

In re Altria Group, Inc. & JUUL Labs, Inc.
Docket No. 9393



**Oral Argument by
Complaint Counsel
September 12, 2022**



An Illegal Agreement, An Unlawful Transaction



Altria



JUUL

- On December 20, 2018, Altria, the largest tobacco company in the United States, acquired a 35 percent stake in the leading e-cigarette company, JUUL Labs Inc, for \$12.8 billion.
 - The totality of the evidence shows that Respondents agreed that Altria would exit the closed-system e-cigarette market. This agreement violates Section 1.
 - Even absent an agreement, the transaction itself is unlawful under Section 7.



Wall Street Suspected Altria's Sudden Withdrawal from E-Cigarettes Was Related to an Impending Deal with JLI

Morgan
Stanley

“[W]e are surprised to see [Altria] forgo this business altogether [W]e question if it is related to a potential JUUL investment” (PX1293 at 121).



Deutsche Bank

“[Altria] is discontinuing production/distribution of all existing MarkTen and Green Smoke e-vapor products . . . potentially clearing the way to a similar minority-investment-with-a-path-to-ownership investment in JUUL in the coming weeks” (PX1293 at 98).

Bank of America
Merrill Lynch

“We see this move as clearing the decks for [Altria's] next possible investment in new growth opportunities – see Will JUUL become part of the Altria family?” (PX1293 at 72).



Proof of Agreement

- “In evaluating the existence of an antitrust conspiracy, courts consider the totality of the evidence.”

United States v. Apple Inc., 952 F. Supp. 2d 638, 689 (S.D.N.Y. 2013)

- “The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.”

Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962)



Timeline of Key Events (July 2018 – August 2018)

Altria MarkTen Efforts

Jul 26
Altria tells investors on earnings call that Nu Mark is growing and its products are “getting traction” with consumers (PX9047)

Aug 3
Altria leadership suggests discontinuing Elite (PX7003)

Aug 14
Quigley (Altria) emails Altria leadership expressing concern about a draft Board presentation (PX1008)

Aug 21-23
Altria leadership presents to Board on e-vapor business without Nu Mark executives (PX1424)

Jul

Aug

Jul 27
JLI banker emails Pritzker (JLI) referencing MarkTen shut down (PX2330)

Jul 30
JLI sends Altria initial term sheet including provision contemplating Altria’s exit from e-cigarettes (PX1300)

Aug 1
Dinner meeting at Park Hyatt Hotel (PX2173)

Aug 4
JLI sends Altria revised term sheet referencing MarkTen “shutdown” (PX2570)

Aug 9
Altria sends revised term sheet striking out provision about MarkTen exit (PX1303)

Aug 15
Valani (JLI) tells Altria the removal of divest / contribute / cease to operate provision is unacceptable (PX4171)

