agreements and the Cooperation Agreement.

IV.

IT IS FURTHER ORDERED that:

A. No later than 90 days from the date this Order becomes final and effective, Respondent Altria shall divest, absolutely and in good faith, at no minimum price, to one or more buyers approved by the Commission (unless the buyer is Respondent JLI), its JLI Equity Stake, or, in the alternative,

B. Respondents shall rescind the Purchase Agreement.

V.

IT IS FURTHER ORDERED that:

A. Respondents shall, within 10 days of this Order becoming final and effective (without regard to the finality of the divestiture requirements herein), remove any director, observer, or other Person associated with a Respondent from the other Respondent's board of directors, including prohibiting any Person associated with a Respondent from attending a board of director meeting convened by the other Respondent;

B. Respondents shall not:

1. Permit any officer or director of either Respondent to serve on the other Respondent's board of directors or attend any of its meetings.

2. Influence or attempt to influence, directly or indirectly, the management or operation of the other Respondent;

3. Receive or attempt to receive, directly or indirectly, any Non-Public Information of, from, or relating to, the other Respondent.

VI.

IT IS FURTHER ORDERED that, no later than ten (10) days from the date on which this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), Respondents shall provide a copy of this Order to each of Respondents' officers, employees, or agents having managerial responsibilities for any of Respondents' obligations under this Order.

VII.

IT IS FURTHER ORDERED that:

A. At any time after this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), the Commission may appoint a Person ("Monitor") to monitor Respondents' compliance with their obligations under this Order, consult with Commission staff, and report to the Commission regarding Respondents' compliance with their obligations under this Order.

B. If a Monitor is appointed pursuant to Paragraph VII.A of this Order, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondents' compliance with the terms of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor pursuant to the terms of this Order and in a manner consistent with the purposes of this Order and in consultation with the Commission or its staff.

2. Within ten 10 days after appointment of the Monitor, Respondents, separately, shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order. If requested by a Respondent, the Monitor shall sign a confidentiality agreement prohibiting the use or disclosure to anyone other than the Commission (or any Person retained by the Monitor pursuant to Paragraph VII.B.5 of this Order), of any competitively-sensitive or proprietary information gained as a result of his or her role as Monitor, for any purpose other than performance of the Monitor's duties under this Order.

3. The Monitor's power and duties under this Section VII shall terminate three 3 business days after the Monitor has completed his or her final report pursuant to Paragraph VII.B.8 of this Order or at such other time as directed by the Commission.

4. Respondents shall cooperate with any Monitor appointed by the Commission in the performance of his or her duties, and shall provide the Monitor with full and complete access to Respondents' books, records, documents, personnel, facilities, and technical information relating to compliance with this Order, or to any other relevant information, as the Monitor may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor. Respondents shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order.

5. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct. For purposes of this Paragraph VII.B.6, the term "Monitor" shall include all Persons retained by the Monitor pursuant to Paragraph VII.B.5 of this Order.

7. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor in the same manner as provided by this Order.

8. The Monitor shall report in writing to the Commission (i) every thirty 30 days from the date this Order becomes final and effective (without regard to the finality of the divestiture requirements herein), (ii) no later than thirty 30 days from the date Respondents complete their obligations under this Order, and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.

C. Respondents shall submit copies of all compliance reports filed with the Commission to the Monitor no later than twenty 20 days after the date the Monitor is appointed by the Commission pursuant to Paragraph VII.A of this Order.

D. The Commission may, on its own initiative or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

VIII.

IT IS FURTHER ORDERED that:

A. Respondents shall:

1. Notify Commission staff via email at bccompliance@ftc.gov of the dates that the Respondents comply with the obligations under Sections III, IV, and V.A, no later than 5 days after the occurrence of each; and

2. Submit any documentation memorializing such occurrences in Paragraph VIII.A.1 to the Commission at bccompliance@ftc.gov no later than 30 days after the date they occur.