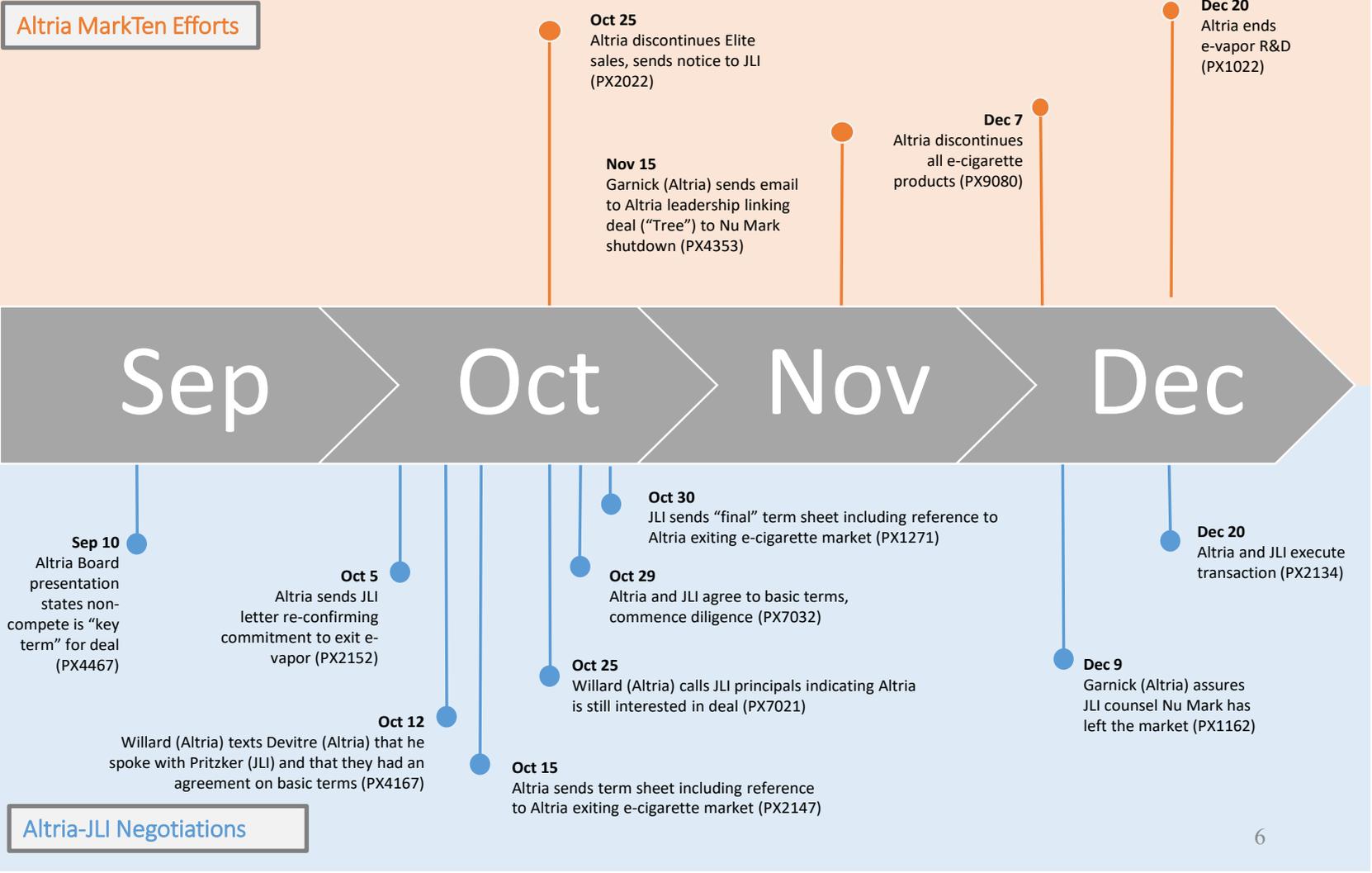
Aug 19
JLI sends revised term sheet reinserting broad non-compete provision (PX2185)

Aug 18
Altria and JLI meet in San Francisco to discuss terms (PX2025)

Altria-JLI Negotiations



Timeline of Key Events (September 2018 – December 2018)



Altria MarkTen Efforts

Sep 10
Altria Board presentation states non-compete is "key term" for deal (PX4467)

Oct 5
Altria sends JLI letter re-confirming commitment to exit e-vapor (PX2152)

Oct 12
Willard (Altria) texts Devitre (Altria) that he spoke with Pritzker (JLI) and that they had an agreement on basic terms (PX4167)

Oct 25
Altria discontinues Elite sales, sends notice to JLI (PX2022)

Nov 15
Garnick (Altria) sends email to Altria leadership linking deal ("Tree") to Nu Mark shutdown (PX4353)

Dec 7
Altria discontinues all e-cigarette products (PX9080)

Dec 20
Altria ends e-vapor R&D (PX1022)

Altria-JLI Negotiations

Sep 10
Altria Board presentation states non-compete is "key term" for deal (PX4467)

Oct 5
Altria sends JLI letter re-confirming commitment to exit e-vapor (PX2152)

Oct 12
Willard (Altria) texts Devitre (Altria) that he spoke with Pritzker (JLI) and that they had an agreement on basic terms (PX4167)

Oct 15
Altria sends term sheet including reference to Altria exiting e-cigarette market (PX2147)

Oct 25
Willard (Altria) calls JLI principals indicating Altria is still interested in deal (PX7021)

Oct 29
Altria and JLI agree to basic terms, commence diligence (PX7032)

Oct 30
JLI sends "final" term sheet including reference to Altria exiting e-cigarette market (PX1271)

Dec 9
Garnick (Altria) assures JLI counsel Nu Mark has left the market (PX1162)

Dec 20
Altria and JLI execute transaction (PX2134)



July 30 Term Sheet: JLI Offers Altria Three Options to Exit the Market

Promptly and in no event later than nine months following the Purchase, subject to the license referenced above, Richard will **divest** (or if divestiture is not reasonably practicable, **contribute** at no cost to Jack and if such a contribution is not reasonably practicable, then **cease to operate**), all Richard assets relating to the Field in the U.S., including all electronic nicotine delivery systems and products it acquired, developed or has under development. For the avoidance of doubt, any such divestment will not affect the license referenced in the previous bullet.

PX1300 (Altria) at 5

Jul

Aug

Jul 30
JLI sends Altria initial term sheet including provision contemplating Altria's exit from e-cigarettes (PX1300)

JLI gives Altria three options:

- **Divest**
- **Contribute**
- **Cease to Operate**



August 4 Term Sheet: JLI Adds “Shutdown” to the Non-Compete Provision

- Richard agrees, for so long as it owns at least 5% of Jack’s outstanding shares, to refrain from competing anywhere in the world in the e-vapor business (other than with respect to MarkTen and MarkTen Elite prior to their divestiture, [shutdown](#) or contribution as described above).

PX2570 (Altria) at 7

Jul

Aug

Aug 4
JLI sends Altria revised term sheet referencing MarkTen “shutdown” (PX2570)



October 15 and October 30 Term Sheets: Both Refer to Altria “Otherwise Exiting” E-Cigarettes

- Services provided upon earlier of (i) contribution described above or (ii) Richard otherwise exiting the marketing and sale of products in the Field (“Contribution Date”). Richard agrees, effective from the Contribution Date and thereafter during the Services Term to provide the following services in the U.S. (the “Contribution Date Services,” and together with the Purchase Date Services, the “Services”):

PX2147 (JLI) at 24

Sep

Oct

Nov

Dec

Oct 15
Altria sends term sheet including reference to Altria exiting e-cigarette market (PX2147)

Oct 30
JLI sends “final” term sheet including reference to Altria exiting e-cigarette market (PX1271)



JLI: It Is “Not Acceptable” for Altria to Retain the Right to Compete in E-Cigarettes

We understood that you (~~and~~ ~~of~~ your ~~successors-successors and~~ ~~of~~ current ~~and~~ ~~of~~ 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.**

PX4171 (Altria) at 2

Jul

Aug

Aug 15

Valani (JLI) tells Altria the removal of divest / contribute / cease to operate provision is unacceptable (PX4171)



MarkTen Gaining Market Traction



Howard Willard
Former Chairman and CEO, Altria

“The drivers of the growth in second quarter and first half was MarkTen Bold and MarkTen Elite. So those products are getting traction with consumers, albeit in the shadow of a product that’s growing much more quickly.”

PX9047 (Altria Earnings Call, July 26, 2018) at 9-10

Jul 26
Altria tells investors on earnings call that Nu Mark is growing and its products are “getting traction” with consumers (PX9047)

Aug 3
Altria leadership suggests discontinuing Elite (PX7003)

Jul 30
JLI sends Altria initial term sheet including provision contemplating Altria’s exit from e-cigarettes (PX1300)

Jul

Aug



Altria Leadership Suggests Pulling Elite from the Market

Altria MarkTen Efforts

Q. We've already looked at some documents that show that both Mark Ten cig-a-likes and Mark Ten Elite, which had just been launched, were growing; is that right?