B. Respondents shall submit verified written reports ("compliance reports") in accordance with the following:

1. Respondents shall submit:

   a. Interim compliance reports 30 days after the Order is issued by this Court, and every 60 days thereafter until Respondents have fully complied with the provisions of Sections, III, IV, and V.A;

   b. Annual compliance reports one year after the date this Order is issued by this Court, and annually for the next 9 years on the anniversary of that date; and

   c. Additional compliance reports as the Commission or its staff may request.

2. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with this Order. Conclusory statements that Respondents have complied with their obligations under this Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented and plan to implement to comply with each paragraph of the Orders.

3. For a period of 5 years after filing a Compliance Report, each Respondent shall retain all material written communications with each party identified in the compliance report and all non-privileged internal memoranda, reports, and recommendations concerning fulfilling Respondents' obligations under the Orders and provide copies of these documents to Commission staff upon request.

4. Respondents shall verify each compliance report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an

original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov*; provided, however*, that Respondents need only file electronic copies of the interim reports required by Paragraph VIII.B.1 (a). In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

IX.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least 30 days prior to:

A. Any proposed dissolution of Altria Group, Inc. or Juul Labs, Inc., respectively;

B. Any proposed acquisition of, or merger or consolidation involving Altria Group, Inc. or Juul Labs, Inc., respectively; or

C. Any other change in Respondents including assignment and the creation, sale, or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon 5 days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession, or under the control, of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and

B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

ORDERED By the Commission:

April J. Tabor
Secretary

Dated:

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2022, I caused a true and correct copy of the foregoing to be filed electronically using the FTC's E-Filing System, which will send notification of such filing to:

April J. Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

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

I also certify that I caused the foregoing document to be served via email to:

Debbie Feinstein
Robert J. Katerberg
Justin P. Hedge
Francesca M. Pisano
Adam Pergament
Tanya Freeman
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW
Washington, DC 20001
Tel: 202-942-5000
debbie.feinstein@arnoldporter.com
robert.katerberg@arnoldporter.com
justin.hedge@arnoldporter.com
francesca.pisano@arnoldporter.com
adam.pergament@arnoldporter.com
tanya.freeman@arnoldporter.com

Beth Wilkinson
James Rosenthal
Hayter Whitman
Megan Braun
Alysha Bohanon
Wilkinson Stekloff LLP
2001 M Street NW, 10th Floor
Washington, DC 20036
Telephone: (202) 847-4000

David I. Gelfand
Jeremy Calsyn
Matthew I. Bachrack
Linden Bernhardt
Jessica Hollis
Cleary Gottlieb Steen & Hamilton LLP
2112 Pennsylvania Avenue, NW
Washington, DC 20037
Telephone: (202) 974-1500
dgelfand@cgsh.com
jcalsyn@cgsh.com
mbachrack@cgsh.com
lbernhardt@cgsh.com
jhollis@cgsh.com

Counsel for Juul Labs, Inc.

bwilkinson@wilkinsonstekloff.com
jrosenthal@wilkinsonstekloff.com
hwhitman@wilkinsonstekloff.com
mbraun@wilkinsonstekloff.com
abohanon@wilkinsonstekloff.com

Moira Penza
Ralia Polechronis
Meghan Cleary
Wilkinson Stekloff LLP
130 West 42nd Street, 24th Floor
New York, NY 10036
Telephone: (212) 294-8910
mpenza@wilkinsonstekloff.com
rpolechronis@wilkinsonstekloff.com
mcleary@wilkinsonstekloff.com

Jonathan M. Moses
Kevin S. Schwartz
Adam L. Goodman
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
Telephone: (212) 403-1000
JMMoses@wlrk.com
KSchwartz@wlrk.com
ALGoodman@wlrk.com

Counsel for Respondent Altria Group, Inc.

By: *s/ James Abell*
James Abell, Attorney

Counsel Supporting the Complaint