A. Correct.

Q. Did you understand why Howard, Billy, Murray and K.C. might want to just shut down the business?

A. I could not understand why.

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

A. Frankly, I did not understand what was going on at the place at that point in time. I was -- felt like I was -- I didn't know what was happening. All I knew was for some reason whatever I said seemed like the wrong answer.

PX7003 (Quigley) IHT at 111

Aug 3
Altria leadership suggests discontinuing Elite (PX7003)

Jul 30
JLI sends Altria initial term sheet including provision contemplating Altria's exit from e-cigarettes (PX1300)

Aug 1
Dinner meeting at Park Hyatt Hotel (PX2173)

Jul

Aug

Altria-JLI Negotiations



Altria's Exit Only Makes Sense with the Transaction



Howard Willard
Former Chairman
and CEO, Altria

“Nu Mark’s goal is to lead the U.S. e-vapor category with a portfolio of superior, potentially reduced-risk products that adult smokers and vapers choose over cigarettes and that generate cigarette-like margins at scale.”

PX9045 (CAGNY Presentation, Feb. 2018) at 6

“Sustained, long-term leadership won’t be achieved overnight. Nu Mark has a diverse product portfolio and a pipeline of promising products in development. We believe it is well positioned to achieve long-term leadership in the category, bolstered by our companies’ world-class marketing, sales and distribution and regulatory capabilities.”

PX9045 (CAGNY Presentation, Feb. 2018) at 7



No Other Major Tobacco Company Has Exited E-Cigarettes

Major Tobacco Company

E-Cigarette Brand





Evidence of Pretext Can Disprove Independent Action

- “[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)

- “[E]vidence of pretext, if believed by [the fact finder], would disprove the likelihood of independent action on the part of [defendant].”

Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469, 474 (3d. Cir. 1985)



Altria's Stated Reasons for Pulling Elite Are Pretextual



February 6, 2019

Howard A. Willard III
Chairman and Chief Executive Officer
Altria Group, Inc.
6601 W. Broad Street
Richmond, VA 23230

Dear Mr. Willard:

I am writing to request a meeting with you and the Food and Drug Administration (FDA) following your submission that followed, where you agreed to take action to help address the mounting concern over youth use of e-cigarettes.

After Altria's acquisition of a 35 percent ownership interest in JUUL Labs, Inc., your newly announced plans with JUUL contradict the commitments you made to the FDA. When we meet, Altria should be prepared to explain how this acquisition affects the full range of representations you made to the FDA and the public regarding your plans to stop marketing e-cigarettes and to address the crisis of youth use of e-cigarettes.

I am aware of deeply concerning data showing that the proportion of the overall use of e-cigarettes among youth is increasing. These youth patterns of use are abating in the near term, and they certainly do not appear to be reversing. Manufacturers have an independent responsibility to take action to address the epidemic of youth use of their products.

My office will contact you to arrange a meeting to discuss these issues. Pursuant to your request, we intend to schedule this as a joint meeting with both Altria and JUUL.

Sincerely,

Scott Gottlieb, M.D.
Commissioner of Food and Drugs

U.S. Food & Drug Administration
10903 New Hampshire Avenue
Silver Spring, MD 20993
www.fda.gov

PX9083-001



After Altria's acquisition of a 35 percent ownership interest in JUUL Labs, Inc., your newly announced plans with JUUL contradict the commitments you made to the FDA. When we meet, Altria should be prepared to explain how this acquisition affects the full range of representations you made to the FDA and the public regarding your plans to stop marketing e-cigarettes and to address the crisis of youth use of e-cigarettes.

PX9083 (FDA Letter to Altria, Feb. 6, 2019) at 1



Altria's Justifications for Pulling Its Products Are Pretextual

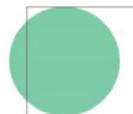
GAME PLAN INSIGHTS – WHAT WE LEARNED

- We can't/haven't measured conversion potential of any of our products to effectively know what is working, what isn't and why

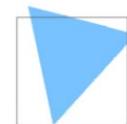
**Innovative Products
Game Plan Input**



Altria Game Plan



9/25-27/18



NuMark
An Altria Innovation Company

President and GM, NuMark | Highly Confidential | Draft | September 26, 2018 | 1

PX1323 (Altria) at 3, 13



Altria's Justifications for Pulling Its Products Are Pretextual



**Enforcement Priorities for
Electronic Nicotine Delivery
Systems (ENDS) and Other
Deemed Products on the Market
Without Premarket
Authorization (Revised)***

Guidance for Industry

“[P]reliminary research indicates that certain effects of nicotine salts in ENDS products (*e.g.*, higher nicotine exposure and faster rate of absorption) may increase the abuse liability of ENDS with nicotine salts, which raises concerns of addiction in youth, particularly due to the vulnerability of the developing adolescent brain.”

PX9112 (FDA Guidance, Apr. 2020) at 21



FDA Has Approved Both Cigalikes and E-Cigarettes Without Nicotine Salts

Cigalikes with PMTA Approval



E-Cigarettes without Nicotine Salts with PMTA Approval



CC's Motion Requesting Official Notice of FDA Decision

IDF 261; CC's Motion, Second Motion, and Third Motion Requesting Official Notice of FDA Decision



The Transaction Is Presumptively Anticompetitive

- Complaint Counsel “can establish its prima facie case by showing that the proposed [transaction] would lead to undue concentration in the market”

United States v. Aetna Inc., 240 F. Supp. 3d 1, 90 (D.D.C. 2017)

- “The FTC need not present market shares and HHI estimates with the precision of a NASA scientist. The closest available approximation often will do.”

FTC v. Sysco Corp., 113 F. Supp. 3d 1, 54 (D.D.C. 2015)



Section 7 Requires Analysis of the “But-For” World

- “The 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.”

FTC v. Peabody Energy Corp., 492 F. Supp. 3d 865, 917 (E.D. Mo. 2020)

- “[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.”

FTC v. Nat’l Tea Co., 603 F.2d 694, 700 (8th Cir. 1979)

- “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.”

Horizontal Merger Guidelines (2010) § 1



Section 7 Legal Standard

- “Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable . . . is called for.”

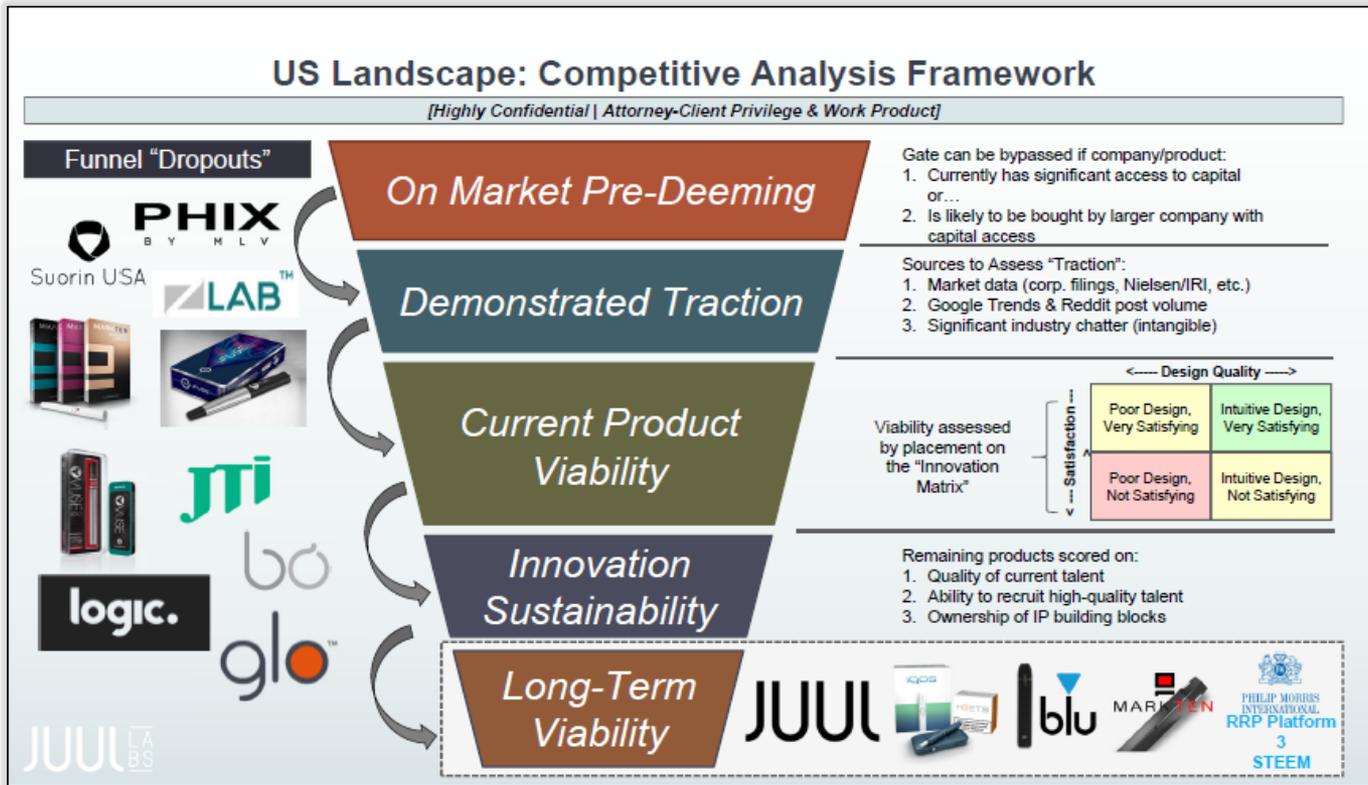
Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986)

- “Even in a consummated [transaction], the ultimate issue under Section 7 is whether anticompetitive effects are reasonably probable in the future . . .”

In re Polypore Int’l, Inc., 2010 WL 9549988, at *8 (F.T.C. Nov. 5, 2010)



JLI Concluded Elite Had “Long-Term Viability”



PX2289 (JLI) at 21



Before the Transaction, Altria Owned the Rights to Commercialize PMI's VEEV – the “Rolls Royce” of E-Cigarettes – in the United States



PHILIP MORRIS
INTERNATIONAL



Altria



PX9120 (VEEV stock photo)



Respondents Failed to Show a Procompetitive Rationale or Substantiate Efficiencies

- Respondents claim a single procompetitive rationale / efficiency:

Altria's provision of regulatory services to assist JLI in obtaining PMTA authorization for JUUL

- This claim is ...
 - Not verifiable
 - Not merger specific
 - And, pending further review, effectively eliminated:

FDA NEWS RELEASE

FDA Denies Authorization to Market JUUL Products

Currently Marketed JUUL Products Must Be Removed from the US Market

CC's Third Motion Requesting Official Notice of FDA Decision, Ex. A

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 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
Tanya Freeman
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Ave, NW
Washington, DC 20001
Telephone: (202) 942-5000
debbie.feinstein@arnoldporter.com
robert.katerberg@arnoldporter.com
justin.hedge@arnoldporter.com
francesca.pisano@arnoldporter.com
tanya.freeman@arnoldporter.com

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 Respondent Juul Labs, Inc.

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

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/ Stephen W. Rodger
Stephen W. Rodger, Attorney

Counsel Supporting the Complaint